Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

George E. Anderson, M.D.
(NPI: 1851325708/PTAN: 00X435F01)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-150

Decision No. CR4631

Date: June 14, 2016

DECISION

The Medicare enrollment and billing privileges of Petitioner, George E. Anderson, M.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9),[1] effective June 4, 2012.

I. Background

Palmetto GBA (Palmetto), a Medicare Administrative Contractor for the Centers for Medicare & Medicaid Services (CMS), notified Petitioner by letter dated August 7, 2015, that his Medicare enrollment and billing privileges were revoked effective January 30, 2013. Palmetto stated that revocation was pursuant to 42 C.F.R. § 424.535(a)(3), based on Petitioner's January 30, 2013 federal felony conviction for filing false income tax returns. Palmetto also cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation based on Petitioner's failure to report his conviction within 30 days of that reportable event. Palmetto advised Petitioner that he was subject to a three-year bar to re-enrollment

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[1] References are to the 2014 revision of the Code of Federal Regulations (C.F.R.), the revision in effect at the time of the initial determination in this case, unless otherwise stated.

beginning 30 days from the postmark on Palmetto's notice letter. CMS Exhibit (Ex.) 1 at 7-8.

On August 17, 2015, Petitioner requested reconsideration of the initial determination to revoke his Medicare enrollment and billing privileges. CMS Ex. 1 at 4-5. On October 23, 2015, Palmetto upheld the revocation on reconsideration, also citing 42 C.F.R. § 424.535(a)(3) and (9) as the bases for revoking Petitioner's Medicare enrollment and billing privileges. CMS Ex. 1 at 1-2.

On December 3, 2015, Petitioner timely filed a request for hearing before an administrative law judge (ALJ). On December 17, 2015, the case was assigned to me for hearing and decision, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction.

On January 19, 2016, CMS filed a combined prehearing brief and motion for summary judgment (CMS Br.) with CMS Exs. 1 through 5. On February 11, 2016, Petitioner filed a combined prehearing brief and opposition to CMS's motion for summary judgment (P. Br.), with Petitioner's exhibits (P. Exs.) 1 through 11. CMS failed to comply with the Prehearing Order, para. II.D.3, which required that CMS file a reply brief or a waiver of a reply.

No objection has been made to my consideration of CMS Exs. 1 through 5 or P. Exs. 2 through 4 and 7 through 11, and they are admitted as evidence. On March 1, 2016, CMS objected to my consideration of P. Exs. 1, 5, and 6. Petitioner responded to the objection on March 7, 2016. P. Ex. 1 is a certificate declaring that Petitioner met the requirements for a specialty in anesthesiology for the period September 27, 2016, to December 31, 2020, and a license to practice medicine and surgery issued by the Virginia Department of Health Professions for the period May 1, 1986, through March 31, 2016. P. Ex. 5 is a client agreement effective May 1, 2007, which reflects the terms of the agreement pursuant to which MedNet provided billing and collection services for Petitioner. P. Ex. 6 includes letters from multiple individuals attesting to Petitioner's skills and the community need for his services as an anesthesiologist. CMS cites 42 C.F.R. § 498.56(e)(1) and the Prehearing Order, para. II.D.2, and objects to my consideration of P. Exs. 1, 5, and 6 on grounds that they were not submitted to the hearing officer on reconsideration and Petitioner has not stated good cause for submitting the documents for the first time on ALJ review. CMS Objection to Petitioner's Exhibits. Petitioner argues that P. Ex. 1 did not exist at the time of his reconsideration request and, though he received the documents before the reconsidered determination issued, he was not told he could submit additional evidence. Petitioner argues that he did not submit P. Ex. 5 as he had no attorney at the time and did not understand that it supported his argument. Petitioner argues that there was no need for P. Ex. 6 prior to the reconsidered determination. Petitioner cites his prehearing brief and opposition to the motion for summary judgment as showing good cause for the admission and my consideration of P.

Exs. 1, 5, and 6. Petitioner's Motion to Overrule CMS' Objection to Petitioner's Exhibits. I conclude that P. Exs. 1 and 6 are not relevant to the issue before me and not admissible as evidence because they do not have a tendency to make a fact at issue before me more or less probable. Fed. R. Evid. 401. I may only admit evidence that is relevant and material. 42 C.F.R. § 498.60(b)(1). There is no dispute that Petitioner has the qualification reflected by P. Ex. 1 and the facts reflected by P. Ex. 1 are not at issue and do not require resolution in this proceeding. The letters in P. Ex. 6 are offered by Petitioner in support of his argument that equity requires that I resolve this case in his favor. P. Br. at 9-10. However, as discussed later, I have no equitable authority. Therefore, the letters in P. Ex. 6 are not relevant to any issue that I may resolve. P. Ex. 5, the agreement between Petitioner and his billing and collection agent is relevant to Petitioner's defense that he relied upon his agent to notify CMS of his conviction. P. Br. 7-8. Petitioner's assertion that he did not have an attorney and he was ignorant of the need to present the document to the hearing officer on reconsideration does not constitute good cause for his failure to do so. Indeed, in his request for reconsideration Petitioner specifically blames his billing company, but he failed to submit the document that he now submits which establishes the terms of the relationship. More significant is the fact that CMS does not dispute that Petitioner had a billing company, the terms of Petitioner's arrangement with his billing company, or that the billing company failed to provide notice to CMS within 30 days of Petitioner's conviction. Therefore, P. Ex. 5 is not relevant to resolving issues in dispute before me. As discussed hereafter, I conclude that as a matter of law Petitioner is responsible to maintain compliance with enrollment requirements and for the failings of his agent to maintain compliance, without regard to the terms of the contract between the two. Accordingly, I conclude that P. Exs. 1, 5, and 6 will not be admitted and considered as evidence.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner, a physician, is a supplier.

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[2] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services,"
(Continued next page.)

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier such as Petitioner must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination, specifying the conditions or requirements the supplier failed to meet, and advising of the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

(Continued from preceding page.)

commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

Whether there was a basis for the revocation of Petitioner's billing privileges and enrollment in Medicare.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

CMS requested summary judgment. A supplier whose enrollment has been revoked has a right to a hearing and judicial review. A hearing on the record is required under the Act. Act §§ 205(b), 1866 (h)(1), (j) (42 U.S.C. § 1395cc(h)(1), (j)); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless CMS's motion for summary judgment has merit.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedure to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g.*, *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order, para. II.D and G. The parties were given notice by my Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment

bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) or (9) that requires a hearing in this case. The issues in this case raised by Petitioner related to revocation under 42 C.F.R. § 424.535(a)(3) and (9) must be resolved against him as a matter of law. The undisputed evidence shows that there are two bases for revocation of Petitioner's Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

2. The issue for hearing and decision is whether there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges and, if there is a basis for revocation, my jurisdiction does not extend to review of whether CMS properly exercised its discretion to revoke Petitioner's Medicare enrollment and billing privileges.

3. Petitioner was convicted of felony offenses.

4. The Secretary has determined and provided by regulation that financial crimes such as income tax evasion or similar crimes are detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i)(B).

5. Petitioner was convicted of failing to file income tax returns, which is a financial crime within the meaning of 42 C.F.R. § 424.535(a)(3)(i)(B).

6. There is a basis for revocation of Petitioner's enrollment in Medicare and his billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B).

7. There is no dispute that neither Petitioner nor anyone on his behalf notified CMS, or its contractor Palmetto, of Petitioner's conviction within 30 days of the date of conviction as required by 42 C.F.R. § 424.516(d)(1)(ii).

8. There is a basis for revocation of Petitioner's enrollment in Medicare and his billing privileges pursuant to 42 C.F.R. § 424.535(a)(9) for violation of 42 C.F.R. § 424.516(d)(1)(ii).

9. Petitioner's Medicare enrollment and billing privileges are revoked effective June 4, 2012. 42 C.F.R. § 424.535(g).

10. I have no authority to review CMS's determination to impose a three-year bar on Petitioner's Medicare re-enrollment.

11. Pursuant to 42 C.F.R. § 424.535(c), the three-year bar to reenrollment runs from the effective date of revocation, but the Secretary and CMS have discretion not to enroll a supplier convicted of a felony determined detrimental to the best interests of Medicare or its beneficiaries for up to ten years from the date of conviction. Act § 1866(b)(2)(42 U.S.C. § 1395cc(b)(2)); 42 C.F.R. § 424.530(a)(3).

a. Facts

The following material facts are undisputed.

In May 2007, Petitioner was enrolled in Medicare and reassigned his right to receive payments from Medicare for services delivered to Medicare-eligible beneficiaries to Farmville Anesthesia Associates, P.C. CMS Ex. 5 at 2, ¶ 5; P. Br. at 2 n.1.

On June 4, 2012, a magistrate judge in the U.S. District Court for the Eastern District of Virginia found Petitioner guilty pursuant to his guilty pleas of two felony counts of filing false income tax returns - one charge related to corporate tax returns and the other related to personal income tax returns. A federal district judge accepted the findings and recommendations of the magistrate and entered findings of guilty on both counts, also on June 4, 2012. CMS Ex. 3 at 34-38. On December 5, 2012, Petitioner appeared before a federal district judge for sentencing. On December 6, 2012, judgment was entered and Petitioner was sentenced to 33 months incarceration, one-year supervised release, a special assessment, and restitution of $471,919. P. Br. at 2; CMS Ex. 1 at 4; CMS Ex. 3 at 4-6, 39-49.

Neither Petitioner nor anyone on his behalf reported his conviction to CMS or its contractor within 30 days of either June 4, 2012, or December 6, 2012. CMS Ex. 5; P. Br. at 1-4.

b. Analysis

Petitioner does not dispute that he was convicted in 2012 of two federal felony counts of filing false income tax returns. Petitioner does not dispute that neither he nor anyone on his behalf reported his conviction to CMS or its contractor within 30 days of the date of the conviction. Petitioner does not dispute that the offenses of which he was convicted – filing false tax returns – are financial crimes akin to income tax evasion, which CMS on behalf of the Secretary has determined to be detrimental to the best interests of Medicare and its beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3)(i)(B).

Palmetto revoked Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) and (9). Sections 424.535(a)(3) and (9) provide in pertinent part:

> (a) *Reasons for revocation*. CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:
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> * * * *
>
> (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 –
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> * * * *
>
> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
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> * * * *
>
> (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.

42 C.F.R. § 424.535(a)(3)(i)(B) and (9). The Act specifically grants the Secretary authority not to enroll or to revoke the enrollment of a provider or supplier convicted under federal or state law of a felony offense that the Secretary determines is detrimental to the program or its beneficiaries. Act § 1866(b)(2)(D). Section 424.516(d)(1) of 42 C.F.R. requires that a physician report any adverse legal action within 30 days of the event. The elements for revocation under both 42 C.F.R. § 424.535(a)(3)(i)(B) and (9) are satisfied by the undisputed facts in this case.

Accordingly, I conclude that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B). I further conclude that the failure to report the conviction within 30 days as required by 42 C.F.R. § 424.516(d)(1)(ii) is an independent basis for revocation of Petitioner's enrollment pursuant to 42 C.F.R. § 424.535(a)(9).

The notice of the initial determination dated August 7, 2015, stated that the effective date of revocation of Petitioner's enrollment and billing privileges was January 30, 2013. The initial determination also incorrectly stated that Petitioner was convicted on January 30, 2013. CMS Ex. 1 at 7. The reconsidered determination dated October 23, 2015, also incorrectly found that Petitioner was convicted on January 30, 2013, and did not change the January 30, 2013 effective date of revocation. CMS Ex. 1 at 1. Petitioner argues that the effective date and running of the three-year bar to re-enrollment determined by Palmetto and urged by CMS are incorrect. P. Br. at 2-6. I agree.

No definition of "conviction" is found in 42 C.F.R. § 424.535 or 42 C.F.R. pt. 424. However, section 1128(i) of the Act provides a definition of conviction. The Act

specifies that one is convicted of a criminal offense when a judgment of conviction has been entered against an individual by a federal, state, or local court; when there has been a finding of guilt by a federal, state, or local court; when a guilty plea or no contest pleas is accepted by a federal state, or local court; or when an individual has entered an arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)). The undisputed evidence shows that Petitioner pleaded guilty and the guilty plea was accepted on June 4, 2012. Accordingly, I conclude that, as a matter of law, Petitioner was convicted on June 4, 2012, within the meaning of Act section 1128(i).

The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g). The regulation provides that when revocation is based on a felony conviction, the effective date of revocation is the date of the conviction. 42 C.F.R. § 424.535(g).

> (g) *Effective date of revocation*. Revocation becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, **except** if the revocation is based on Federal exclusion or debarment, **felony conviction**, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational. **When a revocation is based on a** Federal exclusion or debarment, **felony conviction,** license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational, **the revocation is effective with the date of** exclusion or debarment, **felony conviction,** license suspension or revocation or the date that CMS or its contractor determined that the provider or supplier was no longer operational.

42 C.F.R. § 424.535(g) (emphasis added). This regulation grants CMS and its contractor no discretion to choose an effective date of revocation other than the date of the conviction. Accordingly, the effective date of Petitioner's exclusion pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B) was June 4, 2012. Although failure to report the conviction is an independent basis for revocation under 42 C.F.R. § 424.535(a)(9) that would normally be effective 30 days after notice of the initial determination, the regulation does not grant CMS or its contractor discretion to choose the later effective date.

When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c). In this case, CMS determined that a three-year bar was appropriate. There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545; 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in

42 C.F.R. § 498.3(b) and, thus, is not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 11 (2016).

However, Petitioner disputes when the three-year bar began to run not its duration. P. Br. at 4-6. This dispute must be resolved as a matter of law based on the regulation, which provides:

> (c) *Reapplying after revocation*. After a provider, supplier, delegated official, or authorizing official has had their billing privileges revoked, **they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar**. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation. The re-enrollment bar does not apply in the event a revocation of Medicare billing privileges is imposed under paragraph (a)(1) of this section based upon a provider or supplier's failure to respond timely to a revalidation request or other request for information.

42 C.F.R. § 424.535(c) (emphasis added). The regulation is clear that the re-enrollment bar begins running from the effective date of the revocation and continues until the end of the re-enrollment bar period, whether one, two, or three years. The regulation grants CMS or its contractor no discretion to adjust the running of the period of the bar.

In the case of a revocation based on a felony conviction, however, there is an additional legal obstacle to re-enrolling in Medicare. According to the regulation:

> (d) *Re-enrollment after revocation.* If a provider or supplier seeks to re-establish enrollment in the Medicare program after notification that its billing privileges is [sic] revoked (either after the appeals process is exhausted or in place of the appeals process), the following conditions apply:
>
>> (1) The provider or supplier must re-enroll in the Medicare program through the completion and submission of a new applicable enrollment application and applicable documentation, as a new provider or supplier, for validation by CMS.
>>
>> (2) Providers must be resurveyed and recertified by the State survey agency as a new provider and must

> establish a new provider agreement with CMS's Regional Office.

42 C.F.R. § 424.535(d). Pursuant to section 1866(b)(2) of the Act and 42 C.F.R. § 424.530(a)(3) the Secretary and CMS may deny enrollment in Medicare if during the ten years preceding the enrollment the applicant has been convicted of a federal or state felony offense that the Secretary or CMS has determined to be detrimental to Medicare or its beneficiaries, including financial crimes such as income tax evasion. Thus, while the bar to re-enrollment may expire in Petitioner's case three years after his conviction on June 4, 2012, as Petitioner advocates, the Act and regulation may nevertheless prevent him from enrolling anew in the Medicare program until June 3, 2022. I note however that both section 1866(b)(2) and 42 C.F.R. § 424.530(a)(3) are discretionary not mandatory, as they provide that the Secretary and CMS "may deny" enrollment rather than mandating that they do so.

Petitioner argues that he reasonably relied upon his billing and collection agent to notify CMS of his conviction. P. Br. at 7-8. I accept as true for purposes of summary judgment that Petitioner informed his billing and collections agent, MedNet, of his conviction. I also accept as true that pursuant to the terms of his agreement with MedNet (P. Ex. 5) he had a reasonable expectation that MedNet would make the required report to CMS or its contractor. Petitioner does not dispute that MedNet did not file the required report with CMS or its contractor however. I am not bound to accept Petitioner's legal position that he can shift responsibility for MedNet's failure to report or that MedNet's failure constitutes a defense to revocation pursuant to 42 C.F.R. § 424.535(a)(9). Petitioner cites no statute, regulation, or CMS policy that permits an enrolled supplier or provider to avoid enforcement of participation requirements based on the failure of an employee or an agent. The defense is most often addressed and rejected in the area of the submission of false claims. A provider or supplier is ultimately responsible, both as a matter of law and under the terms of his participation agreement, for ensuring that claims for Medicare reimbursement are accurate and for any errors in those claims. *Louis J. Gaefke*, *D.P.M.*, DAB No. 2554 at 5-6. Petitioner cannot avoid responsibility by the simple expedient of shifting responsibility and liability by contracting with a billing agent.

> In conclusion*, we believe that providers and suppliers are responsible for the claims they submit or the claims submitted on their behalf*. We believe it is essential that providers and suppliers take the necessary steps to ensure they are billing appropriately for services furnished to Medicare beneficiaries.

73 Fed. Reg. 36,448, 36,455 (June 27, 2008) (emphasis added). I conclude on the same rationale that Petitioner cannot avoid responsibility for failure to comply with reporting requirements by blaming his agent. Petitioner's reliance on the ALJ decision in *David Burkett, M.D.*, DAB CR2830 (2013), is misplaced. In that case the ALJ did not conclude

that the petitioner's failure to report should not be a basis for exclusion under 42 C.F.R. § 424.545(a)(9) or that he sufficiently reported. Rather, the ALJ concluded that summary judgment was not appropriate on that alleged basis for exclusion. The judge did not order a hearing as he concluded it was appropriate to grant summary judgment on another basis for exclusion. *Burkett*, DAB CR2830 at 5-6. Even if I accepted Petitioner's argument and excused his failure to report his conviction, Petitioner's Medicare enrollment would nevertheless be subject to revocation based on the conviction, as the conviction is undisputed. I have no authority to review the exercise of discretion by CMS or its contractor to revoke where there is a basis for revocation. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010). The scope of my authority is limited to determining whether there is a legal basis for revocation of Petitioner's Medicare enrollment and billing privileges. *Id*. I have concluded that there is a basis for CMS to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). Thus, a regulatory basis for revocation exists and excusing the failure to report causes no different result in this case.

Petitioner argues that equity dictates that he should be allowed to re-enroll in Medicare immediately. P. Br. at 9-10. I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) ("Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."). Furthermore, I am bound to follow the Act and regulations, and I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (noting that "[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground."). My conclusion that the effective date of revocation was June 4, 2012, and that date triggered the running of the three-bar to re-enrollment means that the bar expired on June 3, 2015. Nevertheless, Petitioner is subject to the provisions of section 1866(b)(2) of the Act and 42 C.F.R. § 424.530(a)(3) which grant the Secretary and CMS discretion to deny Petitioner enrollment for up to ten years from the date of his conviction.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner's Medicare enrollment and billing privileges are properly revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9), effective June 4, 2012.

/s/

Keith W. Sickendick
Administrative Law Judge