Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Dennis McGinty, PT
Docket No. A-17-91
Decision No. 2838
December 21, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Dennis McGinty, PT (Petitioner) appeals a decision by an administrative law judge (ALJ) upholding the Centers for Medicare & Medicaid Services' (CMS) decision to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4). *Dennis McGinty, PT*, DAB CR4841 (2017) (ALJ Decision). The ALJ determined on summary judgment that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges because Petitioner's guilty pleas to felony sex offenses and deferred adjudication in Texas on March 22, 2005, constituted a "final adverse action" that Petitioner was required, but failed, to report on his March 24, 2014 Medicare revalidation application. The ALJ also concluded that June 19, 2016 was the effective date of Petitioner's revocation and that the three-year re-enrollment bar imposed by CMS was not subject to review.

For the reasons discussed below, we uphold the ALJ Decision.

Legal Background

To ensure that only qualified health care providers and suppliers participate in Medicare, Congress directed the Secretary of Health and Human Services to "establish by regulation a process" for Medicare providers and suppliers to enroll and maintain enrollment in Medicare. 42 U.S.C. § 1395cc(j)(1)(A).[1] Physical therapists such as Petitioner are "suppliers" under Medicare. *Id.* § 1395x(u), (d); 42 C.F.R. § 400.202. The regulations in 42 C.F.R. Part 424, subpart P, set out the enrollment requirements that Medicare

[1] The current version of the Social Security Act (Act) can be found at https://www.ssa.gov/OP_Home/ssact/ssact.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.

providers and suppliers must meet to bill for covered services or supplies.[2] Among other things, providers and suppliers must provide complete, accurate, and truthful responses to all information requested in an application to enroll or maintain enrollment in Medicare. 42 C.F.R. §§ 424.510(d), 424.515, 424.516.

CMS may revoke the enrollment and billing privileges of a provider or supplier for any of the "reasons" listed in 42 C.F.R. § 424.535(a). Those reasons include:

> (4) *False or misleading information.* The provider or supplier certified as ''true'' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program. . . .

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(1)(1), 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.

Case Background[3]

On March 22, 2005, Petitioner entered a guilty plea in the District Court of Collin County, Texas, to two counts of Indecency with a Child/Contact, a second-degree felony under the Texas Penal Code. CMS Exhibit (Ex.) 7, at 1, 3. The "Court received the free and voluntary plea(s) . . . ." *Id.* at 4. The Court "hear[d] evidence from the State and the Defendant and … found there was sufficient evidence to support the Defendant's plea and found the offense was committed . . . ." *Id.* In exchange for Petitioner's plea, the Court issued an "Order of Deferred Adjudication," placed Petitioner on community supervision for 10 years, imposed a fine on Petitioner, and "deferred further proceedings without an adjudication of guilty." *Id.* at 3, 4, 5.

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[2] Unless noted otherwise, we refer to the regulations as amended effective February 3, 2015, which were in effect at the time of the May 2016 initial determination to revoke Petitioner's billing privileges. *See* 79 Fed. Reg. 72,500 (Dec. 5, 2014).

[3] The facts included in this section, all undisputed, are drawn from the record before the ALJ and the ALJ Decision; they are not new or substituted findings.

On March 24, 2014, Petitioner submitted a Medicare revalidation application, which required him to report any "final adverse legal actions." CMS Ex. 1, at 1, 3. Petitioner did not report any final adverse legal action on the application. In submitting the application, Petitioner certified its contents to be true and complete.[4] On July 8, 2014, Novitas Solutions (Novitas), a CMS Medicare administrative contractor, notified Petitioner that it approved his application. CMS Ex. 6.

On April 22, 2015, the District Court of Collin County, Texas issued an Order Discharging Defendant from Supervision and Dismissing Proceedings. Petitioner (P.) Ex. 6.

On May 20, 2016, Novitas issued an initial determination revoking Petitioner's Medicare enrollment and billing privileges effective June 18, 2016, pursuant to 42 C.F.R. § 424.535(a)(4). CMS Ex. 5. The determination stated that Petitioner "failed to report [his] March 22, 2005 felony conviction for Indecency with Child Sexual Contact," on his March 24, 2014 Medicare revalidation application. *Id.* "A felony conviction," Novitas stated, "is a final adverse action, as defined by 42 CFR §424.502," and Petitioner's failure to disclose the action constituted false or misleading information on the application. *Id.* Novitas imposed a three-year re-enrollment bar on Petitioner. Petitioner timely requested reconsideration.

In an August 29, 2016 reconsidered determination, Novitas sustained the revocation pursuant to section 424.535(a)(4) because Petitioner --

> failed to report [his] order of deferred adjudication after [he] plead guilty to the felony charge of Indecency with Child Sexual Contact on March 22, 2005 on the CMS 855 revalidation application received on March 24, 2014 which is within the preceding 10 years.

CMS Ex. 3, at 3. In reaching this conclusion, Novitas explained that a felony conviction (as defined in section 424.535(a)(3)(i)) within the 10 years preceding enrollment, revalidation or re-enrollment is a "final adverse action" under 42 C.F.R. § 424.502. *Id.* at 2-4. Section 424.535(a)(3)(i), Novitas continued, "includes guilty pleas and deferred adjudication[s] based on the definition of convicted as defined in 42 CFR §1001.2 . . . ." *Id*. at 3. Novitas concluded that by certifying that the information in his revalidation application was true absent this disclosure, Petitioner did not "show full compliance with the standard[] for which [he was] revoked." *Id.* at 4.

[4] Petitioner filed the application electronically using the Internet-based Medicare Provider Enrollment, Chain, and Ownership System.

Petitioner timely requested an ALJ hearing to contest the reconsidered decision.

The ALJ Decision

The ALJ determined on the parties' cross-motions for summary judgment that CMS had a legal basis to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(4). Petitioner's March 2005 guilty pleas to two counts of a Texas felony sex offense and the court's order of deferred adjudication, the ALJ determined, constituted a "final adverse action" that Petitioner was obligated, but failed, to report on his revalidation application. In reaching this conclusion, the ALJ quoted from section 424.502 of the regulations, which defines "final adverse action" to include 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[.]" ALJ Decision at 7.

The ALJ next determined that an accepted guilty plea and a deferred adjudication are treated the same as a conviction under both the 2013 revision of section 424.535(a)(3)(i), in effect when Petitioner filed his revalidation application, and the 2015 revision of section 424.535(a)(3)(i), in effect when Novitas issued its determinations and which cross-references the definition of "convicted" in section 1001.2 of the regulations. ALJ Decision at 8-11. "To ensure no prejudice to Petitioner through a potentially impermissible retroactive application" of the 2015 revision, the ALJ stated, he would apply the 2013 version. *Id.* at 11. In addition, the ALJ observed, Congress expressly defined "convicted" in 42 U.S.C. § 1320a-7(i) "to include an accepted guilty plea or a deferred adjudication," "whether by a federal, state, or local court." *Id.* at 10-11. The ALJ concluded, "it is the definition of conviction under the Act that controls." *Id.* at 11.

Accordingly, the ALJ determined that Petitioner was required to report his 2005 guilty pleas and deferred adjudication as a final adverse action on his revalidation application, and his failure to do so provided CMS a legal basis to revoke his Medicare enrollment and billing privileges under section 424.535(a)(4). The ALJ further determined that June 19, 2016 was the correct effective date of Petitioner's revocation, that the three-year re-enrollment bar was not subject to review, and that he had no authority to grant Petitioner's request for equitable relief.

Petitioner appealed to the Board.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Norman Johnson, M.D.,* DAB No. 2779, at 10 (2017). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*,

477 U.S. 317, 322-25 (1986). Our standard of review on a disputed conclusion of law is whether an ALJ decision is erroneous. *Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/.

Discussion

Consistent with the parties' cross-motions for summary judgment, we conclude that the material facts, set forth above, are not in dispute. Furthermore, Petitioner does not raise any dispute of material fact on appeal.[5] Rather, Petitioner challenges the ALJ Decision based on the following legal arguments:

- The conclusion that Petitioner was "convicted" of a felony offense for purposes of his Medicare enrollment violates the plain language of 42 U.S.C. § 1395cc(b)(2)(D);

- Petitioner was denied due process because: 1) Novitas retroactively applied section 424.535(a)(3)(i) (2015), which incorporates the definition of "convicted" in 42 C.F.R. § 1001.2, to support the revocation; and 2) the ALJ based his decision on alternative legal theories not set forth in Novitas' initial determination;

- Assuming arguendo that Petitioner was "convicted," the conviction occurred more than 10 years prior to the June 18, 2016 revocation and, thus, it is not a final adverse action under 42 C.F.R. § 424.502.

Below, we first explain that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under section 424.535(a)(4). In reaching this conclusion, we discuss the language of the relevant Medicare enrollment regulations, including the definition of "final adverse action" in 42 C.F.R. 424.502 and the definition of "convicted" in the 2015 and 2013 revisions of 42 C.F.R. § 424.535(a)(3)(i). We conclude that Petitioner was "convicted" within the meaning of both versions of 424.535(a)(3)(i). Because the conviction occurred less than 10 years before Petitioner submitted his 2014 revalidation application, we determine, he was obligated to report this "final adverse action" on the application.

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[5] Petitioner's Reply brief includes a section titled: "CMS's Contention that the ALJ's Decision is 'Supported by Substantial Evidence' is unfounded." P. Reply at 10. Under that heading, however, Petitioner does not contest the facts that he pleaded guilty to a state felony against a person or that the court issued an order of deferred adjudication. Rather, Petitioner essentially reiterates his main legal argument, contending that the Texas court's order of deferred adjudication does not evidence a "conviction" because "it is well settled that a deferred adjudication is not a conviction under Texas law. . . ." *Id.*

We next discuss why we reject each of Petitioner's legal arguments. Lastly, we sustain the ALJ's determination of the effective date of Petitioner's revocation and his conclusion that the re-enrollment bar imposed on Petitioner was not subject to review.

A. *CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).*

As set forth above, 42 C.F.R. § 424.535(a)(4) authorizes CMS to revoke the Medicare enrollment of a provider or supplier who "certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program. . . ." Here, the parties do not dispute that Petitioner was required to report on his March 2014 Medicare revalidation application any "final adverse action." In addition, the parties agree that Petitioner did not report any final adverse action on his application and that he certified his application to be true and complete.

The Medicare enrollment regulations define "final adverse action" under 42 C.F.R. § 424.502 to mean one or more specified circumstances, including:

> (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."[6]

Accordingly, the elements of the fourth type of "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 conviction occurred within the 10 years preceding the enrollment, revalidation, or re-enrollment.

As in effect at the time Novitas issued the initial and reconsidered determinations to revoke Petitioner's Medicare enrollment,[7] the cross-referenced section 424.535(a)(3)(i) (2015) provided:

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[6] This definition of "final adverse action" was the same in the 2013 and 2015 revisions of 42 C.F.R. § 424.502.

[7] The Board has consistently held that the regulations in effect on the date of the initial determination to revoke a supplier's enrollment apply in an appeal of a Medicare enrollment case. *See, e.g.*, *Norman Johnson, M.D.*, DAB No. 2779, at 18-20 (2017); *John P. McDonough III, Ph.D.*, DAB No. 2728, at 2 n.1 (2016) (applying the regulations in effect at the time of the revocation); *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016).

> (3) Felonies. (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

Section 1001.2, in turn, defines "convicted" to include —

> (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.

Applying the plain language of the 2015 revision of section 424.535(a)(3)(i) to the undisputed facts, we conclude that Petitioner was convicted of a state felony offense detrimental to the best interests of the Medicare program and its beneficiaries within the 10 years preceding his March 2014 revalidation. Specifically, it is undisputed that Indecency with a Child/Contact, is a second degree felony against a person under the Texas Penal Code. It is also undisputed that on March 22, 2005, Petitioner entered a plea of guilty to two counts of that felony in the District Court of Collin County, Texas, that the Court received the plea, and the Court issued an order of deferred adjudication. CMS Ex. 7, at 3. Petitioner was therefore "convicted" under the 2015 version of the regulation on two independent grounds: 1) because a "State or local court . . . accepted [his] plea of guilty" and 2) because Petitioner "entered into participation in a . . . deferred adjudication . . . arrangement where judgment of conviction has been withheld."

Petitioner also was "convicted" of a felony crime against a person within the meaning of the 2013 version of section 424.535(a)(3)(i), which provided in relevant part:

> (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.

(Emphasis added.) Again, it is undisputed that the felony crime for which Petitioner was indicted, Indecency with a Child/Contact, is a second-degree felony against a person under the Texas Penal Code. Furthermore, Petitioner does not dispute that on March 22, 2005, he entered a plea of guilty to two counts of that felony in the Collin County, Texas Court and that the Court received the plea. Petitioner was therefore "convicted" within the meaning of the 2013 regulation because "convicted[] include[ed] guilty pleas . . . ." Furthermore, Petitioner's conviction occurred within 10 years preceding the submission of his March 24, 2014 revalidation application. While we agree with the ALJ that Petitioner's "deferred adjudication" is an alternative basis for finding Petitioner was "convicted" because a "deferred adjudication" is encompassed by the language "adjudicated pretrial diversion" in the 2013 version of the regulation (*see* ALJ Decision at 11-12), our decision to affirm the ALJ does not require us to expand on the ALJ's analysis of that basis, which is legally correct.[8]

Accordingly, we conclude that Petitioner was required to report the 2005 guilty plea and deferred adjudication on his March 24, 2014 Medicare revalidation application. Because Petitioner did not report the final adverse action, CMS had a valid legal basis to revoke his Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(4).

B. *The decision to revoke Petitioner's enrollment does not violate the plain language of 42 U.S.C. § 1395cc(b)(2)(D).*

Petitioner's central argument below and on appeal is that a construction of the definition of "convicted" in section 424.535(a)(3) to include a guilty plea and deferred adjudication in a Texas criminal proceeding "violates the plain language of" 42 U.S.C. § 1395cc(b)(2)(D). Request for Review and Brief in Support of Appeal (RR) at 4, 8, 12, 13, 15, 22; P. Reply at 2-8. Furthermore, Petitioner contends, the ALJ erred in relying on the definition of "convicted" in 42 U.S.C. § 1320a-7(i) because that section "is a different statute entirely" and "is at odds with and contrary to the provisions of 42 U.S.C. § 1395cc(b)(2)(D)." P. Reply at 6-7. Petitioner also argues that the ALJ erred in refusing to determine that 42 C.F.R. § 424.535(a)(3), as amended in 2015 to incorporate the definition of "convicted" in the program exclusion statute and 42 C.F.R. § 1001.2, is invalid because it violates the plain language of 42 U.S.C. § 1395cc(b)(2)(D).

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[8] We note Petitioner does not argue that there is any material legal distinction between a "deferred adjudication" and an "adjudicated pretrial diversion," and we find none.

The statutory language on which Petitioner relies authorizes the Secretary to refuse to enter into, to refuse to renew, or to terminate a Medicare participation agreement with a supplier who –

> …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.

42 U.S.C. § 1395cc(b)(2)(D). According to Petitioner, the plain language of the statute "clearly contemplates that the definition of 'convicted' turn[s] upon the definition under applicable federal or state law." RR at 22. Because "it is well settled that a deferred adjudication is not a conviction under Texas law," Petitioner asserts, "an interpretation of 42 C.F.R. § 424.535(a)(3) that a deferred adjudication [in Texas] is a conviction violates the plain language of the statute. . . ." RR at 5, 13, 14, 16-17; P. Reply at 10-11 (citing decisions issued by Texas courts in state criminal proceedings). Consequently, Petitioner argues that "the ALJ wrongly determined" that Petitioner was required to report the 2005 guilty plea and deferred adjudication on his 2014 Medicare application. RR at 5-6.

As the ALJ recognized, the Board has consistently held that federal law – not state law – governs whether a supplier has been "convicted" of an offense, as that term is used for the purposes of Medicare enrollment and other federal laws designed to protect the Medicare program and its beneficiaries. *E.g.*, *Kimberly Shipper, P.A.,* DAB No. 2804, at 5-8 (2017) (guilty plea to Texas felony aggravated assault charge, receipt and entry of the plea by the District Court of Harris County, Texas, and Court's Order of Deferred Adjudication, each qualified as a "conviction" under Medicare enrollment regulations even if Texas law did not recognize the deferred adjudication as a conviction), *appeal docketed,* No. 6:17-cv-00253-RP-JCM (W.D. Tex. Sept. 22, 2017); *John Hartman, D.O.*, DAB No. 2564, at 3 (2014) (guilty plea to Missouri felony assault charge was a "conviction" under section 424.535(a)(3) even though Missouri law did not recognize a conviction occurred), citing *Lorrie Laurel, PT*, DAB No. 2524 (2013) (guilty plea to Florida second-degree felony financial crime was a conviction under section 424.535(a)(3)(i) notwithstanding the provisions of state law).

Furthermore, the Board recently addressed the question whether the plain language of section 42 U.S.C. § 1395cc(b)(2)(D) compels the Secretary to use the definition of "convicted" under state law where a revocation is based on the outcome of a state criminal proceeding. The wording of the statute, the Board observed, "links the phrase 'under Federal or State law' to the noun immediately preceding it – 'felony,' not to the word 'convicted.'" *Shipper* at 7, citing *Laurel* at 4. "Consequently," the Board stated, "the Secretary has understood that phrase to refer to the predicate offense for a revocation action based on a conviction, that is, that the offense must constitute a felony under either

state law or federal law." *Id.* This is consistent with the wording of 42 U.S.C. § 1395cc(b)(2)(D) and the absence in that section of the Act of an express definition of "convicted" or a requirement to use a state law's definition of the term in evaluating whether to revoke a supplier's enrollment and billing privileges. *Id.*

We also reject Petitioner's contention that the definition of "convicted" in 42 U.S.C. 1320a-7, the federal health care program exclusion statute, is "a different statute entirely" and inconsistent with the legislation governing provider and supplier enrollment in Medicare. "Like the overarching objective" of excluding certain individuals from participating in all federal health care programs under 42 U.S.C. 1320a-7, the Board has explained, "the central purpose of the enrollment provisions" is to protect Medicare beneficiaries and Trust Funds from fraudulent, untrustworthy and abusive providers and suppliers. *Shipper* at 8, citing 71 Fed. Reg. 20,754, 20,773 (April 21, 2006). Consequently, while Congress did not define the term "convicted" in 42 U.S.C. § 1395cc(b)(2)(D), the Secretary properly exercised the authority to define the term by regulation consistent with the definition of "convicted" in the exclusion statute. 42 U.S.C. §§ 1302(a), 1395hh(a)(1), and 1395cc(j)(1)(A).

Indeed, given the similar protective purposes of the enrollment and exclusion statutes, it was logical for the Secretary to adopt consistent definitions. Federal law thus rationally and consistently controls the definition of "convicted" in the context of both Medicare enrollment matters and exclusions of certain individuals from participation in all federal health care programs. *Shipper* at 7, citing *Laurel* and *Henry L. Gupton*, DAB No. 2058, at 4-12 (2007) (finding court's acceptance of guilty plea a "conviction" for purposes of Office of Inspector General exclusion notwithstanding state court's deferral of judgment and ultimate expungement of record), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874, 880 (E.D. Tenn. 2008) ("This court agrees with the Secretary's interpretation of the statute and the conclusion that Dr. Gupton was 'convicted.'").

Moreover, "[i]n order to promote program integrity on a department-wide basis," the Board also has explained, "the Secretary . . . logically interprets the term 'convicted' broadly, to include circumstances in which a practitioner's involvement in the criminal justice system raises sufficient concerns about their integrity or trustworthiness to justify a revocation of Medicare enrollment or exclusion from federal health care programs, even if they were not adjudicated guilty for reasons of state criminal justice policy." *Shipper* at 8, citing *Laurel* at 5; *Gupton,* DAB No. 2058, at 7-8. That the term "convicted" is defined more expansively under the Act and regulations than under some state criminal laws reasonably reflects the different objectives of the federal civil laws and state criminal laws. *Id.* "While the goals of criminal law generally include punishment, rehabilitation, and deterrence," the Board has stated, "exclusions are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc …." *Id.*

Accordingly, we conclude that the decision to revoke Petitioner's Medicare enrollment and billing privileges is consistent with the language of 42 U.S.C. § 1395cc(b)(2)(D).

C. *Petitioner had sufficient notice and opportunity to contest the revocation of his Medicare enrollment and billing privileges.*

Petitioner argued before the ALJ and repeats on appeal that he was denied due process because Novitas revoked his Medicare enrollment based on an impermissible, retroactive application of the definition of "convicted" in the 2015 revision of 42 C.F.R. § 424.535(a)(3)(i). RR at 3, 23-25.[9] The revision of section 424.535(a)(3)(i) "became effective on February 3, 2015[,]" Petitioner asserts, [y]et, it is being applied to conduct of the Petitioner that resulted in a deferred adjudication issued on March 22, 2005." *Id.* at 24. "Due Process of law under the Fifth Amendment requires fair notice of agency interpretations[,]" Petitioner asserts, and "[n]othing in this regulation warrants a retroactive application of the amendment incorporating this definition of 'convicted' from the exclusion statute." *Id.*

As the ALJ explained and we discussed above, the 2013 version of section 424.535(a)(3)(i), which was in effect when Petitioner filed his revalidation application, also treated guilty pleas "the same as a conviction for purposes of enrolling and maintaining enrollment in Medicare." ALJ Decision at 11. Accordingly, Petitioner cannot complain that he did not have "fair notice" at the time he submitted his 2014 revalidation application that his 2005 guilty plea to two counts of a second-degree felony sex offense in Texas would be treated as a conviction for Medicare enrollment purposes. Likewise, Petitioner was not prejudiced by the fact that Novitas applied the regulations in effect at the time of initial determination to revoke, rather than the 2013 revision, because Petitioner was "convicted" under the plain language of both versions of section 424.535(a)(3)(i).

Moreover, the Board previously has rejected the argument that applying the 2015 revision of the regulation to conduct that occurred prior to the revision's effective date is an impermissible retroactive application of a rule. *Shipper* at 9-10. "This argument" the Board stated, "is based on the faulty premise that the 2015 amendment effected a

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[9] Petitioner also argued that the ALJ erred in refusing to determine that 42 C.F.R. § 424.535(a)(3), as amended in 2015 to incorporate the definition of "convicted" in the program exclusion statute and section 1001.2, is invalid because it violates the plain language of 42 U.S.C. § 1395cc(b)(2)(D). For the reasons discussed above, we reject Petitioner's interpretation of section 1395cc(b)(2)(D). Moreover, the Board held in *Shipper* that the amended regulation does not conflict with the enrollment statute and, given the similar protective purposes of the exclusion and enrollment statues, it was logical for the Secretary to adopt consistent definitions. Shipper at 8-9. The Board also explained that ALJs and the Board are bound by all applicable regulations and do not have the authority to declare a regulation invalid on any ground, even a constitutional one. *Id.* citing *1866ICPayday.com*, DAB No. 2289, at 14 (2009).

substantive change to section 424.535(a)(3)." *Id.* As CMS stated in the preamble to the proposed rule, CMS offered the amendment in response to public inquiries about the meaning of the term "convicted" and to provide practitioners with a better understanding of what arrangements or circumstances would be considered convictions under the enrollment provisions. 78 Fed. Reg. 25,013, 25,022 (April 29, 2013). In sum, the revision did not alter the meaning of "convicted" in section 424.535(a)(3)(i) as it existed prior to the amendment, but clarified the meaning of that term by incorporating the definition of "convicted" under the exclusion regulations to ensure consistency in how the Secretary administers related provisions with the same goal of promoting federal health care program integrity. *Shipper* at 10.

We also find no merit in Petitioner's argument that the "ALJ committed error and violated Due Process of Law in applying a different definition of conviction under 42 C.F.R. §424.535(a)(3)(i) (2013) from that used by Novitas Solutions when imposing the revocation." RR at 8-9. According to Petitioner, the ALJ "cannot under the guise of avoiding 'prejudice to Petitioner through a potentially impermissible retroactive application,' rely on a different regulation than that used by Novitas and apply a definition of 'convicted' established by the Exclusion statute itself." P. Reply at 14-15. As discussed, Novitas' and the ALJ's reliance on different revisions of the same regulation did not prejudice Petitioner because he was "convicted" under the plain meaning of both the 2013 and 2015 revisions of section 424.535(a)(3)(i). Furthermore, it was reasonable for the ALJ to look to the exclusion statute's definition of "convicted" even though it was not expressly incorporated in the enrollment regulation until the 2015 amendments given the common program integrity goals of the exclusion and enrollment legislation.

Petitioner also contends that "the revocation action was based *only* on Petitioner's failure to report the alleged March 22, 2005 felony conviction, an explicit reference to the deferred adjudication order." *Id.* at 15 (emphasis by Petitioner). Since "Novitas did not revoke based on a 'failure to report the guilty plea' when it issued the May 20, 2016 notice," Petitioner contends, neither CMS nor the ALJ should be permitted to rely on Petitioner's guilty plea to support the revocation. *Id.* at 15. "To sustain the revocation on the basis of whether a guilty plea is a conviction," Petitioner contends, "would be a denial of Due Process." *Id.* at 1-2.

This argument is based on mischaracterizations. Novitas' May 20, 2016, initial determination stated that Petitioner "failed to report [his] March 22, 2005 felony conviction for Indecency with Child Sexual Contact," on his Medicare revalidation application. CMS Ex. 5. While the initial determination did not spell out the nature of the conviction, Novitas' reconsidered determination clearly identified the Court's order of deferred adjudication *and* Petitioner's guilty plea as the factual basis for the

revocation. Specifically, Novitas stated that it was sustaining the revocation because Petitioner "failed to report [his] order of *deferred adjudication* after [he] *plead guilty* to the felony charge of Indecency with Child Sexual Contact on March 22, 2005 . . . ." CMS Ex. 3, at 3 (emphasis added). Novitas went on to state that section 424.535(a)(3) "includes guilty pleas and deferred adjudication[s] . . . ." *Id.*

Furthermore, the Board has held that a federal agency may clarify its reasons for making a determination, or assert new reasons to support that determination, during the ALJ proceeding so long as the non-federal party has adequate notice of the reasons and a reasonable opportunity to respond during that proceeding. *Fady Fayad, M.D.*, DAB No. 2266, at 10-11 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *see also Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008) (and cases cited therein). "The Board has also held that, even assuming inadequate notice [of the basis for a federal agency's determination], it will not find a due process violation absent a showing of resulting prejudice." *Green Hills* at 8. In this case, there would have been no prejudice even if Petitioner understood Novitas to rely only on the deferred adjudication to support the conclusion that Petitioner had been "convicted" of the felony sex offense. CMS's brief supporting its motion for summary disposition before the ALJ expressly explained that Petitioner's guilty plea alone qualified as a "conviction" under the applicable regulations. *See* CMS Motion for Summary Judgement at 5-6, 9. Thus, Petitioner had sufficient and timely opportunity to provide any legal argument he wished to make.

In sum, Petitioner received sufficient notice and opportunity to present his legal arguments through the administrative appeal process. *See Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 13-14 (2016) (disagreeing with a due process claim because the supplier "ha[d] been afforded all of the hearing rights provided by the applicable regulations"); *Horace Bledsoe, M.D.*, DAB No. 2753, at 11 (2016). Indeed, the record in this case shows that Petitioner has taken full advantage of the opportunity to be heard provided by the regulations. For the reasons discussed above, there is a factual and legal basis to revoke his enrollment pursuant to 42 C.F.R. § 424.535(a)(4).

D. *Petitioner's conviction occurred within the 10 years preceding revalidation of his Medicare enrollment.*

Petitioner contends that "assuming *arguendo* that [he] was 'convicted' of a felony as a result of the deferred adjudication order issued March 22, 2005, because it was issued by the Court more than 10 years prior to the June 18, 2016 revocation, the order cannot properly be considered as a reason for revocation." RR at 25-26. Petitioner cites 42 C.F.R. § 424.535(a)(3)(i) to support this argument.

Petitioner is mistaken. Petitioner's revocation is based on section 424.434(a)(4), which, as quoted above, concerns the submission of misleading or false information on an application to enroll or maintain enrollment in Medicare, not under section 424.535(a)(3)(i) for the conviction itself. Specifically, Petitioner's revocation was based on his failure to report a "final adverse action" on his revalidation application and certifying the application as true and complete. The relevant type of "final adverse action" at issue here, also discussed above, is a conviction "within the last 10 years preceding enrollment, revalidation or re-enrollment." 42 C.F.R. § 424.502. Consequently, the date that Petitioner filed his revalidation application, March 24, 2014, is the date that controls, not the date on which Novitas revoked his Medicare enrollment, June 18, 2016. *See* ALJ Decision at 12. Because Petitioner's guilty plea and deferred adjudication in Texas occurred in March 2005, within the 10 years preceding the submission of his revalidation application (and Novitas' July 2014 notification that the application had been approved), the revocation was authorized under section 424.535(a)(4).

E. *We sustain the ALJ's determination of the June 19, 2016 effective date of revocation.*

Section 424.535(g) of the regulations provides that a revocation becomes effective 30 days after CMS or its contractor mails notice of the determination to the provider or supplier, except in certain circumstances not applicable here. Novitas' notice of initial determination in this case is dated May 20, 2016. Thirty days from that date was June 19, 2016. Accordingly, we sustain the ALJ's determination of the June 19, 2016 effective date of Petitioner's revocation.

F. *The three-year duration of Petitioner's re-enrollment bar is not subject to review.*

When CMS validly revokes a supplier's Medicare enrollment, the supplier is barred from seeking re-enrollment for a "minimum" period of one year. 42 C.F.R. § 424.535(c)(1). Section 424.535(c)(1) permits CMS to increase the re-enrollment bar up to three years "depending on the severity of the basis for revocation." *Id.* CMS exercised that authority in this case, imposing a three-year re-enrollment bar on Petitioner.

The applicable regulations governing administrative review of certain CMS actions that adversely affect the rights of physicians and other suppliers to participate in Medicare provide that a determination to revoke a supplier's enrollment under section 424.535(a) may be appealed by a supplier pursuant to 42 C.F.R. Part 498. The Board has held, however, that a determination to impose a impose a re-enrollment bar in excess of the one-year minimum based on the criterion in section 424.535(c) (the "severity" of the basis for revocation) is not subject to administrative review. *Vijendra Dave, M.D.*, DAB No. 2672, at 10-11 (2016).

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member