

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Russell L. Reitz, M.D.  
Docket No. A-16-75  
Decision No. 2748  
November 14, 2016

**FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION**

Russell L. Reitz, M.D. (Petitioner) requests review of an administrative law judge decision affirming the Centers for Medicare & Medicaid Services' (CMS's) determination to revoke his Medicare enrollment and billing privileges. *Russell L. Reitz, M.D.*, DAB CR4566 (2016). The ALJ affirmed the revocation after concluding that 42 C.F.R. § 424.535(a)(3) and (9) authorized CMS to revoke Petitioner's enrollment based, respectively, on his April 30, 2009 conviction for felony aggravated battery and his failure to report that conviction to CMS within 30 days of the conviction. We affirm the ALJ Decision for the reasons explained below.

**Legal Background**

Providers and suppliers must enroll in the Medicare program in order to participate in the program. 42 C.F.R. §§ 424.500, .502, .505. Physicians fall within the definition of "suppliers" for purposes of the Medicare enrollment requirements. 42 U.S.C. § 1395x(d); 42 C.F.R. § 400.202 (defining "supplier" as a physician or other practitioner or entity other than a provider of services that furnishes items or services under Medicare). Suppliers, including physicians, have "billing privileges" – that is, the right to claim and receive Medicare payment for items or services provided to Medicare beneficiaries – only when enrolled in the Medicare program. 42 C.F.R. § 424.505. A physician must report to his Medicare (CMS) contractor within 30 days certain "reportable events," including "any adverse legal action." *Id.* § 424.516(d)(1)(ii).

The regulations in 42 C.F.R. Part 424, subpart P set out the requirements for establishing and maintaining Medicare billing privileges, and section 424.535(a) sets out the bases on which CMS may revoke a "currently enrolled . . . supplier's Medicare billing privileges and any corresponding . . . supplier agreement . . . ." Section 424.535(a)(3) provides for revocation of a supplier "who was, within the preceding 10 years, convicted . . . of a

Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.”<sup>1</sup> A list of “[o]ffenses” covered by the regulation includes, “but [is] not limited in scope or severity to[,] . . . [f]elony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted . . . .” 42 C.F.R. § 424.535(a)(3)(ii)(A).

When a revocation is based on a felony conviction, the revocation is effective the date of the conviction. *Id.* § 424.435(g). For a revocation based on failure to notify the CMS contractor of a “reportable event” within the required time period, the effective date is 30 days from the date CMS or the CMS contractor mails the revocation notice. *Id.* Once revocation occurs, the supplier is “barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar,” a minimum of 1 year or a maximum of 3 years. *Id.* § 424.535(c).

A supplier may appeal a determination by CMS to revoke its Medicare enrollment under the procedures in 42 C.F.R. Part 498 but must first ask CMS for “reconsideration” of the initial revocation determination. *Id.* §§ 498.5(1), 498.22. A provider dissatisfied with the reconsidered determination may request a hearing before an ALJ. *Id.* § 498.40. Either party may seek Board review of an unfavorable ALJ decision. *Id.* § 498.80.

## **Case Background<sup>2</sup>**

### Petitioner’s Conviction and CMS’s Revocation Action

Petitioner is a physician (a radiation oncologist) who also owned the Central Kansas Cancer Institute (CKCI) and was enrolled as a supplier in the Medicare program. ALJ Decision at 1. On April 30, 2009, a Kansas court convicted Petitioner of aggravated felony battery, a level VII offense against a person under Kansas law. *Id.* at 1-2.<sup>3</sup>

---

<sup>1</sup> This wording of section 424.535(a)(3) became effective in February 2015, prior to CMS’s revocation action. *See* 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The previous wording, which was in effect when Petitioner was convicted, was slightly different, but the differences are not material to our decision. *See* 42 C.F.R. § 424.535(a)(3) (Oct. 1, 2014) (stating CMS may revoke the enrollment of a supplier who, “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”).

<sup>2</sup> The facts stated in this section are from the ALJ Decision and the record and are stated only to provide background, not to replace the ALJ’s findings. Unless otherwise noted, the facts stated are undisputed.

<sup>3</sup> The ALJ Decision contains a footnote explaining that the court’s judgment entry contained a typographical error in the statutory citation. ALJ Decision at 2, n.1. That entry stated that Petitioner was convicted under “Kan. Stat. Ann. § 21-3414(1)(A)(c).” *See* CMS Ex. 5, at 1. However, the felony aggravated battery statute in place at the time was actually Kansas Statutes Annotated § 21-3414(a)(1). Petitioner does not dispute his conviction, the crime of which he was convicted (felony aggravated battery), or the statutory basis for the crime as clarified by the ALJ.

Petitioner acknowledged ““that the battery resulted from an altercation with another man in a personal matter involving this man’s relationship with [h]is ex-wife.”” *Id.* at 2, quoting P. Ex. 6, at 3. The court ordered Petitioner to serve a 12-month prison sentence and 24 months of probation, but then suspended the prison sentence. *Id.*, citing CMS Ex. 5, at 2. In September 2010, over the objection of the State of Kansas, the court granted Petitioner’s motion for early termination of probation. *Id.* at 2-3, citing P. Ex. 5, at 2-12. The Kansas State Board of Healing Arts suspended Petitioner’s medical license but reinstated it on October 23, 2010. *Id.* at 3, citing P. Ex. 4, at 3.

Between May 2011 and April 28, 2015, CKCI submitted various documents to Wisconsin Physicians Service (WPS), CMS’s Medicare contractor,<sup>4</sup> beginning with an Electronic Funds Transfer (EFT) Authorization form. *Id.* at 3, citing P. Ex. 7, at 5-6. On May 17, 2011, WPS notified Petitioner that in order ““to update [Petitioner’s] Organizational [National Provider Identifier],”” it needed additional information consisting of IRS verification of CKCI’s legal business name and specified portions of the CMS application Form CMS-855I. *Id.*, quoting P. Ex. 7, at 7. CKCI submitted two different document sets in response to this request, one dated June 11, 2011 (submitted on June 14, 2011), the other dated July 6, 2011. *Id.*, citing P. Ex. 7, at 22, 23. These different sets included “portions of two different Form CMS-855Is, including two unique versions of [the sections dealing with final adverse actions and certification statement].” *Id.*, citing P. Ex. 7, at 16-17, 22-23. Both versions, albeit in somewhat different language, indicated that a final adverse action involving aggravated battery had been taken against Petitioner but that probation had ended, and both versions also indicated that the State had suspended Petitioner’s medical license; however, only the first version indicated that the suspension had ended in September 2010. *Id.* On July 26, 2011, WPS approved CKCI’s EFT Authorization Agreement, sending CKCI a notice that stated, in important part, that WPS had ““approved [its] CMS-855 application to change [its] Medicare enrollment information.”” *Id.* at 4, quoting P. Ex. 7, at 2. The notice letter “specified that the updated information consisted of ‘[s]ignature verification for EFT & Updated NPI to PECOS.’” *Id.* The notice letter “did not indicate that the contractor had revalidated CKCI’s enrollment or had updated any information regarding final adverse actions.”<sup>5</sup> *Id.*, citing P. Ex. 7, at 2-3. The letter advised CKCI that in order to maintain enrollment in the Medicare program, “it needed to submit updates and changes to its enrollment information, including reporting ‘final adverse legal actions, such as felony convictions’ within specified timelines.” *Id.*, quoting P. Ex. 7, at 2-3.

---

<sup>4</sup> Throughout his Request for Review, Petitioner refers to WPS as the “MAC” which we understand to mean the “Medicare administrative contractor,” which is WPS.

<sup>5</sup> Although Petitioner claims this notice letter constituted an “initial determination” to continue CKCI’s enrollment, a claim the ALJ rejected, he does not dispute the ALJ’s findings as to what the notice letter actually stated.

On or about April 28, 2015, CKCI submitted an enrollment revalidation application to WPS. *Id.* at 4, *citing* CMS Ex. 4. In that application, CKCI “reported that its owner, Petitioner, had a final adverse action of ‘unrelated felony conviction’ on April 30, 2009, and that the resolution was a ‘12 mo. sentence suspended.’” *Id.*, *quoting* CMS Ex. 4, at 14. The application also mentioned the suspension and reinstatement of Petitioner’s license. *Id.* On July 22, 2015, after receiving CKCI’s revalidation application, WPS notified Petitioner that his Medicare enrollment and billing privileges were being revoked effective April 30, 2009. CMS Ex. 1. WPS’s revocation notice letter cited Petitioner’s April 30, 2009 felony conviction and his failure to report that conviction to CMS within 30 days as authorizing revocation under 42 C.F.R. § 424.535(a)(3) and 42 C.F.R. § 424.535(a)(9), respectively. *Id.* The notice letter further informed Petitioner that he was barred from applying to re-enroll in the Medicare program for a period of three years, effective 30 days from the postmark date of the letter. *Id.* at 2.

On September 1, 2015, Petitioner requested reconsideration of the July 22, 2015 revocation determination. CMS Ex. 2. Petitioner did not deny that he had been convicted of a felony against a person or assert that he had notified CMS or WPS of that conviction within 30 days thereof. *Id.* On September 10, 2015, WPS informed Petitioner that its reconsideration determination was to affirm the revocation under both section 424.535(a)(3) and section 424.535(a)(9). CMS Ex. 3. The letter informing Petitioner of this reconsidered determination notified him that he could request review by an ALJ, *id.* at 2-3, and Petitioner filed the request for review that resulted in the ALJ Decision upholding the revocation that we are now reviewing.

### The ALJ Proceeding

The ALJ based her decision on the written record, which included the parties’ briefs, CMS Exhibits 1-4, and Petitioner Exhibits 1-7. ALJ Decision at 5. Petitioner Exhibit 6 contained Petitioner’s own direct testimony, but since CMS did not request an opportunity to cross-examine Petitioner and had not submitted witness testimony in its own case, the ALJ concluded that no in-person hearing was necessary. *Id.* at 5 and n. 4. The ALJ stated that the issues before her were limited to whether CMS had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges pursuant to section 424.535(a)(3) based on Petitioner’s April 30, 2009 felony conviction or pursuant to section 424.535(a)(9) based on Petitioner’s failure to report that conviction within 30 days, the time limit provided in the regulation. *Id.* at 6.

The ALJ concluded that the revocation was authorized under either and both of those regulations because

- A jury in Riley County, Kansas, convicted Petitioner of one count of aggravated battery, a level VII felony, on April 30, 2009.

- Petitioner’s felony conviction is for a crime against a person pursuant to 42 C.F.R. § 424.535(a)(3).
- An offense listed in 42 C.F.R. § 424.535(a)(3) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.
- Petitioner did not inform CMS within 30 days of his April 30, 2009 felony conviction.

ALJ Decision at 7, 10.<sup>6</sup> The ALJ further found that “[t]he applicable regulations control the effective date of the revocation,” and that section 424.535(g) provides that “when a revocation is based on a felony conviction, the revocation of the supplier’s billing privileges is effective as of the date of the felony conviction.” *Id.* at 11. “Thus,” the ALJ concluded, “pursuant to the controlling regulation, Petitioner’s revocation became effective on April 30, 2009, the date of his conviction.” *Id.*

In making her findings and conclusions, the ALJ noted that Petitioner “does not dispute that he was found guilty of felony aggravated battery [and] . . . acknowledges that his ‘grounds for appeal are limited,’ in that ‘it must be conclusively presumed that the state felony conviction was detrimental to the best interests of the Medicare Program because the Secretary has decreed that a felony conviction for assault (which is obviously similar to battery) is always detrimental to the best interest of the Medicare Program and its beneficiaries.’” *Id.*, quoting P. Br. at 3.

The ALJ confirmed that the applicable regulations codify the Secretary’s determination that certain categories of felony offenses “are *per se* detrimental to the best interests of the Medicare program and its beneficiaries” and that those categories include “felony crimes against persons, such as murder, rape, assault, and other similar crimes.” *Id.* at 8 (internal quotation marks omitted). The ALJ then found that “the offense of felony aggravated battery [which Petitioner acknowledged was “obviously similar to” assault] is a felony crime against a person under the regulation.” *Id.*

With respect to the revocation under section 424.535(g), the ALJ noted, “Petitioner does not contend that he informed WPS of his felony conviction within 30 days of April 30, 2009.” *Id.* at 10. The ALJ further noted that according to the record, the earliest notice Petitioner gave WPS of his felony conviction was the incidental notice via documents CKCI submitted in June 2011 on response to WPS’s request for additional information regarding CKCI’s EFT Authorization Agreement, documents submitted more than two years after his conviction. *Id.* at 11. The ALJ rejected Petitioner’s argument that WPS’s

---

<sup>6</sup> Although she upheld the revocation on both grounds, the ALJ correctly noted, “Petitioner’s felony conviction in the preceding 10 years, alone, is a sufficient basis for CMS to have revoked his Medicare enrollment and billing privileges.” ALJ Decision at 10, n.9.

July 2011 letter informing CKCI that it had approved CKCI's EFT Authorization Agreement was an "initial determination" that "approved CKCI's enrollment in the Medicare Program effective June 11, 2011." *Id.* (internal quotation marks omitted).

Contrary to Petitioner's argument, the contractor did not purport to be rendering an "initial determination" that "approved CKCI's enrollment in the Medicare Program effective June 11, 2011." Rather, the contractor had approved CKCI's May 2011 EFT Authorization Agreement.

*Id.* (citations omitted), *citing* P. Ex. 7, at 2-3. The ALJ rejected the other arguments made by Petitioner. We address those arguments in our discussion below to the extent Petitioner has reiterated them on appeal and to the extent they are material to our decision.

## Discussion

On appeal, as below, Petitioner does not dispute that he was, within 10 years of the revocation, convicted of a felony offense that under the applicable regulations allowed CMS to revoke his Medicare enrollment and billing privileges and to impose a re-enrollment bar. Also on appeal, Petitioner does not dispute that he did not notify WPS or CMS within 30 days of his 2009 conviction as required by the regulations.<sup>7</sup> Petitioner's principal argument on appeal is that the regulation authorizing revocation of his billing privileges is not authorized by statute. Petitioner made a similar argument before the ALJ although there he argued that neither revocation of his Medicare participation nor his billing privileges was authorized by statute. The ALJ correctly concluded that even if she were to accept that argument, she was, as even Petitioner conceded, bound to follow the regulations. ALJ Decision at 9, *citing 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (holding that ALJs and the Board "may not invalidate either a law or regulation on any ground"). Given Petitioner's concession that his felony conviction provided the grounds for CMS's revocation, we, like the ALJ, must apply the regulatory authority and uphold it.

---

<sup>7</sup> Petitioner reiterates his argument to the ALJ that WPS's July 26, 2011 approval of his EFT authorization form – in support of which he submitted portions of a CMS-855I that mentioned his conviction – constituted approval of CKCI's continued enrollment in the Medicare program notwithstanding his conviction. RR at 4. We agree with the ALJ's rejection of this argument (ALJ Decision at 11) and specifically with her conclusion that WPS's July 2011 letter approved only CKCI's EFT Authorization Agreement. Moreover, Petitioner did not submit the documents he relies on as notice of his conviction until June 14, 2011, which is more than two years after his conviction, not "within 30 days" as required by section 424.516(d)(1)(ii). We note that Petitioner does not challenge the ALJ's denial of his contested subpoena request to WPS.

However, we also agree with the ALJ that Petitioner's argument is not supported by the applicable statutes. *See* ALJ Decision at 9-10. Petitioner argued below that the portions of the enrollment regulations that pertain to revocation for felony convictions were not authorized rulemaking implementing 42 U.S.C. § 1395cc(b)(2)(D). The cited statutory section codifies Section 4302 of the Balanced Budget Act of 1997, P.L. 105-33 (August 5, 1997), which authorizes the Secretary of Health and Human Services to refuse to enter into or to terminate agreements with providers of services who have been convicted of felonies that the Secretary determines are detrimental to the Medicare program or its beneficiaries. The ALJ construed Petitioner's argument as one that revocation actions based on felony convictions are authorized only against providers of services, not suppliers such as Petitioner. ALJ Decision at 9-10. The ALJ correctly pointed out that the same section of the Balanced Budget Act also added language to another statutory section (section 1842(h)) that expressly made revocation on this ground applicable to "a physician or supplier." *Id.* at 10, *quoting* P.L. 105-33, § 4302(b), *codified at* 42 U.S.C. § 1395u(h)(8).<sup>8</sup> The ALJ further pointed out that Congress gave the Secretary "broad authority to 'make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [she] is charged under the Act.'" *Id.*, *quoting* 42 U.S.C. § 1302(a); *see also* 42 U.S.C. §§ 1395hh(a)(1), 1395cc(j)(1)(A) (accord[ing] the Secretary rulemaking authority specifically related to provider and supplier enrollment).

On appeal, Petitioner states that he "is aware of the difference between a provider and a supplier" and acknowledges that 42 U.S.C. § 1395u(h) is "the controlling statute." RR at 2. However, Petitioner argues that while the statute's language expressly authorizes the Secretary to terminate "an agreement with a physician," it "does not address and therefore does not authorize revoking the billing privileges of the offending physician." *Id.* (internal quotation marks omitted). For that reason, Petitioner argues, CMS's exercise of its regulatory authority to revoke his billing privileges was not expressly authorized by statute and violates the Administrative Procedure Act. *Id.* at 2-3, *citing* 5 U.S.C. § 558(b).

We find no basis for the distinction Petitioner attempts to draw between authority to terminate a supplier agreement and authority to terminate a supplier's billing privileges. In order to bill Medicare, a physician (or other supplier) must submit an enrollment application, and CMS must approve the application and enroll the provider in the Medicare program. 42 C.F.R. §§ 424.500, .502, .505. If a supplier is not currently enrolled in the Medicare program, he may not bill for services to Medicare beneficiaries. *Id.* Accordingly, CMS's authority to revoke a supplier's Medicare enrollment necessarily requires, as well, revocation of the supplier's approval to bill the Medicare program.

---

<sup>8</sup> The specific subsection of the United States Code section cited by the ALJ is 42 U.S.C. § 1395u(h).

Petitioner also attempts to interject on appeal an issue he did not raise below, whether WPS, CMS's contractor, was authorized to take the discretionary action to revoke his Medicare agreement and billing privileges. RR at 3. Petitioner argues that a federal department's authorizing a private contractor to take a discretionary action is unconstitutional. *Id.* A party appearing before the Board is not permitted to raise on appeal issues that could have been raised before the ALJ but were not. *Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program, "Completion of the Review Process,"* ¶ (a) ("The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not."), <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>. Petitioner did not present this issue to the ALJ and has not made any showing here that he could not have done so; accordingly, the issue is not properly before the Board. *See, e.g., Mohammad Nawaz, M.D., et al.*, DAB No. 2687 at 10, n.12 (2016); *Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (applying the Board's Appellate Division Guidelines to exclude arguments not raised before the ALJ). We also find Petitioner's suggestion that WPS does not have authority to act on behalf of CMS with respect to revocations inconsistent with the argument Petitioner makes elsewhere in his Request for Review that the ALJ and Board should conclude that CMS is bound by WPS's action in July 2011, which Petitioner improperly characterizes as WPS's having made an "initial determination" to continue Petitioner's Medicare enrollment when it approved the EFT authorization form. RR at 4. In any event, the Board "has consistently held that neither the Board nor an ALJ may [f]ind invalid or refuse to follow Federal statutes or regulations on constitutional grounds." *Zahid Imran, M.D.*, DAB No. 2680, at 9 (2016) (internal quotation marks omitted).

Petitioner's final argument is that revoking his billing privileges retroactive to the date of his conviction is not authorized by statute. RR at 5. Once again, the ALJ and the Board are bound by the Secretary's regulations which expressly provide that when a revocation is based on a felony conviction, the revocation takes effect on the date of the conviction. 42 C.F.R. § 424.535(g). Petitioner is free to make his ultra vires argument to a court, but we may not invalidate or refuse to apply a regulation. Petitioner's appeal, we note, does not directly challenge the length of the re-enrollment bar which, in any event, is not an issue subject to review by ALJs and the Board. *Vijendra Dave, M.D.*, DAB No. 2672, at 8-12 (2016).



**Conclusion**

For the reasons stated above, we affirm the ALJ Decision sustaining CMS’s revocation of Petitioner’s Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) and (a)(9).

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Sheila Ann Hegy  
Presiding Board Member