Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Central Kansas Cancer Institute,
(NPI No. 1285610477)
(PTAN No. 110996),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-4210

Decision No. CR4567

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, Central Kansas Cancer Institute (CKCI or Petitioner), effective April 30, 2009. The revocation was based on the felony conviction of Russell L. Reitz, M.D. (Dr. Reitz), who was the owner of Petitioner until September 16, 2015. For the reasons stated below, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

CKCI is a radiology oncology practice in Manhattan, Kansas, that was enrolled as a supplier in the Medicare program. On April 30, 2009, Dr. Reitz, CKCI's sole owner, 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.) 4 at 14, 27; CMS Ex. 6. Dr. Reitz explained 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. 2 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. 6 at 2. In September 2010, despite the opposition of the State of Kansas, the District Court granted Dr. Reitz's motion for early termination of probation. P. Ex. 8 at 2-12. Dr. Reitz'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. 7 at 2.

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[1] While both parties conceded that Dr. Reitz 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 (herein "judgment of conviction"). *See* CMS Ex. 6. CMS states in its brief that Dr. Reitz violated section 21-5413(b)(1) of the Kansas Code. CMS Br. at 1. However, Chapter 21 of the Kansas Code, pertaining to "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 Dr. Reitz's conviction. Furthermore, the judgment of conviction, apparently erroneously, shows that Dr. Reitz's felony offense was in violation of "section 21-3414(1)(A)(c)." CMS Ex. 6 at 1. This specific code subsection 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 listing of 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 Dr. Reitz'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 Dr. Reitz's offense was "in a 'manner whereby great bodily harm, disfigurement, or death can be inflicted.'" CMS Br. at 1. Based on Dr. Reitz's conviction for a level 7, person felony, only subsections (B) or (C) could be applicable. CMS Ex. 6 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).

In May 2011, Petitioner submitted an Electronic Funds Transfer (EFT) Authorization Agreement to WPS. P. Ex. 9 at 4-5. In correspondence dated May 17, 2011, the contractor informed Petitioner that in order for it to process the EFT Authorization Agreement, Petitioner 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. 9 at 6. WPS informed Petitioner 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 Petitioner would be subject to revalidation procedures.[2] P. Ex. 9 at 6.

Petitioner submitted the requested information on June 14, 2011. P. at 9 at 7-23. 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. 9 at 21-22. 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. 9 at 15-16, 21-22. One version of Section 3 indicates that Dr. Reitz had final adverse actions of "Agg Battery Level VII" on April 27, 2009 and "License Temp. Suspension" on October 16, 2009. P. Ex. 9 at 15. This version of the form indicated the "resolution" was that probation ended on September 10, 2010, and that "suspension and probation" of Dr. Reitz's medical license had ended on October 18, 2010. P. Ex. 9 at 15. This version of Section 3 directed CMS to "see attached documents." P. Ex. 9 at 15. 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. 9 at 16. With respect to Dr. Reitz'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. 9 at 16. The second version of Section 3 does not indicate that any documents had been appended to the form. P. Ex. 9 at 16.

WPS approved Petitioner's EFT Authorization Agreement on July 26, 2011, at which time it notified Petitioner that it had "approved [its] CMS-855 application to change [its] Medicare enrollment information." P. Ex. 9 at 1. The letter specified that the updated information consisted of "[s]ignature verification for EFT & Updated NPI to PECOS." P. Ex. 9 at 1. The letter did not indicate that the contractor had revalidated Petitioner's enrollment or had updated any information regarding final adverse actions. P. Ex. 9 at 1-

[2] The contractor requested that the Petitioner 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).

3. The contractor's letter also informed Petitioner that in order to maintain active enrollment in the Medicare program, it needed to submit updates and changes to its enrollment information, to include reporting "final adverse legal actions, such as felony convictions" within specified timeframes. P. Ex. 9 at 2-3.

On or about April 28, 2015, Petitioner submitted a revalidation application to WPS. CMS Ex. 4. In that application, Petitioner reported that its owner, Dr. Reitz, 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 Dr. Reitz's license had been suspended and reinstated. CMS Ex. 4 at 14.

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

> 42 CFR. § 424.535(a)(3) - Felonies
>
> **The state of Kansas found Russell Reitz 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.**

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 August 14, 2015, Petitioner, who was represented by other counsel, submitted a letter to WPS that stated the following:

> While we are still considering pursuing reconsideration of your decision, we are hoping this matter can be resolved without doing so by the Institute

[3] In a separate action, WPS revoked Dr. Reitz's Medicare enrollment and billing privileges. Dr. Reitz submitted a request for hearing, and that case was also assigned to me under a separate docket number, C-15-4211. In that decision, I affirmed CMS's revocation of Dr. Reitz's Medicare enrollment and billing privileges, effective April 30, 2009, based on his felony conviction for aggravated battery and his failure to report the conviction to CMS or its contractor within 30 days of the offense.

> terminating its "business relationship" with Dr. Reitz on or before August 21, 2015. Dr. Reitz is currently the primary owner of the Institute's (the provider's) practice.
>
> As you know, under 42 C.F.R § 424.535(e), if a revocation is based on an owner's commission of a felony, the revocation can be reversed if the owner terminates his business relationship with the provider within 30 days of the notice of the revocation.

P. Ex. 1 at 2.

On August 24, 2015, Dr. Reitz, as the owner of Petitioner, and J.M., M.D., and J.M., OTD, on behalf of the "Purchaser," entered into a "Letter of Intent for Purchase of Stock." P. Ex. 3 at 2-6.

In a letter dated September 1, 2015, Petitioner requested reconsideration of the July 22, 2015 determination. CMS Ex. 2. In its request for reconsideration, Petitioner did not deny that its owner, Dr. Reitz, had been convicted of a felony against a person. CMS Ex. 2 at 1-4. Petitioner stated in its letter that Dr. Reitz had "terminated all business affiliation with CKCI" and had not seen a patient at Petitioner's office since August 14, 2015. CMS Ex. 2 at 3. Petitioner further reported in its September 1, 2015 letter that Dr. Reitz "has been diligently pursuing buyers of the practice since August 14." CMS Ex. 2 at 3.

In a September 10, 2015 reconsidered determination, WPS informed Petitioner that its Medicare enrollment had been revoked pursuant to, *inter alia*, 42 C.F.R. § 424.535(a)(3) based on Dr. Reitz's felony conviction that "CMS has determined to be detrimental to the best interests of the program and its beneficiaries." CMS Ex. 3 at 1-2. The letter notified Petitioner that it may request further review by an administrative law judge. CMS Ex. 3 at 3.

Petitioner, through its current counsel, filed a request for hearing on September 16, 2015, which the Civil Remedies Division received on September 21, 2015.

On the same day that Petitioner filed its request for hearing, September 16, 2015, it entered into an "Asset Purchase Agreement." CMS Ex. 5 at 3-41.[4] The Asset Purchase

[4] CMS also furnished an unsigned "Confidentiality and Non-Disclosure Agreement," dated August 17, 2015. The document identifies Dr. Reitz as a seller, and S.W. and M.B. as buyers. CMS Ex. 4 at 1-2. The document indicates that the parties were in negotiations regarding "the business offered to sale." CMS Ex. 4 at 1. S.W. and M.B. ultimately did not purchase CKCI. *See* CMS Ex 4 at 3-41.

Agreement effectuated the sale of Petitioner from Dr. Reitz to JMac Radiation Oncology and Diagnostics, LLC (JMac). CMS Ex. 5 at 3-41.

On October 8, 2015, I issued an Acknowledgment and Pre-Hearing 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 five exhibits (CMS Exs. 1-5). Petitioner submitted a pre-hearing brief (P. Br.) and eight exhibits. (P. Exs. 1-8). After both parties filed pre-hearing briefs, Petitioner filed an additional exhibit (P. Ex. 9) and a supplemental brief (P. Supp. Br.) addressing that exhibit. CMS did not object to P. Ex. 9 or otherwise respond to Petitioner's supplemental brief. In response to a March 10, 2016 Order, CMS submitted one additional exhibit, CMS Ex. 6, without objection. I admit the briefs, along with CMS Exs. 1-6 and P. Exs. 1-9, into the record.

Petitioner has submitted the written direct testimony of Dr. Reitz. P. Ex. 2 at 2-5; *see* Order ¶ 8. However, CMS has not requested the opportunity to cross-examine Dr. Reitz. *See* 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.[5]

II. Issues

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3) based on Dr. Reitz's April 30, 2009 felony conviction.[6]

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

[6] Petitioner's Medicare enrollment and billing privileges were also revoked pursuant to 42 C.F.R. § 424.535(a)(9) based on Petitioner's failure to timely report Dr. Reitz's felony conviction. As I have determined that Dr. Reitz had a felony conviction in the preceding 10 years that is detrimental to the best interests of the program, it is unnecessary for me to further address whether it was necessary for Petitioner to have timely reported Dr. Reitz's felony conviction. It is therefore unnecessary for me to address Petitioner's January 29, 2016 request for a subpoena compelling WPS to produce "any and all records in WPS' possession containing disclosure of the April 2009 conviction of Dr. Reitz."

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[7]

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 as a supplier, individuals 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.

With regard to the reversal of a revocation, section 424.535(e) states the following:

> *(e) Reversal of revocation.* If the revocation was due to adverse activity (sanction, exclusion, or felony) against an owner, managing employee, or an unauthorized or delegated official; or a medical director, supervising physician, or other personnel of the provider or supplier furnishing

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

> Medicare reimbursable services, the revocation ***may be reversed*** if the provider or supplier terminates and submits proof that it has terminated its business relationship with that individual within 30 days of the revocation notification.

(emphasis added).

1. ***Dr. Reitz owned CKCI on the date of his conviction and continuously until September 16, 2015.***

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

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

4. ***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.***

Dr. Reitz was the owner of Petitioner until its sale on September 16, 2015. P. Br. at 1; *see* CMS Ex. 4 at 3-41. Petitioner does not dispute that Dr. Reitz was found guilty of felony aggravated battery.[8, 9] In its brief, Petitioner concedes that its "grounds for appealing the sanction at issue here are limited." P. Br. at 2.

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[8] The maximum period of incarceration for a level VII, person felony at the time of Dr. Reitz'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).

[9] Section 424.535(a)(3), as it was in effect at the time of Dr. Reitz'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 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).

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 has such a conviction 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 as is contemplated by that subsection. *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), Dr. Reitz 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.[10] Kan. Stat. Ann. § 21-3414(a)(1) (2007).

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

Petitioner argues that "the sanction must be set aside because it is unauthorized by Congress and thus null and void." P. Br. at 2. Petitioner 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. § 1395cc(b)(2)(D), set forth specific procedures for the Secretary to follow when revoking *provider* agreements, stating:

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[10] Petitioner does not dispute that Dr. Reitz's 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 Dr. Reitz'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. §§ 21-3408 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 the offenses of aggravated assault and aggravated battery, the offenses are analogous.

> 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 its case. P. Br. at 6. Additionally, Petitioner argues that the revocation of its 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. I am 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 it 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.

6. The effective date of the revocation, April 30, 2009, is governed by regulation.

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. Therefore, pursuant to the controlling regulation, Petitioner's revocation became effective on April 30, 2009, the date of Dr. Reitz's conviction.

7. Petitioner has not demonstrated that reversal of its revocation could have been authorized pursuant to 42 C.F.R. § 424.535(e).

8. Petitioner's request for a subpoena to compel the testimony of two witnesses is denied.

CMS *may* reverse a revocation if a provider or supplier "terminates and submits proof that it has terminated its business relationship with an individual within 30 days of the revocation notification." 42 C.F.R. § 424.535(e). Petitioner has not demonstrated that it terminated its business relationship with Dr. Reitz within 30 days of the July 22, 2015

notification.[11] Therefore, Petitioner has not demonstrated that its revocation could have properly been reversed on that discretionary basis.

Petitioner requested, in its brief and in a January 11, 2016 motion (P. Sub. Req.), that I compel two CMS employees, M.H. and B.H, who "have knowledge of the circumstances surrounding the reversal of billing privileges" of a skilled nursing facility (SNF) in a case that Petitioner alleges has "virtually identical circumstances to those here." P. Sub. Req. at 1; P. Br. at 3-4; *see* P. Ex. 4.

I observe that the case of the SNF that Petitioner submitted as P. Ex. 4 involves a situation that so is unlike the instant case that it appears to undermine Petitioner's arguments. Petitioner explains that in this purportedly similar case, the SNF's revocation was reversed because the owner and the facility timely severed their business relationship. P. Br. at 4; P. Sub. Req.; *see* P. Ex. 4. In that case, another attorney from Petitioner's counsel's law firm communicated with M.H. and B.H. after the SNF received its notice of revocation. P. Ex. 4 at 4-13. The attorney representing the SNF kept these individuals informed of the SNF's efforts to sell all of its stock and transfer ownership prior to the 30th day following the notice of the revocation. P. Ex. 4 at 4-13. The SNF was ultimately successful in completely terminating its business relationship with its owner *within 30 days* of the revocation notice, and CMS apparently exercised its discretion to reverse the revocation pursuant to section 424.535(e). P. Sub. Req. at 1-2; P. Br. at 3-4; *see* P. Ex. 4.

While Petitioner feels that the case presented at P. Ex. 4 is similar to its own, it is mistaken; Dr. Reitz did not sell his practice within 30 days following the notice of the revocation, whereas the owner of the SNF had completed its sale within 30 days. CMS Ex. 5 at 3-41. While Petitioner reported that Dr. Reitz stopped treating patients on August 14, 2015, Dr. Reitz continued to own CKCI until September 16, 2015. P. Ex. 1 at 2; CMS Ex. 5 at 3-41. Common sense, along with basic business principles, dictates that the only way for a company to completely *terminate* a business relationship with its owner is for the owner to no longer own the company. In the instant case, Dr. Reitz did not sell CKCI until September 16, 2015, more than 30 days after receipt of the revocation notice, and section 424.535(e) is therefore inapplicable. CMS Ex. 5 at 3-41.

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[11] While I focus on the fact that Petitioner did not terminate its business relationship with Dr. Reitz within 30 days of the date of the notice of revocation, I point out that 42 C.F.R. § 424.535(e) states that the revocation "may" be reversed. The use of the permissive word "may" means that a supplier who successfully terminated its business relationship with an owner within the specified time period would not have a right to have the determination reversed. *See Main Street Pharmacy, LLC*, DAB No. 2349 at 8 (2010) (stating that the use of the term "may" in the regulation implies CMS's authority to reverse a revocation is discretionary and that "nothing in the language of section 424.535(e) requires CMS to demonstrated that it considered whether to exercise its discretionary authority).

Likewise, Petitioner has not demonstrated that M.H. and B.H. would provide testimony that is in any way relevant to this case. The subpoena request 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