Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Breton L. Morgan, M.D., Inc. and Breton L. Morgan, M.D.
Docket No. A-18-53
Decision No. 2933
March 26, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We affirm the Administrative Law Judge (ALJ) decision granting summary judgment to the Center for Medicare & Medicaid Services (CMS) and upholding the revocation of Breton L. Morgan, M.D. and Breton L. Morgan, M.D., Inc.'s (Petitioners) Medicare enrollment and billing privileges and imposing three-year reenrollment bars. *Breton L. Morgan, M.D., Inc. and Breton L. Morgan, M.D.*, DAB CR5014 (2018) (ALJ Decision). The ALJ found no dispute that Petitioners failed to report, on their Medicare enrollment application, Dr. Morgan's felony criminal conviction in 2007, as required by the application and its instructions, thus authorizing the revocations for certifying misleading or false information on a Medicare enrollment application. Petitioners argue as they did below that they did not submit misleading or false information because they disclosed the Department of Health and Human Services' Inspector General's (IG) 2008 exclusion of Dr. Morgan from federal health care programs based on his 2007 criminal conviction. We conclude that the ALJ did not err in rejecting Petitioners' argument and granting summary judgment to CMS sustaining the revocations.

Legal Background

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act) §§ 1811, 1831, 1833.[1] CMS administers Medicare and contracts with private carriers or intermediaries to "act on behalf of CMS in carrying out certain administrative responsibilities that the law imposes." 42 C.F.R. § 421.5(b); s*ee also* Act §§ 1816, 1842, 1866, 1874A. Regulations at 42 C.F.R. Part 424, subpart P (§§ 424.500 – 424.570) set forth the "Requirements for Establishing and Maintaining Medicare Billing Privileges."

[1] The current version of the Social Security Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

Physicians and other "suppliers" of Medicare services must enroll in the Medicare program to claim and receive Medicare payment for health care services provided to Medicare beneficiaries.[2] 42 C.F.R. §§ 424.502, 424.505. To enroll, suppliers and providers "must submit a complete enrollment application," which "must include . . . [c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the provider or supplier type." *Id.* § 424.510(d)(1), (2)(i).

The enrollment application, form CMS-855I, requires applicants to report "each final adverse legal action" including, as relevant here, the supplier's being "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," including "any felonies that would result in a mandatory exclusion under Section 1128(a) of the Social Security Act." CMS Ex. 3, at 13-14; P. Ex. I at 13-14. The regulations define "final adverse action" to include, *inter alia*, "[a] conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i)) within the last 10 years preceding enrollment" and "[a]n exclusion or debarment from participation in a Federal or State health care program"). 42 C.F.R. § 424.502. The felony convictions defined in section 424.535(a)(3)(i) include, *inter alia*, "[a]ny felonies that would result in mandatory exclusion under section 1128(a) of the Act." 42 C.F.R. § 424.535(a)(3)(ii)(D). The applicant is required to certify, under threat of penalties that include revocation of Medicare enrollment, that he or she has read the contents of the application, and that "the information contained herein is true, correct, and complete." CMS Ex. 3, at 26-27; P. Ex. I at 29-30.

CMS has broad authority to revoke Medicare enrollment and billing privileges of a provider or supplier convicted of felonies that the Secretary determines to be detrimental to the best interests of the program and its beneficiaries. *See* Act § 1866; 42 C.F.R. § 424.535(a)(3). Section 424.535(a) authorizes CMS to revoke the Medicare enrollment of a supplier for any of the "reasons" specified in paragraphs one through 14 of that section, including, as relevant here, a supplier's "certify[ying] as 'true' **misleading or false information on the enrollment application** . . . ." 42 C.F.R. § 424.535(a)(4) (emphasis added).[3]

A revocation "becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational." *Id.* § 424.535(g).

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[2] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." "Providers" include hospitals, nursing facilities, and comprehensive outpatient rehabilitation facilities. 42 C.F.R. § 400.202.

[3] Section 424.535(a)(4) also states in a parenthetical that "[o]ffenders may be subject to either fines or imprisonment, or both, in accordance with current law and regulations.)." *Id.*

After CMS revokes a supplier's billing privileges, the supplier may not participate in Medicare from the effective date of the revocation until the end of a re-enrollment bar. *Id.* § 424.535(c). "The re-enrollment bar . . . lasts a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation." *Id.* § 424.535(c)(1). A supplier may seek "reconsideration" of "an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges . . . ." 42 C.F.R. §§ 498.5(*l*), 498.22. If dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ. *Id.* § 498.40. If dissatisfied with an ALJ decision, the supplier may request review by the Departmental Appeals Board (Board). *Id.* § 498.80.

The Board has repeatedly held that "[i]n reviewing a revocation determination, an ALJ or the Board is limited to deciding whether CMS had a valid 'legal basis' for that action." *Care Pro Home Health, Inc.,* DAB No. 2723, at 5 (2016) (citing *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008) ("ALJ's review of CMS's revocation" of Petitioner's Medicare billing privileges is "limited to whether CMS had established a legal basis for its actions"); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2008) (if conditions for revocation in regulations are satisfied, "CMS is legally entitled to revoke a supplier's billing privileges" and "the ALJ and the Board must sustain the revocation; we may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances"), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010)).

Case background

The following facts are not in dispute. In March 2007, Petitioner Dr. Morgan pleaded guilty to a felony charge of obtaining a controlled substance by fraud, and in 2008, the IG, based on that conviction, excluded Dr. Morgan from participating in federal health care programs for five years under section 1128(a) of the Act. Also in 2008, CMS revoked Dr. Morgan's Medicare billing privileges.[4] ALJ Decision at 8; Petitioners' Request for Appeal (RA) at 2-3; P. Exs. A ¶¶ 2, 7, 8; E; F. The IG reinstated Dr.

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[4] Citing CMS's September 3, 2008 revocation letter to Dr. Morgan, the ALJ stated that that revocation "was based on the surrender of his medical license in Ohio." ALJ Decision at 8 (citing CMS Exs. 1, at 22-23 and 2, at 23-24; P. Ex. F). The 2008 revocation letter did state that Dr. Morgan's Medicare enrollment and billing privileges were "being revoked effective April 4, 2006 . . . the date that your medical license was surrendered to the state of Ohio," and there is no dispute that Dr. Morgan surrendered his Ohio medical license around that time or that his license was reinstated in 2013. *See* CMS Ex. 1, at 8; P. Exs. A ¶ 4; F. However, the 2008 letter cited as the regulatory bases for the revocation 42 C.F.R. §§ 424.535(a)(2), (3) and (C). P. Ex. F; *see also* CMS Ex. 1, at 3 (stating that "Dr. Morgan's Medicare billing privileges were revoked under 42 C.F.R. § 424.535(a)(2) and (3) for voluntarily surrendering his medical license to the state of Ohio."). Although CMS's various letters might have stated this point more clearly, it seems clear that CMS based its 2008 revocation of Petitioners' Medicare enrollment and billing privileges, at least in part, on his 2007 felony conviction.

Morgan's eligibility to participate as a Medicare provider in June 2013, and Petitioners filed the CMS-855I Medicare enrollment application at issue in this proceeding, dated July 17, 2013.[5] RA at 3; ALJ Decision at 8; P. Exs. H; I. On the application, under "Basic Information," Petitioners checked the box labeled "Final Adverse Actions/Convictions" as follows: "Exclusion Lifted 6-19-13." P. Ex. I at 5. In Section 3 of the application, in response to a question as to whether Petitioners had ever had a "final adverse legal action" – as defined in the application – imposed against them, Petitioners reported the IG's exclusion of Dr. Morgan and enclosed a copy of the IG's June 19, 2013 letter reinstating Dr. Morgan's eligibility to participate in Medicare. *Id*. at 14-15.

Medicare contractor, Palmetto GBA (Palmetto), approved Petitioners' enrollment application on October 8, 2013. ALJ Decision at 8; P. Ex. J; CMS Ex. 1, at 79-84; CMS Ex. 2 at 80-85. However, on March 22, 2016, Palmetto notified Dr. Morgan that CMS had learned of his 2007 felony conviction and that his Medicare billing privileges were being revoked effective July 17, 2013 based on that conviction and on Dr. Morgan's failure to report it. P. Ex. L at 1-2; CMS Ex. 1, at 96-97. On November 7, 2016, Palmetto notified Dr. Morgan that it had reopened and revised its March 22, 2016, determination and that pursuant to its revised determination, Dr. Morgan's enrollment and billing privileges were being revoked effective December 7, 2016 under section 424.535(a)(4) for providing false or misleading information. ALJ Decision at 2; CMS Ex. 1, at 13-14. On December 30, 2016, Palmetto notified Dr. Morgan's practice of the same reopening and revision and the revised basis (section 424.535(a)(4)) for the revocation. CMS Ex. 1, at 15-16.

Petitioners timely sought reconsideration, arguing that CMS was aware of Dr. Morgan's 2007 felony conviction from having revoked Petitioners' billing privileges in 2008 and from Petitioners' disclosure, on the July 2013 enrollment application, of Dr. Morgan's exclusion by the IG. CMS Exs. 1, at 7-11; 2, at 8-12; *see also* P. Br. & Motion for Summary Judgment at 16 ("CMS did not receive [a] false or misleading application from Dr. Morgan, as it has known since 2008, based on Dr. Morgan's own disclosure, that he had been convicted of a felony and temporarily surrendered his medical licenses."). CMS upheld the revocations on March 30, 2017 (Dr. Morgan) and May 12, 2017 (his practice). CMS noted that Section 3 of the CMS-855I enrollment application required

[5] The record contains several copies of what appear to be the same CMS-855I enrollment application, dated July 17, 2013, signed by Dr. Morgan and identifying Dr. Breton L. Morgan MD, Inc. as the practice location/legal business name. P. Ex. I; CMS Exs. 1, at 36-69; 2, at 37-70. Petitioners cite this application and state that "[f]or ease of reference, we do not describe the virtually identical disclosures made in the reenrollment application submitted for Dr. Morgan's practice entity, Breton L. Morgan, M.D., Inc." RA at 4 n.3. The ALJ and the parties referred to a single enrollment application, and so do we. Petitioners do not dispute that the Medicare contractor's various notices regarding their enrollment status, as they appear in the ALJ record here, apply to both Dr. Morgan and his practice.

reporting of all final adverse actions, including Dr. Morgan's 2007 felony conviction and the 2008 revocation, but Petitioners had certified that Dr. Morgan's 2008 exclusion was the only final adverse action against him or his practice. CMS Exs. 1, at 1-6; 2, at 1-7. The reconsidered determination for Dr. Morgan's practice also found that the practice failed to disclose the other adverse actions on sections of the application requiring reporting of a Medicare-imposed revocation of any Medicare billing privileges of a managing employee (section six) and any final adverse legal actions imposed against it under any current or former name or business identity (section four). CMS Ex. 2, at 4-5.

Petitioners timely sought ALJ review of CMS's two reconsidered determinations, and the ALJ granted their request to consolidate the two cases. ALJ Decision at 2. CMS and Petitioners each moved for summary judgment, filed proposed exhibits and opposed each other's motions. The ALJ granted CMS's motion to exclude two of Petitioners' exhibits (P. Exs. M, N), denied CMS's motion to exclude Petitioners' exhibit B, and admitted Petitioners' exhibits A through L and CMS's exhibits 1 – 4 absent any objection. *Id.* at 2-3. The ALJ also denied Petitioners' requests for subpoenas for documents from Palmetto and one of its contractors, on the basis that the requests "do not specify the pertinent facts Petitioners expect to establish by the documents they want to subpoena or why those facts could not be established without the need for subpoenas," as the hearing regulations require. *Id.* at 3-4 (citing 42 C.F.R. § 498.53(c)(3)).

The ALJ granted CMS's motion for summary judgment, concluding that Petitioners' undisputed failure to list Dr. Morgan's 2007 felony conviction on the enrollment application authorized CMS to revoke their enrollment and billing privileges under section 424.435(a)(4) for "[c]ertifying as true information on an enrollment application or application to maintain enrollment that is misleading or false."[6] ALJ Decision at 7; *id.* at 10 ("There is no dispute that Dr. Morgan's 2007 felony conviction was not listed on the CMS-855I signed on July 17, 2013."). The ALJ concluded that "Petitioner Dr. Morgan failed to list his 2007 felony conviction and, as a result, the application he certified by his signature on July 17, 2013, was not true, correct, and complete, but rather was false and misleading because it did not list all adverse actions required to be listed" and that "Petitioners did not list Dr. Morgan's 2007 felony conviction on the enrollment

[6] The ALJ did not address Petitioners' failure to report the other adverse action – the 2008 revocation of Dr. Morgan's Medicare enrollment by CMS – which CMS notes it presented to the ALJ in its summary judgment motion as an additional legal ground for the revocation under section 424.535(a)(4). *See* CMS Response to appeal (CMS Resp.) at 11. In light of the ALJ's silence on the additional adverse action Petitioners failed to report, we base our decision only on Petitioners' failure to report the felony conviction. However, the ALJ's silence on the additional legal ground (and our not addressing it) does not affect the ALJ Decision or ours since CMS has a basis to revoke under section 424.535(a)(4) for failure to report any adverse action. *Cf. Brenda Lee Jackson*, DAB No. 2903, at 11 (2018) ("Concluding that CMS was authorized to act under one of the bases for revocation enumerated in the regulations is all that is necessary to uphold revocation.") (citing *Donna Maneice, M.D.*, DAB No. 2826, at 8 (2017) ("CMS needs to establish only one ground for revocation.")).

application signed and certified by Dr. Morgan as true, correct, and complete on July 17, 2013 and filed within ten years of the date of Dr. Morgan's conviction"; and he concluded that "CMS has a basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4)." *Id*. at 10.

The ALJ rejected Petitioners' argument that "CMS had records and was aware of Dr. Morgan's felony conviction" as "not the issue" because "Petitioners had an affirmative duty under the regulations, of which they were advised by the CMS-855I, to submit a true, complete, and accurate application" and "violated that affirmative duty." *Id*. at 10-11.[7]

With respect to the three-year reenrollment bar imposed by CMS, the ALJ concluded that the regulations authorized a bar of one to three years; that there is "is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes" and 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 is not subject to ALJ review. *Id*. at 12 (citing *Vijendra Dave, M.D.*, DAB No. 2672, at 10-11 (2016)). The ALJ also held that the revocations were effective December 7, 2016 for Dr. Morgan and January 29, 2017 for his practice, which is 30 days after the notices of CMS's reconsidered determinations in their cases. *Id*. at 1, 12; 42 C.F.R. § 424.535(g). Petitioners do not challenge the ALJ's determinations of the length of the exclusions or their effective dates, and the ALJ correctly stated that the duration is not subject to appeal.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 6 (2016); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2 (2009) (citing *Lebanon Nursing & Rehab. Ctr*., DAB No. 1918 (2004)); *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare and Medicaid Programs* (*Guidelines*), https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html. Summary judgment is appropriate if there is no genuine dispute of fact material to the result and the moving party is entitled to judgment as a matter of law. *See 1866ICPayday.com* at 2 (citing *Celotex Corp. v.*

[7] The ALJ also rejected arguments "that revocation is barred by the affirmative defenses of waiver, estoppel, laches, res judicata, collateral estoppel, and double jeopardy" and further held, correctly, that he was not authorized to grant equitable relief and had "no authority to review the exercise of discretion by CMS to revoke Petitioners' Medicare enrollment and billing privileges." ALJ Decision at 11 (citing *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*, 710 F. Supp. 2d 167 (D. Mass. 2010)). On appeal, Petitioners do not challenge these determinations.

Catrett, 477 U.S. 317, 322-25 (1986)); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (citing *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994)). The Board construes the facts in the light most favorable to the non-moving party and gives it the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs*., 388 F.3d 168, 172-73 (6th Cir. 2004); *Sandra E. Johnson, CNRA,* DAB No. 2708, at 8 (2016).

The standard of review on a disputed issue of law is whether the ALJ decision or ruling is erroneous. *Guidelines*.

Discussion

I. Petitioners were required to report Dr. Morgan's 2007 felony conviction on their 2013 Medicare enrollment application.

Section 3 of Petitioners' CMS-855I Medicare enrollment application, titled "Final Adverse Legal Actions/Convictions," asked, under the heading "Final Adverse Legal Action History"–

> 1. Have you, under any current or former name or business identity, ever had a final adverse legal action listed on page 12 of this application imposed against you? [boxes for applicant to check "YES" or "NO"]
>
> 2. If yes, **report each final adverse legal action**, when it occurred, the Federal or State agency or the court/administrative body that imposed the action, and the resolution, if any.

P. Ex. I at 13-14 (emphasis added); ALJ Decision at 8; RA at 3. These two questions were followed by enough space for the applicant to list multiple final adverse legal actions, together with the date for each action, who took the action, and the action's resolution. P. Ex. I at 14. The instructions for Section 3 stated that "[**a**]**ll applicable final adverse actions must be reported**, regardless of whether any records were expunged or any appeals are pending." *Id*. at 13 (emphasis added).

The list of final adverse legal actions "listed on page 12" of the application consisted of the categories "Convictions" and "Exclusions, Revocations, or Suspensions." *Id*. "Convictions" included the applicant having been, within the previous 10 years, "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," including "any felonies that would result in a mandatory exclusion under Section 1128(a) of the Social Security Act." *Id*. Section 1128(a) of the Act states that the Secretary of HHS "shall exclude . . . from participation in any Federal health care program" individuals and

entities that have been convicted of listed crimes including, as relevant here, "a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" "in connection with the delivery of a health care item or service." Act § 1128(a)(3); *see* ALJ Decision at 8 ("Any felony conviction that would result in mandatory exclusion by the I.G. pursuant to section 1128(a) of the Act that occurred within the ten years preceding the date of filing an enrollment or revalidation application is specifically listed as an adverse action that must be reported under Section 3 of the CMS-855I that Petitioners filed."); *see also* 42 C.F.R. § 424.502 (defining "Final adverse action" to include "[a] conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i) ["a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries" including "[a]ny felonies that would result in mandatory exclusion under section 1128(a) of the Act"] within the last 10 years preceding enrollment, revalidation, or re-enrollment," as well as "[a] Medicare-imposed revocation of any Medicare billing privileges" and "[a]n exclusion or debarment from participation in a Federal or State health care program.").

Petitioners concede that Dr. Morgan has "a felony conviction: in March 2007 he pleaded guilty to a single charge of Obtaining a Schedule III Controlled Substance by Fraud, relating to the diversion of patient samples of opioids from his practice for his own use." RA at 2. Petitioners also concede that, as a result, "the [IG] excluded Dr. Morgan from the federal health care programs in 2008 for the minimum statutory period of five years years—an action required by section 1128(a)(3) of the Social Security Act," and that "[t]he [IG] exclusion was a mandatory administrative enforcement action based solely on the felony conviction." *Id.*; *see* P. Ex. E (May 30, 2008 letter from the IG notifying Dr. Morgan of his five-year exclusion from federal health care programs under Act section 1128(a)(3) based on his felony conviction); *see also* ALJ Decision at 9 (Petitioner Dr. Morgan "does not dispute that he was convicted of a felony in 2007 within the meaning of 42 C.F.R. § 424.502[]" or "that he was subject to mandatory exclusion by the I.G. based on that felony pursuant to section 1128(a)(3) of the Act.").

There is thus no dispute that Dr. Morgan's March 2007 federal felony conviction was for "a[] felon[y] that would result in a mandatory exclusion under Section 1128(a) of the Social Security Act" as stated in the enrollment application, triggering the requirement in the instructions to report that conviction as a final adverse legal action in Section 3 of Petitioners' July 2013 enrollment application. *See* P. Ex. I at 13; ALJ Decision at 8 ("It is undisputed that Petitioner Dr. Morgan filed the enrollment application within ten years of his felony conviction and that the I.G. excluded him pursuant to section 1128(a)(3) of the Act based on that conviction."). The plain terms of the application required that Petitioners report Dr. Morgan's 2007 conviction as a final adverse legal action.

II. CMS was authorized to revoke Petitioners' enrollment and billing privileges because Petitioners failed to report Dr. Morgan's 2007 felony conviction on their Medicare enrollment application.

There is no dispute that Petitioners did not report the 2007 felony conviction on the July 17, 2013 enrollment application. In section three of the application, discussed above, Petitioners checked the "YES" box in answer to the question "[h]ave you, under any current or former name or business identity, ever had a final adverse legal action listed on page 12 of this application imposed against you?" and wrote, on the table that followed, "Medicare Exclusion" from May 30, 2008 to June 19, 2013, and "see release from Office of Inspector General attached." P. Ex. I at 14. Petitioners then attached, within the application after page 13, a June 19, 2013 letter from the IG stating, in relevant part, that "[y]our request for the reinstatement of your eligibility to participate as a provider of items and services covered by the title XVIII (Medicare) program has been approved. The reinstatement is effective with the date of this notice" and that "your right to participate in the Federal health care programs has been reinstated." *Id*. at 15. As Petitioners state, they also reported the IG exclusion in several other places in the application and attached two additional copies of the IG's letter. P Ex. I at 1, 5, 13, 16-17, 23-24; RA at 4.

This is the entirety of Petitioners' reporting of final adverse legal actions on the enrollment application. Petitioners concede that the application requires reporting of "[a]ll applicable final adverse actions." RA at 7. Yet, nowhere does the application state the fact of Dr. Morgan's 2007 felony conviction for obtaining a controlled substance by fraud, as required by the instructions to Section 3 of the application to "report each final adverse legal action" including "any felonies that would result in a mandatory exclusion under Section 1128(a)" of the Act. There was no error in the ALJ's determination that Dr. Morgan "did not list [his] conviction on his enrollment application submitted within ten years of the date of that conviction." ALJ Decision at 7.

As the ALJ pointed out, "Dr. Morgan signed the certification statement on the application on July 17, 2013, certifying that the information contained in the application was 'true, correct, and **complete**[,]'" as required by the regulations. *Id*. at 8 (emphasis added); P. Ex. I at 29-30; 42 C.F.R. § 424.510(d)(2)(i) (enrollment application "must include . . . [c]omplete, accurate, and truthful responses to all information requested"). The omission of the 2007 felony conviction which, it is not disputed, was among the final adverse actions listed in the section 3 instructions, and is among the adverse actions in the regulatory definitions, thus constituted a failure to provide complete information on the enrollment application, authorizing CMS to revoke Petitioners' enrollment. *See* ALJ Decision at 7 ("There is a basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because Petitioners failed to list as a

final adverse action a 2007 felony conviction on the enrollment application signed July 17, 2013, while certifying that the information in the application was true, correct, and complete.") (emphasis omitted); *see also Brenda Lee Jackson*, DAB No. 2903, at 10 (2018) ("By certifying the application without disclosing her 2010 DUI conviction, Petitioner certified as true an application which falsely asserted that she had no adverse legal actions to disclose.").

III. Petitioners have shown no error in the ALJ Decision.

As discussed above, Petitioners have conceded that the IG's exclusion of Dr. Morgan was "an action required by section 1128(a)(3) of the Social Security Act" and "based solely on the felony conviction." RA at 2. They thus do not dispute that his conviction was for one of the "felonies that would result in a mandatory exclusion under Section 1128(a) of the Social Security Act" that the instructions in Section 3 of the CMS-855I enrollment application state is a final adverse legal action that must be reported on the application. *See* P. Reply at 3 (Dr. Morgan "does not and has never argued" that "the conviction does not meet this definition," i.e., "'final adverse actions' reportable on the 855I application."). Petitioners, as discussed, also concede that the application requires reporting of all adverse legal actions. RA at 7. Since Petitioners did not report all adverse legal applications on their 2013 enrollment applications, the elements necessary to sustain the ALJ's summary judgment decision are present.

Nonetheless, Petitioners argue that "the ALJ's decision to grant summary judgment was erroneous in two ways." RA at 6. "First," they argue, "the essential factual claim of this case—that Dr. Morgan provided 'false or misleading information' regarding his felony conviction in his Form CMS-855I enrollment application—remains in dispute"; and, "[s]econd, the ALJ's grant of summary judgment is based on an erroneous legal conclusion: that Dr. Morgan's repeated disclosure of his exclusion arising out of his felony conviction was 'false and misleading' as the term is used in the Medicare regulations." RA at 6. Neither argument is correct.

A. Petitioners have identified no dispute of material fact precluding summary judgment.

As pointed out above, there is no dispute that Petitioners did not report Dr. Morgan's felony conviction on their applications, notwithstanding their concession that **all** final adverse actions must be reported. Petitioners argue, however, that the fact they reported the IG exclusion, which was based on Dr. Morgan's conviction, and submitted a copy of the IG's reinstatement letter suffices to raise a dispute as to whether they, in fact, failed to disclose his felony conviction. *See, e.g.*, RA at 7 (The issue is "whether Dr. Morgan in fact disclosed his felony conviction by disclosing his exclusion, which resulted from that conviction."). As we discuss, we reject this argument and conclude that there is no factual dispute precluding summary judgment for CMS.

Petitioners attempt to support their argument that reporting the exclusion was sufficient to satisfy the requirement to report all adverse actions by arguing that the application and its instructions are ambiguous. More specifically, Petitioners argue that the application instructions, CMS guidance and advice from Palmetto were unclear or confusing about whether to also report the conviction "where each legal action was generated by the same series of events" and "the endpoint (the [IG's] [exclusion] letter) was the same." RA at 7; P. Reply at 4. They maintain that the instructions "do not state that all legal actions must be reported separately, nor do they indicate that 'final adverse legal actions' must be reported in duplicate if the same underlying situation leads to actions in multiple categories." RA at 7. They contend that CMS's Medicare Program Integrity Manual (MPIM), "does not suggest that a single nucleus of facts must be reported iteratively" and that "CMS's own contractor instructed him to disclose the [IG] letter." *Id.* (citing MPIM, CMS Pub. No. 100-08, Ch. 15 § 15.5.3); P. Reply at 4; RA at 8 (Dr. Morgan disclosed his exclusion "after a consultation with Palmetto's provider support team").

Petitioners thus contend that "viewed in the context of the specific actions Dr. Morgan sought to disclose, the relationship between those actions, and the instructions provided (or better stated, not provided) by CMS in its own materials, it is at a minimum debatable whether a provider would reach CMS's 'clear' conclusion" that "the instructions require the disclosure of each distinct adverse action as issued by separate and distinct agencies, courts or administrative bodies." P. Reply at 4 (quoting CMS Resp. at 8); *see also* at 7 ("Dr. Morgan is not the only provider left in confusion by the existing CMS guidance in 2013 regarding disclosures of prior CMS revocations.").

These arguments attempt to create ambiguity where there is none. The application form instructions list discrete, specific "final adverse legal actions," including **both** convictions of "any felonies that would result in a mandatory exclusion under Section 1128(a) of the Social Security Act" **and** "[a]ny suspension or exclusion from participation in" federal or state health care programs. P. Ex. I at 13. The form also requires applicants to "report **each** final adverse legal action, when it occurred, the Federal or State agency or the court/administrative body that imposed the action, and the resolution, if any." *Id.* at 14 (emphasis added). We find no ambiguity in this language, and Petitioners have identified none. Nor do we find anything that could foster a reasonable belief that reporting two different final adverse legal actions (as defined in the instructions) taken by two different bodies under different authorities – that is, a criminal conviction in a court of law and a subsequent exclusion by the IG – somehow constitutes reporting "in duplicate," as Petitioners contend. RA at 7.

Equally baseless is Petitioners' argument that the word "final" in "final adverse legal action implies that a provider or supplier applying for Medicare enrollment and billing privileges must disclose only the ultimate adverse action when more than one adverse action stems from a common series of events. *See* RA at 7 ("A review of the relevant

application reveals that where a physician has a sole basis for exclusion from the federal health care programs—a single conviction, for example—CMS does nothing to signal that it requires a step-by-step disclosure of all salient points on the resulting timeline."). Petitioners cite nothing in the application or elsewhere that justifies their interpretation of the word "final," and that interpretation would be inconsistent with what we have concluded is the application's plain requirement to list "each" final adverse legal action. Moreover, Petitioners' argument is undercut by their own acknowledgment that Dr. Morgan's felony conviction was a "final adverse legal action" within the meaning of the application. *See* P. Reply at 3 (Dr. Morgan "does not and has never argued" that "the conviction does not meet this definition," i.e., "'final adverse actions' reportable on the 855I application.").[8]

Petitioners' argument about the meaning of the word "final" is also refuted by the undisputed sequence of events in this case. The IG imposed the exclusion of Dr. Morgan by notice of May 30, 2008, **before** CMS's revocation of Dr. Morgan's billing privileges, which occurred on September 3, 2008. P. Exs. E, F. Under Petitioners' theory, the revocation, and not the exclusion, would have been the "final" adverse legal action to arise from the circumstances surrounding Dr. Morgan's felony conviction. Yet, Petitioners did not report that revocation on their enrollment application.

We also note that, although Petitioners assert that their submission of the IG's reinstatement letter with their enrollment application should be treated as reporting Dr. Morgan's felony conviction, they admit that the letter "does not detail the underlying conviction which led to Dr. Morgan's exclusion from the program." RA at 4. Nonetheless, Petitioners argue, CMS should have treated this letter as disclosing Dr. Morgan's felony conviction because the letter referred to an IG case file number. *Id.* Once again, Petitioners ignore the plain language of the enrollment application, which requires specific, direct disclosure of all final adverse actions, not disclosure of some actions or indirect references that, if followed, might result in CMS's becoming aware of final adverse actions not mentioned. As the ALJ found, "[w]hether or not CMS had

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[8] Petitioners also do not quote or discuss any language in the MPIM section they reference (nor do we find any) that would support a conclusion that the application's direction to report "each" final adverse legal action does not apply when more than one final adverse legal action is based on what Petitioners call "a single nucleus of facts." RA at 7. Similarly ineffective to support such a conclusion is Petitioners' assertion that Palmetto "instructed [Petitioners] to disclose the [IG reinstatement] letter." *See* P. Reply at 4 (citing P. Ex. B at 1). Petitioners' assertion is not an accurate statement of what the affiant cited by Petitioners stated. The affiant's statement was that the person she consulted (presumably at Palmetto although she says "CMS") "confirmed that Dr. Morgan should advise CMS of his [IG] exclusion, which was based on his felony conviction." Instructing Dr. Morgan to inform CMS of the IG exclusion is not an instruction to **not also** inform CMS of the conviction itself. Nor is there any indication that the affiant even asked whether Petitioners should report the conviction itself.

records and was aware of Dr. Morgan's felony conviction in 2007 is not the issue. Petitioners had an affirmative duty under the regulations, of which they were advised by the CMS-855I, to submit a true, complete, and accurate application. Petitioners violated that affirmative duty." ALJ Decision at 10-11.

Finally, the Board (and ALJ) decisions CMS cited before the ALJ, which upheld revocations of suppliers who did not disclose final adverse actions on enrollment applications they certified as true, do not place this case "into a grey area—the very essence of a case where summary judgment is not appropriate," as Petitioners contend. RA at 8; *see* CMS Pre-Hearing Br. at 8-9 (citing *Johnson,* DAB No. 2708; *Mark Koch, D.O.*, DAB No. 2610 (2014)).[9] Petitioners attempt to distinguish those cases from theirs on the ground that the Medicare suppliers checked the "No" box in Section 3 of the application or otherwise denied having any final adverse actions, whereas "Dr. Morgan asserted repeatedly that he did in fact have a final adverse legal action and provided documentation regarding the same." RA at 8. Petitioners assert that "CMS has not presented a single instance in which an ALJ upheld revocation of a provider's billing privileges under 42 C.F.R. § 424.535(a)(4) where the provider actually disclosed a prior adverse action on his or her application." *Id*.

In light of our conclusion that the enrollment application and its instructions were not ambiguous but, rather, plainly required Petitioners to report Dr. Morgan's felony conviction, we see no significance in the possibility that this is a case of first impression with respect to the specific facts. The decisions Petitioners cite also did not address the specific legal issue presented here, whether reporting only one of multiple final adverse actions is a ground for revocation where the provider or supplier has certified that it did not provide misleading or false information on the Medicare enrollment application. Rather, those decisions addressed the legal issue of whether revocation was authorized where the omission of a final adverse legal action on the application was "inadvertent or accidental, a product of an innocent mistake made by an employee of [the supplier's] physician group" (*Koch* at 4), or due to "billing personnel" who "intentionally or lazily failed to include information about the sanctions" when "they submitted [the supplier's] Medicare enrollment applications" to CMS or its contractors (*Johnson* at 5 (internal quotation marks omitted)). Petitioners identify no principles or discussion in those decisions (and we find none) that support their arguments here.

In sum, we conclude for the reasons stated that the ALJ correctly concluded that there is no genuine dispute of material fact that precluded summary judgment for CMS.

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[9] We address only the Board decisions because ALJ decisions are not precedential and do not bind other ALJs or the Board. *Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 14 n.11 (2018) (citing *Melissa Michelle Phalora*, DAB No. 2772, at 14 (2017), *appeal dismissed pursuant to voluntary dismissal*, *Phalora v. U.S. Dep't of Health & Human Servs.*, No. 2:17-cv-00188 (N.D. Ind. June 15, 2018) and cases cited therein).

B. The ALJ's conclusion that Petitioners provided false or misleading information is legally correct.

Petitioners' second line of argument is that the ALJ's grant of summary judgment "relied on an erroneous legal conclusion: that Dr. Morgan's disclosure of only the exclusion on his enrollment application met the legal definition of providing 'false or misleading' information under the Medicare regulations." RA at 9. On that point, Petitioners first argue that their response at Section 3 of the application was not "false . . . under any meaning of the word" because "[a]ll of the information provided by Dr. Morgan on his application was true: he did, in fact, have a final adverse legal action—an exclusion from the federal health care programs for his conviction, which had been lifted on June 19, 2013, and for which he provided documentation." *Id.*

This argument entails a crabbed view of the meaning of "false" that has no merit given the directives in Section 3 of the enrollment application to provide not only a yes/no response but also to list "each" final adverse legal action (as well as its date, resolution, and the "court/administrative body that imposed the action") and the requirement to certify that the information in the application was not only "true" and "correct," but also "**complete.**" P. Ex. I at 13-14, 29-30 (emphasis added); *see* 42 C.F.R. § 424.510(d)(2)(i) (enrollment application "must include . . . [c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the provider or supplier type"). Providing "true" information about one of multiple final adverse actions when an application, as we have concluded, unambiguously requires reporting of **all** final adverse actions is not providing "correct" or "complete" information. On the contrary, the omission of required information renders the application incorrect and incomplete. Similarly, providing incomplete reporting of final adverse actions when the application requires reporting of all adverse actions is unquestionably misleading since it deprives CMS of information needed to enforce regulatory enrollment requirements designed to protect the Medicare program and its beneficiaries.

In support of their argument that omission of the felony conviction information on the applications was not misleading Petitioners again cite the Board (and ALJ) decisions discussed above. RA at 8-10. Petitioners note that in those cases "the provider actually said one thing when the truth was another" and argue that CMS thus "cites no authority for the proposition that a provider who discloses as Dr. Morgan did has provided 'misleading' information." RA at 9. The distinction Petitioners propose between a deliberate falsehood and an omission of required true information is meaningless for purposes of upholding CMS's revocation actions. As the Board indicated in those cases, the subjective intent of the applicant is not material to deciding whether the information provided (or omitted) is misleading. In *Mark Koch, D.O.*, the Board rejected claims that failure to report the adverse action was "an innocent mistake" by an employee. The Board adopted the ALJ's conclusion that "section 424.535(a)(4) does not require proof that Petitioner subjectively intended to provide false information, only proof that he **in**

fact provided misleading or false information that he certified as true." DAB No. 2610, at 4 (emphasis in original). Similarly, in *Sandra E. Johnson, CNRA,* the Board cited this holding from *Koch* and held that "once CMS determined that Petitioner submitted Medicare enrollment applications that contained false or misleading statements that Petitioner certified as 'true,' CMS had a legal basis for revocation," even accepting that Petitioner did not intend to mislead the Medicare program. DAB No. 2708, at 15. As in those cases, we need not decide whether Petitioners here intended to provide untrue, incorrect or misleading information when they certified an enrollment application that did not report Dr. Morgan's 2007 felony conviction. The material fact is that they did not report the conviction notwithstanding the application's instructions to list, and provide information about, each final adverse legal action yet certified that their responses were complete, correct, and true. Petitioners' subjective intent does not alter that fact and, therefore, is not material.

We thus find no error in the ALJ's conclusions that summary judgment was appropriate and that CMS had "a basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because Petitioners failed to list as a final adverse action a 2007 felony conviction on the enrollment application signed July 17, 2013, while certifying that the information in the application was true, correct, and complete." We affirm the ALJ's determinations revoking Petitioners' Medicare enrollment and billing privileges, effective December 7, 2016 for Petitioner Dr. Morgan and January 29, 2017 for his practice.

Conclusion

For the reasons explained above, we affirm the ALJ Decision upholding the revocation of Petitioners' Medicare enrollment and billing privileges.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member