Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Russell L. Reitz, M.D.,
(NPI No. 1902882194,
PTAN No. 103464)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-4211

Decision No. CR4566

Date: April 1, 2016

DECISION

Wisconsin Physicians Service Insurance Corporation (WPS or "the contractor"), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Russell L. Reitz, M.D., effective April 30, 2009. The revocation was based on Petitioner's felony conviction for aggravated battery and his failure to timely report the felony conviction. For the reasons stated below, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner, a radiation oncologist who was also the owner of the Central Kansas Cancer Institute (CKCI), was enrolled as a supplier in the Medicare program. On April 30, 2009, Petitioner was convicted of aggravated felony battery, a level VII offense against a person, pursuant to Kan. Stat. Ann. § "21-3414(1)(A)(c)," stemming from a May 17,

2008 incident.[1] CMS Exhibit (Ex.) 5. Petitioner described that the conviction resulted from an "incident with another male [his] ex-wife was dating." Petitioner Exhibit (P. Ex.) 5 at 17. Petitioner further acknowledged that "[t]he battery resulted from an altercation with another man in a personal matter involving this man's relationship with [h]is ex-wife." P. Ex. 6 at 3. The District Court of Riley County, Kansas (District Court) imposed a 12-month prison sentence that was suspended, and 24 months of probation with supervision administered by Community Corrections. CMS Ex. 5 at 2. In September 2010, despite the opposition of the State of Kansas, the District Court granted

[1] While both parties discussed that Petitioner had been convicted of a felony offense, neither party submitted any documentation regarding the conviction or the date thereof. In response to a March 10, 2015 Order, CMS filed a copy of the Kansas Sentencing Guidelines Journal Entry of Judgment ("judgment of conviction"). *See* CMS Ex. 5. CMS states in its brief that Petitioner violated section 21-5413(b)(1) of the Kansas Code. CMS Br. at 1. However, Chapter 21 of the Kansas Code, "Crimes and Punishments," was re-codified following Petitioner's April 30, 2009 conviction, and the offense CMS identified under section 21-5413(b)(1) did not exist in the Kansas Code at the time of Petitioner's conviction. Furthermore, the judgment of conviction, apparently erroneously, shows that Petitioner's felony offense was in violation of "section 21-3414(1)(A)(c)." CMS Ex. 5 at 1. This specific section does not appear in the earlier version of the Kansas Code, and it appears that the judgment of conviction contains a typographical error in its citation to the applicable code section for the conviction. *See* Kan. Stat. Ann. § 21-3414(a) (2007). Subsection (a)(1) of Section 21-3414, in effect at the time of Petitioner's conviction, stated that aggravated battery is: (A) Intentionally causing great bodily harm to another person or disfigurement of another person; or (B) intentionally causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, or death can be inflicted; or (C) intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted. CMS, without any citation to evidence, argues that Petitioner's offense was "in a manner whereby great bodily harm, disfigurement or death can be inflicted." CMS Br. at 1. Based on Petitioner's conviction of a level VII, person felony, only subsections (B) or (C) could be applicable. CMS Ex. 5 at 1; Kan. Stat. Ann. § 21-3414(a)(1)(C) and (b) (2007). The offense under subsection (C) does not necessarily require that the offense was committed in such a manner as described by CMS; rather, an offense under subsection (C) could involve "physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon *or* in any manner whereby great bodily harm, disfigurement, or death can be inflicted." Kan. Stat. Ann. § 21-3414(a)(1)(C) (emphasis added).

Petitioner's motion for early termination of probation. P. Ex. 5 at 2-12. Petitioner's medical license was suspended by the Kansas State Board of Healing Arts, the state medical board, for approximately one year and his license was reinstated on October 23, 2010. P. Ex. 4 at 3.

In May 2011, CKCI submitted an Electronic Funds Transfer (EFT) Authorization Agreement to WPS. P. Ex. 7 at 5-6. In correspondence dated May 17, 2011, the contractor informed CKCI that in order for it to process the EFT Authorization Agreement, CKCI needed to provide a tax document from the Internal Revenue Service that verified its legal business name and also submit specified portions of the CMS application Form CMS-855I in order "to update [its] Organizational [National Provider Identifier]." P. Ex. 7 at 7. WPS informed CKCI that if WPS did not receive the requested documentation by June 16, 2011, WPS would not be able to process the EFT Authorization Agreement and CKCI would be subject to revalidation procedures.[2] P. Ex. 7 at 7.

CKCI submitted the requested information on June 14, 2011. P. Ex. 7 at 8-23. However, it appears that some of the documents were submitted in July 2011, as one set of documents bears a June 11, 2011 date, whereas another set of documents bears a July 6, 2011 date. P. Ex. 7 at 22, 23. Along those lines, the record contains portions of two different Form CMS-855Is, including two unique versions of both Section 3 (Final Adverse Actions/Convictions) and Section 15 (Certification Statement). P. Ex. 7 at 16-17, 22-23. One version of Section 3 indicates that Petitioner had final adverse actions of "Agg Battery Level VII" on April 27, 2009 and "License Temp. Suspension" on October 16, 2009. P. Ex. 7 at 16. This version of the form indicated the "resolution" was that probation ended on September 10, 2010, and that "suspension and probation" of Petitioner's medical license had ended on October 18, 2010. P. Ex. 7 at 16. This version of Section 3 directed CMS to "see attached documents." P. Ex. 7 at 16. The second version of Section 3 lists a final adverse action of "Level 7 Agg Battery," with a listed resolution of "probation ended 10/10." P. Ex. 7 at 17. With respect to Petitioner's medical license, the second version of the form indicates "suspension KS license" and does not provide the date or any response in the section corresponding to "resolution." P. Ex. 7 at 17. The second version of Section 3 does not indicate that any documents had been appended to the form. P. Ex. 7 at 17.

[2] The contractor requested that CKCI submit portions of the enrollment application but did not conduct a revalidation at that time. *See* 42 C.F.R. § 424.515(d)(1) (noting that CMS has the right to perform off-cycle revalidations in addition to regular 5-year revalidations and may request that a provider or supplier recertify the accuracy of the enrollment information when warranted).

WPS approved CKCI's EFT Authorization Agreement on July 26, 2011, at which time it notified CKCI that it had "approved [its] CMS-855 application to change [its] Medicare enrollment information." P. Ex. 7 at 2. The letter specified that the updated information consisted of "[s]ignature verification for EFT & Updated NPI to PECOS." P. Ex. 7 at 2. The letter did not indicate that the contractor had revalidated CKCI's enrollment or had updated any information regarding final adverse actions. P. Ex. 7 at 2-3. The contractor's letter also informed CKCI that in order to maintain active 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. P. Ex. 7 at 2-3.

On or about April 28, 2015, CKCI submitted a revalidation application to WPS. 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." CMS Ex. 4 at 14. With respect to the Kansas Board of Healing Arts, the application listed a final adverse action of "unrelated felony conviction" and that Petitioner's license had been suspended and reinstated. CMS Ex. 4 at 14.

After receiving CKCI's revalidation application, WPS sent Petitioner a notice on July 22, 2015 informing CKCI that its Medicare enrollment and billing privileges were being revoked, effective April 30, 2009. CMS Ex. 1. WPS provided the following explanation in its letter:[3]

> 42 CFR § 424.535(a)(3) - Felonies
>
> **The state of Kansas found you guilty of aggravated battery in a manner whereby great bodily harm, disfigurement, or death can be inflicted, a Level VII, person felony on April 30, 2009.**
>
> 42 CFR § 424.535[(a)(9)] – Failure to Report Changes
>
> **Failure to report guilty plea within 30 days of the reportable event.**

[3] In a separate action, WPS revoked CKCI's Medicare enrollment and billing privileges. CKCI submitted a request for hearing, and that case was also assigned to me under a separate docket number, C-15-4210. In that decision, I affirmed CMS's revocation of Petitioner's Medicare enrollment and billing privileges, effective April 30, 2009, based on Petitioner's felony conviction for aggravated battery.

CMS Ex. 1 at 1 (emphasis in original). The effective date of the revocation was April 30, 2009, and Petitioner was informed that the contractor had established a re-enrollment bar for a period of three years, effective 30 days from the postmark date of the letter. CMS Ex. 1 at 1-2.

In a letter dated September 1, 2015, Petitioner requested reconsideration of the July 22, 2015 determination. CMS Ex. 2. In his request for reconsideration, Petitioner did not deny that he had been convicted of a felony against a person, nor did he assert that he had notified CMS or the contractor within 30 days of his conviction. CMS Ex. 2 at 1-4.

In a September 10, 2015 reconsidered determination, WPS informed Petitioner that his Medicare enrollment had been revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (a)(9) based on having a felony conviction that "CMS has determined to be detrimental to the best interests of the program and its beneficiaries" and for his failure to report the conviction within 30 days. CMS Ex. 3 at 1-2. The letter notified Petitioner that he may request further review by an administrative law judge. CMS Ex. 3 at 3.

Petitioner, through his current counsel, filed a request for hearing on September 16, 2015, which the Civil Remedies Division received on September 21, 2015. On October 8, 2015, I issued an Acknowledgment and Pre-Hearing Order (Order) directing the parties to file pre-hearing exchanges, consisting of a brief by CMS and a response brief by Petitioner, along with supporting evidence, in accordance with specific requirements and deadlines.

CMS filed a pre-hearing brief and motion for summary judgment, along with four exhibits (CMS Exs. 1-4). Petitioner submitted a pre-hearing brief (P. Br.) and six exhibits. (P. Exs. 1-6). After both parties filed pre-hearing briefs, Petitioner filed an additional exhibit (P. Ex. 7) and a supplemental brief (P. Supp. Br.) addressing that exhibit. CMS did not object to P. Ex. 7 or otherwise respond to Petitioner's supplemental brief. In response to a March 10, 2016 Order, CMS submitted one additional exhibit, CMS Ex. 5, without objection. I admit the briefs, along with CMS Exs. 1-5 and P. Exs. 1-7, into the record.

Petitioner has submitted his own written direct testimony. P. Ex. 6 at 2-5; *see* Order ¶ 8. However, CMS has not requested the opportunity to cross-examine Petitioner. Order ¶ 9. Consequently, there are no witnesses for the parties to cross-examine at a live hearing. Order ¶¶ 9-10. The record is closed, and the case is ready for a decision on the merits.[4]

[4] As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

II. Issues

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3) or (a)(9) based on his April 30, 2009 felony conviction and failure to comply with reporting requirements.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis[5]

As a physician, Petitioner is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program, a supplier must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke a supplier's enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535(a).

CMS may revoke a supplier's enrollment based on the existence of a felony conviction, as set forth in 42 C.F.R. § 424.535(a)(3), which currently provides:

> (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 [C.F.R. §] 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.
>
> (ii) Offenses include, but are not limited in scope or severity to—
>
> * * *
>
> (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.

CMS also may revoke a supplier's Medicare enrollment and billing privileges based on the supplier's failure to timely report a final adverse action, as is set forth in 42 C.F.R. § 424.535(a)(9):

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[5] My numbered findings of fact and conclusions of law are set forth in italics and bold font.

> (9) *Failure to report.* The provider or supplier did not comply with the reporting requirements specified in §424.516(d)(1)(ii) and (iii) of this subpart.

Pursuant to 42 C.F.R. § 424.516(d)(1)(ii), physicians *must* report "[a]ny adverse legal action" within 30 days of the reportable event, and 42 C.F.R. § 424.502 (Definitions) lists a conviction of a felony offense as defined in section 424.535(a)(3)(i) within the last 10 years preceding enrollment, revalidation, or re-enrollment as a final adverse action.

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

2. ***Petitioner's felony conviction is for a crime against a person pursuant to 42 C.F.R. § 424.535(a)(3).***

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 does not dispute that he was found guilty of felony aggravated battery.[6] In his brief, Petitioner 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 interests of the Medicare Program and its beneficiaries." P. Br. at 3. Thus, Petitioner has conceded that his felony conviction for aggravated battery is a basis for the revocation of his enrollment pursuant to section 424.535(a)(3).[7]

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[6] The maximum period of incarceration for a level VII, person felony at the time of Petitioner's conviction was 34 months, making it a felony offense. Kan. Stat. Ann. § 21-4704 (sentencing grid); *see* 18 U.S.C. § 3559 (classifying an offense punishable by less than five years but more than one year of incarceration as a Class E felony).

[7] Section 424.535(a)(3), as it was in effect at the time of Petitioner's felony conviction, indicated that revocation of enrollment and billing privileges is warranted if the "provider, supplier, or any owner of the provider or supplier, within 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." The current version of section 424.535(a)(3), which became effective on February 3, 2015, states that revocation of enrollment and billing privileges is warranted if 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

Petitioner argues that his felony conviction had nothing to do with the practice of medicine or any government or other health care program or beneficiary, and did not involve dishonesty or fraud. P. Br. at 3. Yet, Petitioner recognizes that his felony offense warrants revocation of enrollment, and that "the Administrative Law Judge is presumably bound" by section 424.535(a)(3). P. Br. at 3-4.

Pursuant to subsection 424.535(a)(3)(ii)(A), CMS explicitly has determined that four categories of felony offenses are *per se* detrimental to the best interests of the Medicare program and its beneficiaries, and it has determined that one of those four categories involves "[f]elony crimes against persons, *such as* murder, rape, assault, and other similar crimes." 42 C.F.R. § 424.535(a)(3)(ii)(A) (emphasis added). CMS may revoke a supplier's billing privileges and supplier agreement if the supplier was convicted in the previous 10 years. 42 C.F.R. § 424.535(a)(3)(i). The offense of felony aggravated battery is a felony crime against a person under the regulation. *See* 42 C.F.R. § 424.535(a)(3)(ii)(A). The list of examples in subsection (A), which is preceded by the phrase "such as" and clearly indicates non-exclusivity, points to examples of felony crimes against persons. For purposes of subsection (A), Petitioner need only have committed a felony crime against a person; in this instance, a jury determined that he committed felony aggravated battery against another person.[8] Kan. Stat. Ann. § 21-3414(a)(1) (2007).

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in 42 [C.F.R. §] 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." *See* 79 Fed. Reg. 72500, 72532 (Dec. 5, 2014).

[8] Petitioner does not dispute that his crime of aggravated battery was a felony crime against a person as contemplated by 42 C.F.R. § 424.535(a)(3)(ii)(A). Section 424.535(a)(3)(ii)(A) lists the criminal offense of "assault" as a representative felony offense against a person. At the time of Petitioner's offense, Kansas Law defined aggravated assault, which is the felonious level of assault in Kansas, as "intentionally placing another person in reasonable apprehension of immediate bodily harm" that is committed with a deadly weapon, while disguised in any manner designed to conceal identity, or with intent to commit a felony. Kan. Stat. Ann. §§ 21-4308 and 21-3410 (2007). A conviction for aggravated assault thereby would not necessarily have involved any physical contact between an offender and his or her victim. Kan. Stat. Ann. § 21-3410 (2007). However, a level VII, person offense of aggravated battery would involve, at a minimum, that the offender intentionally caused physical contact with a deadly weapon or in a manner whereby great bodily harm, disfigurement or death could be inflicted. Kan. Stat. Ann. §§ 21-3414(a)(1)(B), (C) and 21-3414(b) (2007). Based on the elements of each offense, I agree with Petitioner that the two offenses are similar. *See* P. Br. at 3.

4. CMS has the statutory and regulatory authority to revoke Petitioner's Medicare enrollment and billing privileges.

Petitioner argues that "the absence of statutory authority dooms the sanction." P. Br. at 4. He further argues that the Secretary of the Department of Health and Human Services (Secretary) lacked the authority to promulgate the regulation in question. P. Br. at 6. In arguing that the Secretary lacked the authority to promulgate the pertinent regulation, Petitioner contends that Section 4302 of the Balanced Budget Act of 1997, P.L. 105-33 (August 5, 1997), which was codified in part at 42 U.S.C. § 1395(b)(2)(D), set forth specific procedures for the Secretary to follow when revoking *provider* agreements, stating:

> Section 4302 gives the Secretary the authority to refuse to enter into a provider agreement or to terminate a provider agreement in the event [the] physician or others have been convicted of a felony which the Secretary determines is detrimental to the best interest of the Medicare Program or beneficiaries. The provision is codified at 42 U.S.C. § 1395cc(b)(2)(D), which specifies that the Secretary may refuse to enter into an agreement, or upon notice to the public and the provider, terminate such an agreement after the Secretary has ascertained that the provider has been convicted of a felony which the Secretary determines to be detrimental to the program or program beneficiaries.

P. Br. at 6. Petitioner further argues that 42 U.S.C. § 1395cc(b)(2)(D) requires the Secretary to give pre-revocation notice to the public and the provider, and that CMS erred by not giving any pre-revocation notice in his case. P. Br. at 6. Additionally, Petitioner argues that the revocation of his enrollment agreement and billing privileges should have been prospective, rather than retroactive to the date of the felony conviction. P. Br. at 6-7.

Petitioner identifies no authority stating that an administrative law judge has the authority to essentially invalidate a regulation. In fact, Petitioner concedes that I am "presumably bound" by section 424.535(a). P. Br. at 4. I am indeed bound by all applicable regulations and "may not invalidate either a law or regulation on any ground."). *See, e.g., 1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009).

Moreover, Petitioner fails to appreciate that when Congress addressed the Secretary's authority to refuse to enter into Medicare agreements with individuals or entities convicted of felonies, it amended *two* separate sections of the Social Security Act. Petitioner contends that the portions of section 424.535 that pertain to him are not an authorized rulemaking implementing 42 U.S.C. § 1395cc(b)(2)(d). It is noteworthy that section 1395cc(b)(2)(d) applies only to "Agreements with *Providers* of Services;

Enrollment Processes." Congress defined the term "provider of services" to mean "a hospital, critical access hospital, skilling nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or, for purposes of section 1814(h) and section 1835(e), a fund." 42 U.S.C. § 1395x(u). As noted above, Petitioner is not a provider of services as defined by the statute, but is a *supplier* of services. *See* 42 C.F.R. § 400.202 (providing definitions of both "provider" and supplier"); 42 U.S.C. § 1395x(d) (defining "supplier" as a "physician or other practitioner, a facility or other entity (other than a provider of services) that furnishes items or services under this subchapter"). Section 4302 of the Balanced Budget Act of 1997, however, also provided for the Secretary to revise section 424.535(a)(3) to apply to suppliers, such as Petitioner, by adding the following sentence to 42 U.S.C. § 1395u(h):

> The Secretary may refuse to enter into an agreement with a physician or supplier under this subsection, or may terminate or refuse to renew such agreement, in the event that such a physician or supplier *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.*

P.L. 105-33, Section 4302; 42 U.S.C. 1395u(h) (emphasis added). Thus, the plain language of 42 U.S.C. 1395u(h) gives the Secretary the authority to terminate a Medicare agreement if a physician or supplier has been convicted of a felony offense that the Secretary has determined is detrimental to the best interests of the program or its beneficiaries. 42 U.S.C. § 1395u(h). Furthermore, Congress has given the Secretary the 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." 42 U.S.C. § 1302(a). Petitioner has not identified any language in section 424.535 pertaining to his revocation, as a supplier, that is inconsistent with the Social Security Act.

5. Petitioner did not inform CMS within 30 days of his April 30, 2009 felony conviction.[9]

The regulations at 42 C.F.R. § 424.516(d)(1)(ii) require that physicians report, within 30 days, any adverse legal action to their Medicare contractor. Failure to timely report an adverse legal action subjects a physician to revocation of his or her Medicare billing privileges. 42 C.F.R. § 424.535(a)(9). Petitioner does not contend that he informed WPS of his felony conviction within 30 days of April 30, 2009.

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[9] I recognize that 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.

The evidence indicates that Petitioner first notified the contactor of his felony conviction in June 2011, and that he gave notice of the conviction incidentally, when he responded to the contractor's request for additional documentation in connection with CKCI's submission of an EFT agreement in April 2011. P. Ex. 7 at 16-17. In April 2011, more than two years after Petitioner's felony conviction, CKCI submitted a Form CMS-588, which is an EFT Authorization Agreement. P. Ex. 7 at 5-6. Shortly thereafter, WPS requested, *inter alia*, that CKCI "complete Sections 1, 2A, 3, 13, and 15 of the CMS 855I application "to update [its] Organizational [National Provider Identifier]." P. Ex. 7 at 7. CKCI submitted the requested information in June 2011, at which time it included information about Petitioner's April 2009 felony conviction. P. Ex. 7 at 8-23. WPS, in July 2011, approved CKCI's EFT Authorization Agreement. P. Ex. 7 at 2-3. At that time, WPS notified CKCI that its enrollment change had been approved and that the updated information included "[s]ignature verification for EFT & [u]pdated NPI to PECOS." P. Ex. 7 at 2. 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." P. Supp. Br. at 3; P. Ex. 7 at 2. Rather, the contractor had approved CKCI's May 2011 EFT Authorization Agreement. P. Ex. 7 at 2-3.

Petitioner cannot escape responsibility for his failure to report his conviction within 30 days of his conviction, and his argument that his conviction was reported elsewhere, such as by his licensing board and the National Practitioner Data Bank, is unavailing. P. Br. at 7-8. Petitioner is responsible for knowing the rules pertaining to Medicare suppliers. "Petitioner's pleas of ignorance [to the reporting requirement] are no defense. The regulation places the burden upon the Medicare participant to report '[a]ny adverse legal action.' 42 C.F.R. § 424.516(d)(1)(ii). There are no exceptions to the requirement to report." *Phyllis Barson, M.D.*, DAB CR2510 at 7 (2012). Section 424.516(d)(1)(ii) requires Petitioner to have reported any adverse legal action, even if it is not a final adverse action. *Akram A. Ismail*, DAB No. 2429 at 10-11 (2011). Therefore, I conclude that Petitioner failed to notify WPS of an adverse legal action within 30 days as required, and that this failure serves as a legitimate basis to revoke his Medicare billing privileges.

6. The applicable regulations control the effective date of the revocation.

The regulation at 42 C.F.R. § 424.535(g) states 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. Thus, pursuant to the controlling regulation, Petitioner's revocation became effective on April 30, 2009, the date of his conviction.

7. Petitioner's request for a subpoena is denied because Petitioner has not identified any documents to be produced pursuant to 42 C.F.R. § 498.58(c)(3).

Petitioner submitted a request for a subpoena (P. Sub. Req.) on January 29, 2016, and CMS filed an objection to that request on February 18, 2016 (CMS Objection). Petitioner requested that I issue a subpoena for WPS to produce "any and all records in WPS' possession containing disclosure of the April 2009 conviction of Dr. Reitz." P. Sub. Req. at 1. Petitioner adds that "as is the case with the recently revealed July 26, 2011 initial determination by WPS, there are similar earlier determinations and disclosure [sic]." P. Sub. Req. at 2.

CMS stated in its objection that Petitioner is seeking a subpoena for a "fishing expedition" and asserted that "CMS states there are no documents earlier than June 11, 2011." CMS Objection at 1-2.

Petitioner, in his brief, subpoena request, and written direct testimony, does not ever allege that he notified CMS within 30 days of his felony conviction, nor does he identify any specific document that would show that he provided timely notice of his felony conviction. P. Br., P. Sub. Req., and P. Ex. 6 at 2-5. In fact, Petitioner states in his written direct testimony, under the penalty of perjury, that he believed that because his conviction had been reported to the National Practitioner Data Bank, that "further reporting was not required." P. Ex. 6 at 3. Likewise, in his brief, Petitioner asserted that "it is important to emphasize that Dr. Reitz will testify that he was not aware of the requirement to report the conviction directly to the Medicare contractor after his conviction."[10] P. Br. at 7. Petitioner added that "[h]e did not become aware of that responsibility until April 2015 at which time he reported the conviction in CKCI's enrollment application." P. Br. at 7. Petitioner contended that his conviction had been reported to the National Practitioner Data Bank "as long ago as October 23, 2009," and that "CMS contractors are charged with notice of such public data."[11] P. Br. at 7.

According to 42 C.F.R. § 498.58(c)(3), a subpoena request must identify the "documents to be produced" and "[s]pecify the pertinent facts the party expects to establish by the witnesses or documents, and indicate why those facts could not be established without use of a subpoena." Petitioner has not asserted that there is a document in existence showing that he notified CMS or its contractor of his felony conviction within 30 days of the conviction; in fact, his statements have been to the contrary. Furthermore, Petitioner has not demonstrated that the facts he seeks to prove could not be established without the issuance of a subpoena. Petitioner's counsel, in his February 1, 2016 affidavit (Hooper

[10] The fact that Petitioner only reported his conviction in response to the contractor's May 2011 request for additional documentation supports this statement. P. Ex. 7 at 7.

[11] Even assuming *arguendo* that such an October 23, 2009 National Practitioner Data Bank report could serve as notification to CMS of a felony conviction, a proposition with which I disagree, such notice on October 23, 2009 would be well beyond the 30-day notice requirement set forth in 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9).

Affidavit), explained that the contractor willingly provided him with a copy of the complete July 26, 2011 letter (*see* P. Ex. 7 at 2-4), along with additional documents pertaining to the July 26, 2011 letter, on the *same day* that counsel requested those documents on January 25, 2016. Hooper Affidavit at 2. Furthermore, Petitioner's counsel has indicated that CMS counsel "had no objection" to him "contacting CMS for the full letter" contained at P. Ex. 7 at 2-4. Hooper Affidavit at 2.

Not only has Petitioner not identified the specific document or documents that he is seeking from the issuance of a subpoena, but he has not asserted that any such document has ever existed. Petitioner is unquestionably in the best position to know if he informed CMS or its contractor of his felony conviction within 30 days of his felony conviction, and he has not actually asserted that he provided notice within 30 days of his felony conviction. Petitioner has not shown that the information he is seeking from these documents, even if they were to actually exist (and in contradiction of his previous statements that such documents were never created), can only be obtained through the use of a subpoena. Petitioner's request for a subpoena is therefore denied.

V. Conclusion

For the reasons explained above, I affirm CMS's determination revoking Petitioner's Medicare enrollment and billing privileges effective April 30, 2009.

/s/
Leslie C. Rogall
Administrative Law Judge