Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Sandra E. Johnson, CRNA
Docket No. A-16-5
Decision No. 2708
June 2, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Sandra E. Johnson, a Certified Registered Nurse Anesthetist (CRNA), appeals a September 10, 2015 decision of an administrative law judge (ALJ) that the Centers for Medicare & Medicaid Services (CMS) lawfully revoked Petitioner's enrollment in the Medicare program pursuant to 42 C.F.R. § 424.535(a)(4). The ALJ granted CMS's motion for summary judgment on the ground that undisputed facts established that Petitioner submitted Medicare enrollment applications in which she certified as "true" false or misleading information and, therefore, CMS had a legal basis for revoking her enrollment. *Sandra E. Johnson, CRNA*, DAB CR4209 (2015) (ALJ Decision).

For the reasons stated below, the Board affirms the ALJ Decision.

Authorities

The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Social Security Act (Act) §§ 1816, 1842, 1874A[1]; 42 C.F.R. § 421.5(b).

CMS may revoke a provider's or supplier's[2] Medicare billing privileges and any corresponding provider agreement or supplier agreement for the "reasons" set out in 42 C.F.R. § 424.535(a). As relevant here, section 424.535(a)(4) provides:

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

[2] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202. "Providers" include, *inter alia*, hospitals, nursing facilities, and comprehensive outpatient rehabilitation facilities. *Id.*

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

Revocation of billing privileges results in the termination of any provider or supplier agreement in effect at the time of the revocation effective the date of revocation. 42 C.F.R. § 424.535(b).

Section 1866(j)(8) of the Act provides administrative and judicial hearing rights to providers and suppliers whose Medicare billing privileges are revoked. CMS implemented section 1866(j) by providing administrative hearing rights for revoked providers and suppliers.[3] Under section 424.545(a), a "provider or supplier whose Medicare enrollment has been revoked may appeal CMS' decision in accordance with part 498, subpart A of this chapter." Part 498 sets forth "Appeals Procedures for Determinations that Affect Participation in the Medicare Program." In accordance with 42 C.F.R. § 498.5(l)(2), a prospective or existing provider or supplier dissatisfied with a reconsidered determination issued under 42 C.F.R. § 498.5(l)(1) is entitled to a hearing before an ALJ. If dissatisfied with the ALJ's decision, a prospective or existing provider or supplier may seek Board review and judicial review of the Board's decision. 42 C.F.R. § 498.5(l)(3); 42 C.F.R. § 498.1(g).

If CMS revokes a provider's or supplier's billing privileges, the provider or supplier is "barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," which lasts for a minimum of one year and a maximum of three years depending on the severity of the basis for revocation. 42 C.F.R. § 424.535(c). The re-enrollment process set out in 42 C.F.R. § 424.535(d) applies to a provider or supplier seeking to re-establish enrollment in Medicare after the revocation of billing privileges.

---

[3] Section 1866(j)(8) of the Act provides:

> Hearing rights in cases of denial or non-renewal.—A provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied may have a hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A) to a provider of services that is dissatisfied with a determination by the Secretary.

While the statute does not specifically refer to the hearing rights of enrolled providers and suppliers whose billing privileges are revoked, CMS has interpreted it as providing hearing rights in such cases. *See, e.g.*, 42 C.F.R. §§ 498.1(g), 405.874.

Case background[4]

In mid 2014, CMS, acting through Wisconsin Physicians Service Insurance Corporation (WPS), a CMS contractor, issued initial determination letters informing Petitioner that her Medicare enrollment was revoked effective August 31, 2014. CMS Ex. 6. As grounds for the revocation, CMS stated:

> Your Michigan CRNA license was suspended in February 2005 and May 2006. Your Ohio CRNA license was revoked effective May 21, 2010. In [CMS Form] 855I enrollment applications submitted to WPS that were received on August 29, 2011 and April 29, 2013 you failed to disclose these events as adverse legal history.
>
> Therefore, it is for this reason your Medicare billing privileges are being revoked effective August 31, 2014.

CMS Ex. 6, at 1, citing 42 C.F.R. § 424.535(a)(4).[5] CMS imposed upon Petitioner a one-year re-enrollment bar. *Id.* at 2, citing 42 C.F.R. § 424.535(c).

Petitioner sought reconsideration. CMS Ex. 7.[6] By reconsidered determination dated October 20, 2014, CMS, through WPS, upheld the revocation, stating:

> According to the reconsideration request [Petitioner] did not submit the applications that failed to disclose the adverse legal actions of the Michigan CRNA license being suspended in February 2005 and May 2006, or the

[4] The factual information in this section is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal.

[5] CMS Exhibit 6 is comprised of eight nearly identical initial determination letters from WPS to Petitioner, each dated August 1, 2014. Together they account for initial determinations on Petitioner's National Provider Identifier (NPI) Number, 1063440030, and nine different Provider Transaction Access Number(s) (PTAN(s)) associated with Petitioner (one letter identified two PTANs). Also, as the ALJ noted, each letter referred to an earlier "'revocation letter dated July 15, 2014'" and stated that the August 1, 2014 letter "'supersedes'" the July 15, 2014 letter which Petitioner indicated named a different individual whose billing privileges were revoked. ALJ Decision at 2, quoting the letters in CMS Ex. 6; CMS Ex. 7 (reconsideration request), at 1 (stating that WPS's "second letter [referring to the August 1, 2014 letter(s)] went to the correct person (Sandra E. Johnson) and that letter as you stated supersedes the earlier revocation letter dated July 15, 2014"). As the ALJ also noted in page 2 of his decision, the "July 15, 2014 letters" are not of record. But neither party has submitted any July 15, 2014 letter(s) as exhibit(s) or raised any dispute concerning the absence of the letter(s) from the record.

[6] Some of CMS's exhibits are not marked with exhibit or exhibit page numbers, but CMS uploaded the unmarked exhibits to DAB E-File designating them as CMS Exhibits 3, 4, 5, 7 and 8. We therefore refer to those CMS Exhibits using numbers 3, 4, 5, 7, and 8.

> Ohio CRNA license being revoked effective May 21, 2010. However, [Petitioner] did sign section 15 of the CMS-855I application. This is the Certification Statement section that states:
>
> "By signing the Certification Statement, you agree to adhere to all of the requirements listed therein and acknowledge that you may be denied entry to or revoked from the Medicare program if any requirements are not met." and "I, the undersigned, certify to the following:
>
> 1. I have read the contents of this application, and the information contained herein is true, correct, and complete. If I become aware that any information in this application is not true, correct, or complete, I agree to notify the Medicare fee-for-service contractor of this fact in accordance with the time frames established in 42 CFR 424.516."
> "3. I have read and understand the Penalties for Falsifying Information, as printed in this application. I understand that any deliberate omission, misrepresentation, or falsification of any information contained in this application or contained in any communication supplying information to Medicare, or any deliberate alteration of any text on this application form, may be punished by criminal, civil, or administrative penalties including, but not limited to, the denial or revocation of Medicare billing privileges, and/or the imposition of fines, civil damages, and/or imprisonment."
>
> [Petitioner] is responsible for reviewing the applications that she is signing.

CMS Ex. 8, at 1-2 (quoting Form 855I, Section 15, "Certification Statement"). *See also* CMS Exs. 1, at 11 and 2, at 23 (Section 15, Forms 855I, same language).

Petitioner requested a hearing before an ALJ. CMS submitted eight exhibits and moved for summary judgment, asserting that the undisputed facts establish that Petitioner violated 42 C.F.R. § 424.535(a)(4) by certifying in her August 2011 and April 2013 enrollment applications that there were no adverse legal actions imposed against her when in fact adverse legal actions had been imposed. More specifically, CMS asserted, it is undisputed that Petitioner's Ohio CRNA license and certificate of authority were revoked in May 2010 and that her Michigan CRNA license was suspended in 2005 and 2006. CMS's motion at 6-7. The ALJ admitted all eight of CMS's exhibits. *See* ALJ Decision at 2.

Petitioner opposed the motion, asserting that her case presented genuine issues of material fact that precluded disposition by summary judgment. Petitioner's brief to the ALJ (P. Br. to ALJ) at 10. She said that her case was "unique" and "factually distinguishable from the run of the mill presentation of uncontested materials facts" offered by CMS (*id.* at 10) because she "**always** informed employers, insurance and

government" of her history of licensing sanctions (*id.* at 9, emphasis in original) that stemmed from her December 2003 plea of guilty to two misdemeanors for "resisting/obstruction" and driving under the influence (DUI) in July 2003 (*id.* at 2). Petitioner wrote, "When completing the required CMS forms, Section 3, [Petitioner] informs CMS on the signature pages and attaches her explanatory letter." *Id.* at 6 (emphasis in original).[7] *See also id.* at 7 ("[Petitioner] is required to renew every three months on CMS' website and has **always reported** the DUI/suspension information. Medicare has been and is continually made aware of [her] past DUI/suspension." Emphasis in original.). However, Petitioner said, employer(s) or employer billing personnel "intentionally or lazily" failed to include information about the sanctions that she disclosed to them when they submitted her Medicare enrollment applications to CMS (or CMS contractor(s)). *Id.* at 6-7, 10-11.

Petitioner submitted six exhibits, to which CMS objected on the grounds that the exhibits are new evidence that Petitioner did not submit earlier and for which Petitioner did not show good cause for admitting them during the ALJ proceedings. ALJ Decision at 2, 4. The ALJ noted that "all of [them] disclose Petitioner's license suspensions to varying degrees" and "appear[] to have existed at the time Petitioner requested reconsideration of CMS's initial determination to exclude her." *Id.* at 4. The ALJ noted, also, that his December 4, 2014 Acknowledgment and Prehearing Order, ¶ 6, notified the parties that he "must" exclude any new evidence offered by Petitioner unless Petitioner shows good cause for not submitting them earlier. *Id.*, citing 42 C.F.R. § 498.56(e). Moreover, the ALJ noted, Petitioner neither disputed that she did not submit the six exhibits at the reconsideration level, nor articulated good cause for submitting them to the ALJ for the first time. *Id.* The ALJ excluded all six of Petitioner's exhibits (*id.*), stating that, "[e]ven if [he] were to consider P. Exs. 1-6, they would not change the outcome of this proceeding because they do not create any dispute of the material facts which dictate the outcome here." (*id.* n.3). Petitioner also offered the affidavits of three individuals. One of the affidavits was Petitioner's own. In addition, Petitioner offered the affidavits of Shannon Szczotka, a billing person for Anesthesia Revenue Management, and Carol Peters, at National Anesthesia Network Inc. The ALJ admitted all three affidavits. *Id.* at 3 (discussing the affidavits submitted on March 10, March 26, and April 1, 2015).[8]

[7] Section 3 of Form 855I is headed "Final Adverse Legal Actions/Convictions." *See* CMS Ex. 1, at 7.

[8] The March 10, 2015 affidavit to which the ALJ referred is the affidavit of Ms. Szczotka. The affidavit submitted to the ALJ on March 10, 2015 was not signed. The next day Ms. Szczotka signed her affidavit before a notary public. Similarly, on March 30, 2015, Petitioner submitted to the ALJ Ms. Peters' affidavit, not signed; on April 1, 2015, she submitted the signed affidavit of Ms. Peters.

The ALJ noted Petitioner's position that she had informed employers and Medicare about her adverse licensing history but that a billing person, "'a lazy form preparer[,] did not look at [Petitioner's] information but apparently **assumed** she had no adverse history to disclose and submitted an inaccurate CMS form without [Petitioner's] knowledge[,]'" and a "'shady doctor who employed her and works her business out of her home'" was responsible for failing to include information about her adverse licensing history in the application(s). *Id.* at 5, quoting P. Br. to ALJ at 9 and 11 (emphasis in original).

The ALJ drew inferences in Petitioner's favor. He accepted as true, for purposes of summary judgment, "that Petitioner only signed the relevant certification statements in the enrollment applications rather than preparing the enrollment applications herself." *Id.* at 5. He also stated that he was accepting as true that, for at least one of the two applications, an employer's billing person "'gave [Petitioner] only the signature page and not the entire Medicare package to sign,'" as Petitioner stated in her brief. *Id.* at 6, quoting P. Br. to ALJ at 7. *See also* P. Br. to ALJ at 7 (Petitioner said that a billing person named "Shannon" "admitted that she gave [Petitioner] only the signature page and not the entire Medicare package to sign."); Shannon Szczotka's Affidavit, ¶ 5.[9]

The ALJ nevertheless determined that "whether Petitioner personally prepared the applications is not material to the outcome here." ALJ Decision at 5-6, citing CMS Ex. 1, at 12 and CMS Ex. 2, at 24 (signature page of certification statements in the enrollment applications). The ALJ pointed out that, even drawing all favorable inferences and accepting that Petitioner did not prepare the applications or that the individuals who did so may have made "unintentional or clerical errors," would not "alter the plain language of the regulation [in section 424.535(a)(4)]" that permits revocation if Petitioner certified as "true" false or misleading information in an enrollment application, and hence these contentions "do not impact the result here." *Id.* at 6.

The ALJ found no genuine dispute of any material fact in this case. The ALJ said:

> CMS has presented evidence showing that Petitioner submitted two separate Medicare enrollment applications that contained false or misleading information that Petitioner certified as true. Petitioner specifically certified that no adverse actions had been taken against her when, in fact, three adverse actions had been taken against her. Petitioner does not dispute that she signed the certification statements in the

[9] Petitioner's submittals did not clearly explain which of the two enrollment applications, or both, was (were) the subject of Ms. Szczotka's and Ms. Peters' affidavits. However, both affidavits appear to concern the first enrollment application bearing Petitioner's signature on August 15, 2011, admitted as CMS Exhibit 1. The doctor who Petitioner said (in her brief to the ALJ) "worked out of her home" evidently was Dr. A. Shah, whose name appears in the second enrollment application, signed by Petitioner on April 23, 2013, admitted as CMS Exhibit 2.

> applications, nor does she dispute that the applications did not list the adverse actions that both Michigan [two license suspensions] and Ohio [license revocation] took against her. . . . Petitioner does not identify what [the disputed] issues of fact may be or otherwise identify any evidence that demonstrates the existence of any dispute of material fact.

Id. at 5, citing P. Br. to ALJ at 3, 4, 5, 6, 11; *see also id.* at 6 (discussing the August 2011 and April 2013 enrollment applications, CMS Exs. 1 and 2, in which Petitioner responded "NO" to indicate there is no adverse legal action and signed the certification statement to attest that she read the contents of the applications and to the truth, accuracy and completeness of the contents). The ALJ noted, moreover, that Petitioner did not dispute that the signatures on the two enrollment applications were her "true and correct" signatures. *Id.* at 6.

The ALJ also found undisputed evidence of two summary suspensions of Petitioner's Michigan license (2005 and 2006), and permanent revocation of her Ohio license (2010). *Id.*, citing CMS Exs. 3 and 5, and P. Br. to ALJ at 3, 4, 5. Moreover, the ALJ determined that, even assuming that in at least one instance a billing person gave Petitioner only the signature page, Petitioner certified both applications as "true" that there was no history of adverse legal action when, in fact, three such actions had been imposed on her. *Id.* at 6-7, citing P. Br. to ALJ at 7.

The ALJ concluded that, because Petitioner submitted enrollment applications that contained false or misleading statements that Petitioner certified as "true," CMS had a legal basis for revoking Petitioner's enrollment and billing privileges under section 424.535(a)(4). *Id.* at 7. The ALJ stated:

> [I]t is well established that suppliers are responsible for the applications and information that their billers or others submit on their behalves where the supplier certifies the information contained in the application as "true." *Mark Koch, D.O.*, DAB No. 2610, at 4 (2014). Indeed, "section 424.535(a)(4) does not require proof that Petitioner subjectively intended to provide false information, only proof that [s]he *in fact provided* misleading or false information that [s]he certified as true." *Id.* (emphasis in original). Moreover, as in *Koch*, Petitioner's lack of awareness regarding the contents of the applications submitted under her signature is evidence that she had not, in fact, "read the contents of th[e] application[s]," contrary to the certification statements she signed.

Id. The ALJ stated that the revocation of Petitioner's enrollment and billing privileges was effective August 31, 2014, with the one-year re-enrollment bar beginning on that date. *Id.* at 8.

Petitioner's position before the Board

Petitioner asserts that the ALJ "**misunderstood**" the facts and "applied the **wrong** facts" and, as a result, erred in determining that there was no genuine dispute of material fact to grant summary judgment for CMS. Petitioner's brief to the Board (P. Br. at 2) (emphasis in original). Petitioner surmises that, despite the ALJ's statement that this case "'turns on a matter of law and is therefore appropriate for summary judgment'" (*id.*, quoting ALJ Decision at 6), the ALJ made factual errors because the ALJ, like the attorney representing CMS in this case, "work in a **very** specialized and **repetitive** area of the law" and "**unconsciously** and automatically . . . pigeonholes [a case] into a *schema*" (*id.* at 2-3; emphases in original).

Petitioner makes distinctions between the facts of her case and those of *Koch*, which Petitioner asserts are critical distinctions the ALJ did not appreciate. *Id.* at 3-5. According to Petitioner, Dr. Koch was a "shady, unscrupulous provider" who had failed to disclose to CMS a history of criminal conviction and later, when "caught" by CMS, attempted to explain away his "critical" failure to disclose by asserting "some kind of mistake, negligence, misunderstanding or omission." *Id.* at 3-4.[10] In contrast, Petitioner says, she disclosed her adverse licensing history to the "temporary employer" in writing, but a "third party . . . took it upon herself . . . either intentionally or negligently" to omit the disclosure from the application and then affixed the signed certification page of the application without letting Petitioner see the version as revised by the "third party." *Id.* at 5 (referring to Ms. Szczotka); *see also id.* at 6, 7 (discussing Ms. Szczotka's "erroneous work product" and "wrongdoing"). Petitioner says that "[s]ince [she] did not submit a false document, her . . . case is distinguishable from the facts of" *Koch* and, therefore, the ALJ erred in relying upon *Koch* as controlling authority. *Id.* at 7.

Standard of review

We review the ALJ's grant of summary judgment de novo, viewing the facts in the light most favorable to Petitioner and giving her the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to

[10] As related in *Koch*, DAB No. 2610 (2014), Dr. Koch was convicted by guilty plea of felony conspiracy to distribute and possess with the intent to distribute anabolic steroids in violation of 21 U.S.C. § 846 and was excluded from participating in Medicare, Medicaid, and all federal health care programs under section 1128(a) of the Act. CMS revoked Dr. Koch's Medicare enrollment based on three grounds – felony conviction for conspiracy; for providing misleading or false information on Medicare enrollment applications; and failure to timely notify Medicare of adverse legal actions (including his guilty plea) – under 42 C.F.R. § 424.535(a)(3), (a)(4), and (a)(9). As we discuss herein, however, Petitioner has not made a case for how the factual differences between her case and *Koch* are material such that the ALJ erred in deciding the case on summary judgment or in relying on *Koch*.

the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment (here, CMS) has the initial burden of demonstrating that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party carries that burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co., LTD. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure).[11] Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Discussion

Below, we first address evidentiary matters. We then set out our reasons and bases for agreeing with the ALJ that there is no genuine dispute of material fact. We determine that the ALJ did not err in granting summary judgment for CMS. CMS lawfully revoked Petitioner's enrollment.

1. Evidentiary matters

Petitioner submitted to the Board four documents, identified as Exhibits 1 through 4, as attachments to her brief. The attachments identified as Exhibits 2, 3, and 4 are copies of the three affidavits (of Petitioner, Ms. Szczotka, and Ms. Peters) the ALJ admitted and are already a part of the evidentiary record.

The attachment identified as Exhibit 1 in Petitioner's submission to the Board, however, is a duplicate copy of page 11 of Petitioner's Exhibit 3 to the ALJ. That page appears to be from a Medicare enrollment application form 855I. Specifically, the exhibit constitutes an enlarged copy of the first of the two pages of Section 3, entitled "Final Adverse Legal Actions/Convictions." That page describes in some detail the types of adverse actions, including convictions, exclusions, revocations, and suspensions, that are subject to disclosure. On the bottom of the page is a handwritten notation, presumably made by Petitioner, reading "DUIL 7/03 → suspension & probation of Nsa. license."

[11] Effective December 1, 2010, Rule 56 of the Federal Rules of Civil Procedure was "revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts." Committee Notes on Rules - 2010 Amendment, available at https://www.law.cornell.edu/rules/frcp/rule_56. The revisions alter the language of the rule, but the "standard for granting summary judgment remains unchanged." *Id.* The Federal Rules of Civil Procedure are not directly applicable to administrative proceedings as in this case, but Rule 56 and related case law provide guidance for determining whether summary judgment may be appropriate in administrative proceedings.

As noted earlier, the ALJ excluded all six of Petitioner's exhibits on the grounds that they appeared to have been in existence at the time Petitioner requested reconsideration of the initial determination, but were being submitted for the first time to the ALJ without a showing of good cause. ALJ Decision at 4, citing 42 C.F.R. § 498.56(e). Since page 11 of Petitioner's Exhibit 3 was excluded by the ALJ, the same document submitted to the Board as Petitioner's Exhibit 1 is new evidence at our level. It is not admissible as such because the Board is barred by regulation from deciding supplier (or provider) enrollment appeals, such as the instant appeal which involves revocation of supplier enrollment, based on evidence not provided at the reconsideration or ALJ hearing level. 42 C.F.R. § 498.86(a); *MedStar Health, Inc.*, DAB No. 2684, at 6 (2016) (stating that section 498.86(a) "expressly except[s] provider and supplier enrollment appeals from the general rule authorizing the Board to admit additional evidence that the Board finds is relevant and material"). *See also 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 3-4 (2009) (discussing CMS's rationale for excepting provider or supplier enrollment appeals from the general rule authorizing the Board to exercise discretion to admit additional evidence, a revision made to section 498.86(a) in 2008); *Guidelines*, section entitled "Development Of The Record On Appeal," ¶ (f) ("The Board may not admit evidence into the record in addition to the evidence introduced at the ALJ hearing or in addition to the documents considered by the ALJ if the hearing was waived. See 42 C.F.R. § 498.86(a).").

Petitioner does not expressly assert ALJ error of law or abuse of discretion in excluding any of the six exhibits in reliance on section 498.56(e), and we find neither. The ALJ rightly said that under section 498.56(e), to which he was bound, he "must" exclude new evidence that was offered without good cause. ALJ Decision at 4; *see Mohammad Nawaz, M.D., and Mohammad Zaim, M.D., PA*, DAB No. 2687, at 13 (2016) and *Zille Shah, M.D., and Zille Huma Zaim, M.D., PA*, DAB No. 2688, at 14 (2016) (finding no abuse of discretion or legal error by the ALJ in construing the regulation similarly and in excluding new evidence for failure to show good cause, and stating that section 498.56(e) itself provided petitioners adequate notice of the requirement to provide all documents on reconsideration). Rather, Petitioner merely refers to page 11 of her Exhibit 3 and the duplicate copy of it attached to her brief to the Board, stating, "The document read, signed and prepared by Petitioner **did** list her DUI convictions as well as her licensing sanctions." P. Br. at 6 (emphasis in original). This statement does not establish admissibility and does not even establish that the evidence would be relevant to whether the applications contained false or misleading information.

As noted earlier, the ALJ said, "Even if I were to consider P. Ex. 1-6, they would not change the outcome of this proceeding because they do not create any dispute of the material facts which dictate their outcome here." ALJ Decision at 4 n.3. Thus, in the ALJ's view, even had he been able to consider the exhibits, he saw nothing in them to

contradict the facts CMS asserts are undisputed, drawing every reasonable inference in Petitioner's favor, for purposes of deciding the appeal on summary judgment. Petitioner fails to make to us any showing that the ALJ overlooked a good cause basis to admit the exhibits or even to establish that their exclusion prejudiced her.

Petitioner says nothing about how "[t]he document" (Petitioner's Exhibit 3, page 11; copy submitted to the Board) substantiates disclosure of her adverse licensing history in the *two applications at issue*. We observe that the corresponding pages of Section 3 of the two applications on which the revocation was based did not include the handwritten notation, i.e., Petitioner's Exhibit 3, page 11 does not match the corresponding page of either enrollment application of record. *Compare* CMS Ex. 1, at 7 and CMS Ex. 2, at 10 *and* P. Ex. 3, at 11. Petitioner nowhere asserted that the two applications at issue, as submitted to CMS or WPS, included the notation such that there is a factual dispute about whether CMS Exhibits 1 and 2 are not in fact true copies of the applications that were submitted and based on which CMS later revoked Petitioner's enrollment. Nor did Petitioner say that Petitioner's Exhibit 3, page 11 was submitted to CMS or WPS as a corrected or supplemental replacement page or update to either of the applications of record as CMS Exhibits 1 and 2. The implication appears to be that Petitioner may have informed CMS on other occasions of her adverse history, but we do not find that, even if true, such information provided in other documents would necessarily undercut the significance here of submitting false statements about her adverse history on the two applications at issue here.[12]

In conclusion, we find that the ALJ did not commit error of law or abuse his discretion in excluding Petitioner's Exhibit 3, including the page Petitioner now tries to submit to us. We therefore exclude that page which was identified as Exhibit 1 to Petitioner's brief to the Board.

[12] Among the exhibits excluded by the ALJ, for the reasons we upheld as discussed above, was another apparent copy of a page from Section 3, "Final Adverse Actions/Convictions" from a different Form 855I. It contains a handwritten notation referencing the 2003 suspension and probation and Petitioner's signature dated March 3, 2013. P. Ex. 2, at 4 ("OUIL 2003 suspension/probation"). Petitioner pointed to this document as evidence of her disclosure to the employer/billing persons for purposes of both applications. P. Br. to ALJ at 6. The document does not, however, match either of the corresponding pages of the 2011 and 2013 applications on which the revocation was based. That is, the corresponding pages of the 2011 and 2013 applications included no notation at all. *See* CMS Ex. 1, at 7; CMS Ex. 2, at 10. Moreover, the signature date of March 3, 2013 does not match the signature dates on the two applications. Petitioner signed the first application on August 15, 2011 (CMS Ex. 1, at 12); she signed the second application on April 23, 2013 (CMS Ex. 2, at 24). Thus, we find Petitioner's claim of disclosure based on this document (P. Ex. 2, at 4) implausible even were the document admissible.

2. *Summary judgment was appropriate because the ALJ correctly determined that there was no genuine dispute of material fact.*

Petitioner's position, in essence, is that the ALJ misunderstood the facts of her case. According to Petitioner, the facts of her case are distinguishable from those in *Koch*, the Board decision on which the ALJ relied. Petitioner attempts unsuccessfully to show a genuine factual dispute material to the outcome of this case such that granting summary judgment in CMS's favor was legal error.

As related earlier, CMS revoked Petitioner's enrollment and billing privileges under section 424.535(a)(4) on the ground that in her August 2011 and April 2013 enrollment applications Petitioner certified as "true" false or misleading information concerning a history of adverse legal action, attesting that there was no such adverse history when in fact Michigan twice suspended her license and Ohio revoked her license. Accordingly, the facts material to the ALJ's decision, and to our de novo review, are (1) whether Petitioner did have adverse legal action subject to disclosure in the August 2011 and April 2013 applications; and (2) if so, whether Petitioner nonetheless certified in those applications that she had no such history to disclose or otherwise failed to disclose such history.

Under the summary judgment standard, CMS must initially come forward with evidence on these facts. CMS has clearly met that burden. Of record are two enrollment applications for Petitioner. In both the box for "NO" in Section 3 is filled in to indicate no "adverse legal actions/convictions." CMS Ex. 1, at 8; CMS Ex. 2, at 11. In both, Petitioner signed the certification statement to attest that the contents of the applications, which did not disclose any history of adverse legal actions, are in fact true, correct, and complete. CMS Ex. 1, at 11-12 (signed August 15, 2011); CMS Ex. 2, at 23-24 (signed April 23, 2013). We see nothing in either application form, or on the items evidently submitted with the forms, e.g., copy of Petitioner's University of Michigan Master's degree diploma (CMS Ex. 1, at 13-16; CMS Ex. 2, at 27-31), disclosing or noting adverse licensing history. There also is evidence that in May 2010 the Ohio Board of Nursing permanently revoked Petitioner's license to practice nursing as a registered

nurse and certificate of authority to practice as CRNA. CMS Ex. 3.[13] Moreover, CMS submitted evidence indicating "Summary Suspension" of Petitioner's Michigan license on February 8, 2005, and a second "Summary Suspension" on May 9, 2006. CMS Ex. 5 (July 29, 2014 printout of licensing verification data for Petitioner, from the Michigan Department of Licensing and Regulatory Affairs online database).[14]

Petitioner raises no specific argument about the ALJ's findings regarding the evidence CMS presented and on which the ALJ determined there was no dispute of material fact. Rather, she attempts to distinguish the facts of her case from those of *Koch*, asserting that, unlike Dr. Koch, she in good faith consistently disclosed, in advance, her adverse licensing history to employers and billing persons. The question is not whether Petitioner disclosed her history, in whole or part, to other entities or at other times. The question before us is whether she in fact disclosed it – or failed to do so, by denying the history with a "NO" response and certifying as true, correct and complete the contents of the forms that did not disclose the history – when she submitted these applications to Medicare. The undisputed facts establish that she had negative licensing history in two states and that none of it is shown on either 855I form certified by Petitioner.

Indeed, Petitioner herself expressly admitted to certain facts that formed a part of the foundation for the ALJ Decision. Specifically, Petitioner said:

> "[Petitioner's Michigan] license was summarily suspended February 2005 . . . ." P. Br. to ALJ at 3.

---

[13] We note two other things related to the licensing history in Ohio. First, the Ohio Department of Job and Family Services terminated Petitioner's Medicaid provider agreement following the revocation of her Ohio license. *See* CMS Ex. 4. CMS did not cite this as a basis for revocation.

Second, Petitioner suggested that she did not receive notice of the Ohio license revocation, possibly implying that she could not disclose what she did not know. *See* P. Br. to ALJ at 5. But, she also recounted her earlier attempt to have her Ohio license renewed and admitted she "inaccurately answered questions regarding restricted, suspended and disciplinary actions regarding her license." *Id.* She says she had an opportunity to be heard before the Ohio Board of Nursing, but decided not to further pursue the matter and let her Ohio license "lapse." *Id.* So, it appears that before Ohio issued its 2010 determination to revoke, Petitioner was aware that Ohio's decision on her licensing status would be forthcoming. And, the Ohio Board of Nursing notified Petitioner of the revocation by letter (certified mail) dated June 1, 2010. CMS Ex. 3, at 1. Presumably Petitioner received it well before she signed the first of the two Medicare enrollment applications, in August 2011. CMS Ex. 1, at 12.

[14] CMS Exhibit 5 also shows "Summary Suspension Dissolved" on February 24, 2005 and September 6, 2006, as well as "Probation" on November 2, 2005 and September 6, 2006, and "Date of Compliance" of probation on September 23, 2008. In her brief to the ALJ, Petitioner explained in some detail the circumstances leading up to and surrounding the Michigan and Ohio licensing actions. Whatever the implications of the additional entries in CMS Exhibit 5 are it is clear that Petitioner had adverse licensing history in Michigan to which Petitioner admits. Moreover, inasmuch as there is no dispute as to the revocation of the Ohio license, that adverse licensing action alone, undisclosed, could have been the basis for revoking Petitioner's Medicare enrollment and billing privileges.

> "Michigan again summarily suspended [Petitioner's] nursing license [in] May 2006 . . . ." P. Br. to ALJ at 4.
>
> "Ohio ordered [Petitioner's] license be permanently revoked in May 2010." P. Br. to ALJ at 5.

The first two statements are consistent with CMS Exhibit 5; the third statement is consistent with CMS Exhibit 3. By her own words, Petitioner communicated that she did in fact have negative licensing history pre-dating the 2011 and 2013 Medicare enrollment applications.

At the heart of Petitioner's dispute is her position that she herself did not intentionally provide Medicare false or misleading information. She points to her disclosure of the adverse actions to employers and billers and asserts that others' subsequent actions or omissions resulted in the filing of 855I forms that were not true, correct and complete.[15] However, as we explain below, it is ultimately immaterial whether Petitioner actually completed the 855I forms herself, or, someone else completed the forms for Petitioner and intentionally or negligently omitted information about the negative licensing history from the forms. Nor is it relevant whether a billing person did or did not provide Petitioner an opportunity to review the forms before they were filed or inform Petitioner when or how the forms would be filed (*see* P. Reply (filed with the Board) at 2), or that none of the CRNAs Petitioner personally knows reportedly have been given an opportunity to check their own Medicare application packets for accuracy and completeness (Petitioner's Affidavit at ¶ 6). The responsibility for reviewing the content of her applications before attesting to their accuracy lay entirely with Petitioner and she averred by her signature that she had performed such a review.

As for Petitioner's statement that the "biller/preparer" Ms. Szczotka was "obliged to check [Petitioner's] licensing status on the internet but she failed to do that" (Petitioner's Affidavit ¶ 5), this too is immaterial. Petitioner seems to derive this obligation from statements in the affidavits of Ms. Szczotka and Ms. Peters. The statements are less than clear as to the nature or source of any such obligation and as to what information Ms. Szczotka may have had access to in preparing Petitioner's application. In any case, as we

[15] Also, as noted earlier, before the ALJ, Petitioner said she "is required to renew every three months on CMS' website and has **always reported** the DUI/suspension information. Medicare has been and is continually made aware of [her] past DUI/suspension." P. Br. to ALJ at 7 (emphasis in original). Petitioner did not specifically explain what the three-month renewal on the website entails and does not revisit this aspect of her position. In any case, as discussed elsewhere, the 855I forms on which the revocation was based did not include any such disclosure and affirmatively denied any adverse history.

have explained, Petitioner remained responsible for the contents of her application. 42 C.F.R. § 424.510(d)(3) (The signature on the certification statement of the enrollment application form "attests that the information submitted is accurate and that the provider or supplier is aware of, and abides by, all applicable statutes, regulations, and program instructions.").

Petitioner's various assertions essentially amount to an attempt to shift the blame to others for any alleged act or omission that resulted in the applications being submitted to Medicare without the disclosure of adverse licensing history. The ALJ properly rejected that attempt. ALJ Decision at 7, citing *Mark Koch, D.O.* As the Board said in *Koch* –

> [S]ection 424.535(a)(4) does not require proof that Petitioner [Dr. Koch] subjectively intended to provide false information, only proof that he *in fact provided* misleading or false information that he certified as true. We note that even if Petitioner did not subjectively intend to mislead the Medicare program on [his] . . . application, he was not without fault. Petitioner admits that, contrary to his signed certification, he did not read the completed application before signing and submitting it to Medicare. . . . That omission was certainly negligent and exhibited indifference to Medicare requirements.

Koch at 4-5 (emphasis in original; citation to record omitted). The Board has rejected similar attempts in revocation cases other than *Koch*. *See Howard B. Reife, D.P.M.*, DAB No. 2527 (2013) and *Louis J. Gaefke, D.P.M.*, DAB No. 2554 (2013) (rejecting petitioners' attempt to blame a billing agent for improper claims that resulted in revocation for improper billing under section 424.535(a)(8)).

Petitioner, like Dr. Koch, in fact provided misleading or false information that she certified as true. Moreover, even accepting that Petitioner did not intend to mislead the Medicare program, Petitioner admitted that she did not read at least one of the applications inasmuch as she asserted that she was not given an opportunity to review the application form itself. By signing the certification statements in both application forms (and she does not dispute that the signatures are hers), she attested to the truth, accuracy and completeness of their content, as is.

As the ALJ correctly noted, once CMS determined that Petitioner submitted Medicare enrollment applications that contained false or misleading statements that Petitioner certified as "true," CMS had a legal basis for revocation. Petitioner offered no evidence in response to CMS's showing that could undercut any material fact or demonstrate any cognizable defense. The ALJ correctly noted, too, that his review authority was limited to determining whether CMS was authorized to revoke Petitioner's Medicare enrollment

and billing privileges, rather than to substitute his judgment for that of CMS about whether to revoke. ALJ Decision at 7, citing 42 C.F.R. § 424.535(a)(4); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008); *John Hartman, D.O.*, DAB No. 2564, at 5-6 (2014). On review, once the Board finds that the revocation was made lawfully, i.e., grounded in fact and satisfied the applicable regulatory criteria, as we do here, then the Board is obliged to uphold the revocation. *Hartman* at 5-6.

Petitioner suggested below that CMS could have or should have exercised its discretion to decide not to revoke. *See* P. Br. to ALJ at 2 ("Yes, arguably Medicare could use its discretion to exclude a provider for such an offense [that is, a violation of section 424.535(a)(4)] but it is not mandatory."). But CMS *did* decide to revoke Petitioner's enrollment and billing privileges based on section 424.535(a)(4). Our (and the ALJ's) task is to decide whether that determination is grounded in law and fact. It is. We observe that CMS exercised discretion here in setting the duration of the re-enrollment bar (one-year bar as opposed to two or three years), a matter which the ALJ and the Board lack authority to review. *Vijendra Dave, M.D.*, DAB No. 2672, at 8-12 (2016).

We, like the ALJ, conclude that CMS, the movant, has carried its initial burden to show that there is no genuine dispute of material fact. Petitioner, the non-movant, has not carried her burden to show that there is indeed such a dispute. We find no legal or factual basis to disturb the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare enrollment pursuant to section 424.535(a)(4). The ALJ did not err in deciding this case on summary judgment for CMS.

Conclusion

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

/s/
Leslie A. Sussan

/s/
Christopher S. Randolph

/s/
Susan S. Yim
Presiding Board Member