Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Daniel Wiltz, M.D. and Family Healthcare Clinic, APMC
Docket No. A-18-9
Decision No. 2864
April 2, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioners Daniel Wiltz, M.D. and Family Healthcare Clinic, APMC (FHC) appeal the August 24, 2017 decision of an administrative law judge (ALJ), *Daniel Wiltz, M.D. and Family Healthcare Clinic, APMC*, DAB CR4929 (ALJ Decision). The ALJ Decision sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioners' Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), (a)(4) and (a)(9). The Board affirms the ALJ Decision.

Legal Background

To receive payment under Medicare, a physician or other "supplier" of Medicare services must be enrolled in the program. 42 C.F.R. § 424.505.[1] Enrollment confers on a supplier "billing privileges," i.e., the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502 (defining "Enroll/enrollment"), 424.505.

CMS may revoke a supplier's Medicare billing privileges for any of the reasons stated in subsection 424.535(a). Relevant here, subsection 424.535(a)(3)[2] authorizes CMS to revoke a supplier's billing privileges and participation agreement if the supplier or any owner or managing employee of the supplier –

[1] The term "supplier" refers to "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.

[2] We apply subsection 424.535(a)(3) as revised effective February 3, 2015 (79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014)) and in effect on June 27, 2016, the date of the two initial revocation determinations, one addressed to Dr. Wiltz, and one addressed to FHC (CMS Exs. 2, 3). *See, e.g., John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016); *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016) (noting the revision of section 424.535 and stating that the version of the regulations in effect on the date of the initial determination to revoke applies).

> was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2)[3] of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

Id. § 424.535(a)(3)(i); *see also* Social Security Act (Act) §§ 1842(h)(8), 1866(b)(2)(D). Felony offenses detrimental to the program and its beneficiaries "include, but are not limited in scope or severity to . . . [f]inancial crimes, such as . . . insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas . . . ." 42 C.F.R. § 424.535(a)(3)(ii)(B).

Two additional bases for revocation are relevant here. Subsection 424.535(a)(4) authorizes revocation if the supplier "certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in" Medicare. CMS also may revoke a supplier's billing privileges under subsection 424.535(a)(9) for failure to comply with the "reporting requirements specified in [42 C.F.R.] § 424.516(d)(1)(ii) and (iii)." As relevant here, subsection 424.516(d)(1)(ii) provides that physicians and physician practitioner organizations "must" report to their Medicare contractor "[a]ny adverse legal action" "[w]ithin 30 days." A "final adverse action" is defined to include a "conviction of a Federal or State felony offense . . . within the last 10 years preceding enrollment, revalidation, or re-enrollment." 42 C.F.R. § 424.502.

Revocation effectively terminates any provider agreement and bars the supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. *Id.* § 424.535(b), (c). The re-enrollment bar lasts between one year and three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). Revocation takes effect 30 days after CMS or its contractor mails the notice of determination to revoke to the supplier, unless, as relevant here, the revocation is based on a felony conviction, in which case revocation takes effect on the date of the conviction. *Id.* § 424.535(g).

A supplier may seek reconsideration of an initial determination to revoke. *Id.* §§ 498.3(b)(17), 498.5(*l*)(1), 498.22(a). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. *Id.* §§ 498.5(*l*)(2), 498.40.

---

[3] An individual is deemed to have been "convicted" when, as relevant here, "[a] Federal . . . court has accepted a plea of guilty" by that individual. 42 C.F.R. § 1001.2(c).

Case Background[4]

Dr. Wiltz is a Louisiana physician who practices family medicine at FHC. CMS Ex. 1, at 2, 4. He enrolled in Medicare as a supplier in 2010. CMS Ex. 5, at 5. Between mid-2006 and December 10, 2006, Dr. Wiltz owned a furniture business, American Wholesale Furniture, Incorporated. CMS Ex. 6, at 2, 3. An insurance policy issued by The Hartford Insurance Company (Hartford) was taken out for the business, with Dr. Wiltz, d/b/a American Wholesale Furniture, as the beneficiary of the policy. *Id.* at 4. The policy covered business interruption and property damage due to events such as fire, but did not cover loss due to criminal acts, such as arson, committed by the insured, or the partners or authorized representatives of the insured. *Id.* The furniture store was destroyed by fire on December 10, 2006. *Id.* At that time, the business had less than $300,000 in furniture inventory, and was "essentially bankrupt, having substantial debts and virtually no cash or accounts receivables." *Id.* at 4-5. A claim was made on the policy, and Hartford issued two $100,000 checks, made payable to Dr. Wiltz d/b/a American Wholesale Furniture. *Id.* at 5, 10. The checks were deposited into the store's account. *Id.* at 10.

The U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigated to determine whether the fire could have been due to arson, for purposes of insurance fraud. *Id.* at 5. On March 13, 2008, a federal grand jury in the United States District Court for the Middle District of Lousiana indicted Dr. Wiltz and others, including the manager of the furniture store, for felony conspiracy to commit mail fraud and wire fraud on Hartford (Count Three of the indictment). *Id.* at 1, 3, and 7-10, citing 18 U.S.C. §§ 2, 371, 1341 and 1343. Two of Dr. Wiltz's co-defendants were charged with arson and using fire to commit a felony. *Id.* at 6, citing 18 U.S.C. §§ 2, 844(h)(1), 844(i). Dr. Wiltz was also charged with a felony crime of "knowingly and willfully" making "materially false and fraudulent statements and representations in a matter within the jurisdiction of the ATF" by telling the ATF investigator that he "did not authorize [the bank] to cash the $200,000 check [he had] written" from his personal account to a co-defendant "when, in truth and in fact, as [he] well knew, he did authorize and insist" that the bank cash that check. *Id.* at 1, 13-14 (Count Eight of the indictment), citing 18 U.S.C. § 1001(a)(2). Dr. Wiltz pleaded guilty to Count Eight (making false statements). *Id.* at 20. The court imposed judgment of conviction on the guilty plea on April 2, 2013; sentenced Dr. Wiltz to two years of probation; ordered him to pay $100,000 in restitution, a fine of $4,000, and an assessment of $100; and dismissed Count Three (conspiracy to commit mail fraud and wire fraud). *Id.* at 20, 21, 23.

[4] The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings. The facts as set forth herein are undisputed unless otherwise indicated.

By two initial determinations dated June 27, 2016 (one addressed to Dr. Wiltz; one addressed to FHC), Novitas Solutions, Inc. (Novitas), a CMS Medicare Administrative Contractor, revoked Petitioners' enrollment and billing privileges effective April 2, 2013, the date of Dr. Wiltz's conviction. CMS Exs. 2, 3. In the determination addressed to Dr. Wiltz, Novitas cited three bases for revocation: 1) 42 C.F.R. § 424.535(a)(3), based on Dr. Wiltz's felony conviction for making false statements; 2) 42 C.F.R. § 424.535(a)(4), for failure to disclose the conviction in an enrollment application (Form CMS 855) that Dr. Wiltz signed on August 20, 2015; and 3) 42 C.F.R. § 424.535(a)(9), for failure to report the conviction as required by 42 C.F.R. § 424.516. CMS Ex. 2, at 1. In the determination addressed to FHC, Novitas cited as bases for revocation subsections 424.535(a)(3) and (a)(9),[5] noting that Dr. Wiltz was "listed as a 5% or more owner" of FHC in FHC's "[Form CMS] 855 enrollment record." CMS Ex. 3, at 1; *see also* CMS Ex. 1.[6] Novitas informed Petitioners that they were barred from re-enrolling in Medicare for three years. CMS Ex. 2, at 2; CMS Ex. 3, at 2.

On November 17, 2016, the Provider Enrollment & Oversight Group of CMS's Center for Program Integrity issued a reconsidered determination, citing the three bases for revocation – subsections 424.535(a)(3), (a)(4), and (a)(9) – stated earlier in the initial determinations. CMS Ex. 5.[7] In its reconsidered determination, CMS expressly informed Petitioners that it determined that Dr. Wiltz's crime of making false statements in connection with a federal investigation into arson and insurance fraud is detrimental to the Medicare program and its beneficiaries because the crime raises concerns about Dr. Wiltz's trustworthiness and veracity. CMS stated:

[5] The initial determinations stated: "[CMS] has been made aware of your April 2, 2013, felony conviction . . . . You did not notify [CMS] of this change in practice location as required under 42 CFR §424.516." CMS Ex. 2, at 1; CMS Ex. 3, at 1. The references to "change in practice location" appear to have been error. Nothing in the record indicates that Petitioners relocated or that revocation was based on the failure to report a change in their practice location. Noting the reference to "change in practice location," the ALJ stated that "Petitioners did not claim to be confused by this error" and that the reconsidered determination clearly indicated that the revocation was based on the failure to report Dr. Wiltz's conviction. ALJ Decision at 3 n.3.

[6] CMS Exhibit 1 is the Provider Enrollment, Chain, and Ownership System (PECOS) record associated with an application form (Form CMS 855I) Dr. Wiltz signed (electronically) and submitted on August 20, 2015, to "revalidat[e] a deactivated Medicare billing number." CMS Ex. 1, at 2. The PECOS record indicates that Dr. Wiltz has "5% or more ownership interest" in FHC. *Id.* at 5-6. (PECOS is a web-based system for enrolling providers and suppliers into the Medicare program.) CMS may revoke a supplier's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) based on a qualifying felony conviction of the supplier or any owner of the supplier. 42 C.F.R. § 424.535(a)(3)(i).

[7] CMS issued one reconsidered determination, addressed to the attorney who represented Dr. Wiltz and FHC below and represents them before the Board. There is no dispute that the reconsidered determination affirmed the revocation as to both Dr. Wiltz and FHC.

> Dr. Wiltz pled guilty to an allegation of having made a false statement, in connection with arson and insurance fraud. The false, fraudulent, misleading and material statement made by Dr. Wiltz in the context of a very serious criminal investigation calls into question his trustworthiness and veracity. Payment under the Medicare program is made for claims submitted in a manner that relies upon the trustworthiness of our Medicare partners. Consequently, Dr. Wiltz's continued participation in the Medicare program could place Trust Funds at risk. On this basis, CMS found Dr. Wiltz's conviction for making false statements detrimental to the Medicare program and its beneficiaries.

Id. at 4. CMS also stated that section 3 of the Form CMS 855I that Dr. Wiltz signed on August 20, 2015, headed "Final Adverse Legal Actions," was left blank. *Id.*; CMS Ex. 1, at 4. By signing his name on that form, CMS said, Dr. Wiltz "certified as true a statement where he falsely claimed not to have any adverse legal actions, by omittance." CMS Ex. 5, at 4. Lastly, CMS stated that, because Dr. Wiltz failed to report his April 2, 2013 conviction "within 30 days" as required under 42 C.F.R. § 424.516(d)(1)(ii), it had an additional basis for revocation, under subsection 424.535(a)(9). *Id.* at 5.

ALJ Proceedings and Decision

Petitioners requested a hearing before an ALJ.[8] CMS moved for summary judgment, asserting that there is no dispute that: 1) on April 2, 2013, Dr. Wiltz was convicted, by guilty plea, of a felony offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries; 2) when Dr. Wiltz updated his enrollment record in August 2015, he failed to disclose his felony conviction, and thus provided false enrollment information (by omission), certifying that the information as submitted was accurate and complete; and 3) Dr. Wiltz failed to report his felony conviction within 30 days. Accordingly, CMS asserted, it lawfully revoked Petitioners' enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), (a)(4) and (a)(9). CMS's motion for summary judgment and pre-hearing brief (CMS's MSJ) at 6-8.

[8] CMS submitted, and the ALJ admitted, eight exhibits, marked CMS Exhibits 1 through 8. ALJ Decision at 4. Petitioners submitted documents with their request for hearing, but did not later attempt to resubmit any of them as exhibits, marked in accordance with the instructions in the ALJ's pre-hearing order, for admission into the record. Petitioners also stated that they "adopt all of CMS' Exhibits and have no additional exhibits to add . . . ." Petitioners' opposition to CMS's motion for summary judgment and pre-hearing brief (P. Br.) at 2 (not paginated).

The ALJ also denied Petitioners' request to have Dr. Wiltz testify regarding the facts leading to his guilty plea, the reason behind his failure to notify CMS of that adverse event and the nature of his practice, because Petitioners failed to comply with the ALJ's pre-hearing order regarding offers of testimony, and because the proposed testimony would be irrelevant and amount to an impermissible collateral attack on Dr. Wiltz's conviction. *See* ALJ Decision at 4 and 8 at n.5; P. Br. at 2. Thus, the evidentiary record below consisted only of CMS Exhibits 1 through 8. Neither party raises an argument about the ALJ's evidentiary rulings or her determination not to hold a hearing.

In their opposition to CMS's motion, Petitioners did not dispute that on April 2, 2013 Dr. Wiltz was convicted, by guilty plea, of the felony crime of making false statements in violation of 18 U.S.C. § 1001(a)(2). Nor did they dispute the failure to disclose the conviction in the application form Dr. Wiltz signed on August 20, 2015, or the failure to report the conviction within 30 days. ALJ Decision at 5, citing P. Br. at 1. Instead, Petitioners argued, in essence, that there is no qualifying conviction for purposes of revocation under subsection 424.535(a)(3) because Dr. Wiltz was not convicted of (let alone charged with) insurance fraud; nor was he convicted of any similar crimes. *Id.* at 5-6 and 7, citing P. Br. at 1-2. Petitioners moreover maintained that Dr. Wiltz made the false statement to the ATF investigator only to distance himself from the fraud perpetrated by others. *Id.* at 5-6, citing P. Br. at 1-2.

The ALJ stated that, "even accepting these arguments and representations as true" for summary judgment purposes, CMS was entitled to judgment as a matter of law. *Id.* at 4, 5-6. The ALJ also stated that, while she agreed with Petitioners that Dr. Wiltz was "neither charged with insurance fraud nor convicted of conspiracy to commit mail fraud or wire fraud," that "d[id] not eliminate the basis for revocation" (*id.* at 7) because:

> Dr. Wiltz made the false statement for which he was convicted in connection with an investigation into arson and insurance fraud. CMS Br. at 8; *see also* CMS Ex. 5 at 4. Petitioners acknowledge that Dr. Wiltz made a false statement regarding a . . . check that 'was issued due to an insurance claim submitted by Petitioners' former partners.' P. Br. at 1. Petitioners further acknowledge that Dr. Wiltz's former partners were convicted of insurance fraud and arson. P. Br. at 2. Thus, despite Petitioners' attempt to distance Dr. Wiltz's false statement from his former partners' scheme to defraud the insurance company, it is apparent that the false statement concerned facts material to the ATF investigation into that scheme.
>
> I may consider the facts and circumstances surrounding the conviction to determine whether the conviction is for an offense 'similar' to an enumerated felony . . . . The record before me does not include a transcript of Dr. Wiltz's plea allocution. Nevertheless, in pleading guilty to making a false statement in violation of 18 U.S.C. § 1001(a)(2), Dr. Wiltz at a minimum admitted to making a 'materially false, fictitious, or *fraudulent* statement of representation' in a matter within the jurisdiction of a branch of the United States government. 18 U.S.C. § 1001(a)(2) (emphasis added). Thus, in the course of a federal investigation into arson and insurance fraud, Dr. Wiltz made a false or fraudulent statement regarding disposition of proceeds of an insurance policy, which may have been obtained by fraud. This is sufficiently similar to insurance fraud to invoke the definition at 42 C.F.R. § 424.535(a)(3)(ii)(B).

Id. at 7-8 (footnotes omitted).[9]

The ALJ also stated that even were she to conclude that Dr. Wiltz's conviction for making a false statement is not similar to insurance fraud, she nevertheless would conclude that CMS properly determined the conviction was for a felony that CMS determined is detrimental to the Medicare program and its beneficiaries because "it is apparent that CMS exercised its discretion, pursuant to 42 C.F.R. § 424.535(a)(3)(i), to determine that a felony conviction not listed in 42 C.F.R. § 424.535(a)(3)(ii) is detrimental to the Medicare program and its beneficiaries and, accordingly, warrants revocation." *Id.* at 8, citing *Saeed A. Bajwa, M.D.*, DAB No. 2799, at 8, 10-11 (2017). Noting that "CMS itself issued the reconsidered determination in which it expressly found that Dr. Wiltz's conviction is detrimental to the Medicare program and its beneficiaries because the conviction calls into question whether Dr. Wiltz can be trusted to submit truthful claims to Medicare," the ALJ determined that the record "amply demonstrate[d] that CMS exercised its discretion" to revoke. *Id.* at 9, citing CMS Ex. 5, at 4.

The ALJ further determined that revocation would be lawful based on two additional uncontested bases for revocation, subsections 424.535(a)(4) and 424.535(a)(9). *Id.* at 9-10. Petitioners did not deny that Dr. Wiltz failed to disclose his conviction in the August 20, 2015 enrollment application, *id.* at 9, or that they failed to report Dr. Wiltz's conviction within 30 days after April 2, 2013. *Id.* at 10 & 10 n.7 (noting that subsection 424.516(d)(1)(ii) requires a supplier to report *any* felony conviction).

Petitioners urged the ALJ to consider the impact revocation of their enrollment and billing privileges could have on program beneficiaries who Petitioners said would have difficulty accessing primary care services in the rural area in which Dr. Wiltz's practice is located. The ALJ stated that, "[t]o the extent Petitioners are arguing that revocation . . . is inequitable under the circumstances presented, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances." *Id.* at 10, citing *Letantia Bussell*, DAB No. 2196, at 13 (2008).

[9] The ALJ also stated that Petitioners did not address "whether CMS properly determined that Dr. Wiltz's felony conviction was detrimental to Medicare and its beneficiaries independent of its relationship to one of the felony convictions enumerated in 42 C.F.R. § 424.535(a)(3)(ii)." ALJ Decision at 7. Before the Board, Petitioners do not raise any specific argument concerning this statement by the ALJ.

Standard of Review

We review the ALJ's grant of summary judgment de novo, construing the facts in the light most favorable to petitioners and giving petitioners 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 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 has the initial burden to demonstrate 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. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure) (italics omitted). The Board's 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

The Board concludes that the ALJ did not err in sustaining on summary judgment CMS's determination to revoke Petitioners' enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), (a)(4) and (a)(9). We uphold the ALJ Decision.

I. CMS had a legal basis to revoke Petitioners' enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3), based on a qualifying felony conviction established by undisputed facts.

Before the ALJ, Petitioners did not dispute that Dr. Wiltz, who had ownership interest in FHC, was convicted, by guilty plea, of a felony crime of making false statements in violation of 18 U.S.C. § 1001(a)(2), "within the preceding 10 years" (42 C.F.R. § 424.535(a)(3)(i)) for purposes of revocation under subsection 424.535(a)(3). Request for Hearing (RFH) at 2. Petitioners argued that, although Dr. Wiltz's offense "arose from a false statement to a federal agent about whether [Dr. Wiltz] had a telephone conversation with a bank officer" about a check that was "issued due to an insurance claim submitted by Petitioners' former partners in a furniture store," Dr. Wiltz's "denial of authorizing the check was not for purposes of furthering the fraud perpetrated by Petitioners' partners but as a defensive reflection of [Dr. Wiltz] to distan[ce] himself from

his former partners and from the events leading up to their ultimate trial and convictions." P. Br. at 1-2. Petitioners pointed out that Dr. Wiltz was not charged with insurance fraud and arson as his "former partners" were. *Id.* at 2. Dr. Wiltz stated that he "truly regrets his lack of candor" and that "his lapse in judgment was in no way connected to ensuring that the check was processed or that the insurance fraud/arson scheme was successful." *Id.*

Before the Board, Petitioners do not dispute Dr. Wiltz's 2013 felony conviction for making false statements, but essentially reassert the arguments raised below, using language similar to that in their brief submitted to the ALJ. They again state that Dr. Wiltz was not charged with, let alone convicted of, insurance fraud – one of several crimes expressly identified in 42 C.F.R. § 424.535(a)(3)(ii)(B) as financial crimes that are detrimental to the Medicare program and its beneficiaries – or arson. Petitioners' reply brief (P. Reply) at 1-2. Petitioners state that, in contrast to the crimes named in the regulation, which Petitioners say are "egregious by nature," the crime of which Dr. Wiltz was convicted is "non-egregious," and that Dr. Wiltz has met the sentencing obligations the court imposed on him. *Id.* at 2; Notice of Appeal (NA) at 1-2. They ask the Board to "overturn the revocation" so that Dr. Wiltz can continue to serve his community. NA at 3.

Petitioners' arguments before the ALJ and the Board, in essence, amount to an assertion that Dr. Wiltz's conviction for making false statements was not a qualifying felony conviction for purposes of revocation under subsection 424.535(a)(3). The ALJ rejected Petitioners' arguments. We, too, reject them.

First, that making false statements is not among the financial crimes expressly identified in 42 C.F.R. § 424.535(a)(3)(ii)(B) (and arguably is not *ipso facto* a "financial" crime) does not preclude a finding that CMS has established the existence of a qualifying felony conviction for a financial crime for purposes of revocation under subsection 424.535(a)(3). By its plain terms, the regulation contemplates that a crime "similar" to those specifically identified in the regulation could be the basis for revocation under subsection 424.535(a)(3). 42 C.F.R. § 424.535(a)(3)(ii)(B) ("[f]inancial crimes, such as . . . insurance fraud and other similar crimes . . ."). Thus, CMS's authority to revoke enrollment and billing privileges under subsection 424.535(a)(3) based on a qualifying financial crime is not constrained to those situations where the particular crime a provider or supplier was convicted of is expressly named in the regulation as a financial crime. *See Saeed A. Bajwa, M.D.*, DAB No. 2799, at 10-11 (2017); *Stanley Beekman, D.P.M.*, DAB No. 2650, at 7 (2015) (CMS is authorized to revoke billing privileges under 42 C.F.R. § 424.535(a)(3) based on "*any* financial crime, regardless of whether the

supplier's particular financial crime is specified in the regulation's illustrative list of financial crimes"); *see also Fady Fayad*, DAB No. 2266, at 8 (2009) ("section 424.535(a)(3)(i) is reasonably read as setting out a non-exhaustive list of crimes that may constitute a basis for revocation"), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011). Moreover, the Board has recognized CMS's authority to decide, on a case-by-case basis, whether a particular crime or category of crime not expressly identified in the regulation is detrimental to the best interests of the Medicare program. *Fayad* at 8 (section 424.535(a)(3) "does not preclude CMS from making a case-specific, or adjudicative, determination that a crime or category of crime not specified in the regulation is detrimental to the best interests of Medicare"); *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 10 (2009) ("even if [p]etitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime" since the words "'such as'" that preceded the regulation's list of illustrative financial crimes "imply that the subsequent list of illustrative crimes, including crimes similar to those named in the list, are not the only set of crimes that may be considered 'financial'"), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).[10]

Second, as the ALJ correctly stated, in expressly setting out certain crimes (such as insurance fraud) in the regulation, CMS has determined that those crimes "are detrimental per se to Medicare." ALJ Decision at 6, citing *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008). Petitioners themselves acknowledge that insurance fraud is expressly identified in the regulation as one of the "financial offenses deemed detrimental to the Medicare program." P. Reply at 2.

The question, as the ALJ put it, is whether the felony crime of which Dr. Wiltz was convicted – making false statements – is similar to insurance fraud. The ALJ determined that Dr. Wiltz's felony offense is sufficiently similar to insurance fraud, and, accordingly, there is a qualifying felony conviction for purposes of revoking Petitioners' enrollment and billing privileges under subsection 424.535(a)(3). ALJ Decision at 7-8.

We agree with the ALJ that there is a qualifying felony conviction in this case. Petitioners do not dispute that Dr. Wiltz made false statements, concerning insurance claim money that he received as a beneficiary of the Hartford policy after the destruction (by fire) of his furniture business, to a federal agent who was investigating for arson and insurance fraud, or that Dr. Wiltz's former business partners were convicted of insurance

[10] The regulation in effect before the February 3, 2015 revision (42 C.F.R. § 424.535(a)(3)(i)(B)), like the revised regulation in effect since February 3, 2015 (42 C.F.R. § 424.535(a)(3)(ii)(B)), identified "insurance fraud" as a "financial crime" and stated that revocation may be based upon "insurance fraud and other similar crimes."

fraud (and arson). P. Br. at 1; NA at 2; P. Reply at 2; CMS Ex. 6, at 4-5. Moreover, as the ALJ noted, while the record did not include a transcript of Dr. Wiltz's plea allocution, in pleading guilty to a violation of 18 U.S.C. § 1001(a)(2), Dr. Wiltz at a minimum admitted to making a materially false, fictitious, or fraudulent statement or representation in the course of an ATF investigation into arson and insurance fraud. ALJ Decision at 8; CMS Ex. 6, at 14 (Count Eight of the indictment, stating that, "[o]n or about September 14, 2007, . . . defendant WILTZ knowingly and willfully made materially false and fraudulent statements and representations in a matter within the jurisdiction of the ATF . . . ." in violation of 18 U.S.C. § 1001(a)(2)). Thus, despite Petitioners' attempt to distance Dr. Wiltz's statements from the insurance fraud scheme and ATF's investigation into that scheme, it is apparent to the Board, as it was to the ALJ, that Dr. Wiltz made false or fraudulent statements concerning insurance money that could have been obtained by fraud, to a federal agent who was investigating into insurance fraud. There is, therefore, a connection (and in our view a strong one) between Dr. Wiltz's crime of making false statements – which we note concerned a financial matter because the statements were about insurance money put into a bank account for a business Dr. Wiltz had owned – and insurance fraud. The undisputed evidence supports such a connection, and Petitioners nowhere specifically argue, or show, that there is no relationship between Dr. Wiltz's crime of making false statements and insurance fraud.

Moreover, as the Board decisions discussed above state, for purposes of revocation under section 424.535(a)(3), CMS is not precluded from determining on a case-by-case basis whether a crime or category of crime that is not expressly identified in the regulation is detrimental to the Medicare program and its beneficiaries. It is plainly evident that, in this case, CMS determined that the crime of making false statements is a crime detrimental to the Medicare program and its beneficiaries because making false statements, like insurance fraud, which ATF was investigating when the investigator questioned Dr. Wiltz about the insurance money, implicates the supplier's trustworthiness that is considered essential for maintaining the integrity of the Medicare program and protecting program funds. CMS Ex. 5, at 4 (stating that Dr. Wiltz's felony offense of making false statements in connection with a "very serious criminal investigation" into insurance fraud and arson indeed raises a concern about Dr. Wiltz's "trustworthiness and veracity" and that permitting Petitioners to remain enrolled could put Medicare Trust funds at risk). Petitioners nowhere squarely challenge the ALJ's determination (with which we agree) that, even assuming that making false statements is not similar to insurance fraud, CMS nevertheless had a legal basis to revoke pursuant to section 424.535(a) because, in exercising its discretion, it determined that Dr. Wiltz's crime of making false statements, in light of the circumstances of this case, is a crime detrimental to the Medicare program and its beneficiaries and, thus, it had a basis for revocation. ALJ Decision at 8-9. The ALJ's determination was consistent with the Board decisions (a number of which we discussed earlier) that the ALJ cited in her decision.

Where, as here, a basis for revocation exists under subsection 424.535(a)(3), CMS is "legally entitled to revoke" the suppliers' billing privileges. *Ahmed* at 19. Once CMS, in exercising its discretion, proceeds with revocation because, as it determined here, the supplier's crime is detrimental to the Medicare program and its beneficiaries, on appeal, the ALJ and the Board must uphold the revocation if there is a legal basis for revocation. *Bussell* at 13; *Fayad* at 16. Accordingly, it is immaterial here whether Dr. Wiltz's offense was "egregious" or "non-egregious," or why Dr. Wiltz made the false statements, or that he regrets what he did. That Dr. Wiltz has complied with court-imposed sentencing requirements and the potential impact of revocation on the patients Petitioners have served have no bearing on the question of whether there is or is not a legal basis for revocation under subsection 424.535(a)(3). If, as here, CMS has a basis for revocation, the Board must uphold the determination to revoke without regard to, e.g., the scope or seriousness of the supplier's criminal conduct and the potential impact of revocation on the supplier's patients, that CMS might reasonably have weighed to determine whether to proceed with revocation. *See Fayad* at 16.

II. The undisputed facts also establish two additional bases for revocation, under 42 C.F.R. § 424.535(a)(4) and (a)(9).

As discussed above, CMS has a legal basis for revoking Petitioners' billing privileges under subsection 424.535(a)(3), and we have upheld the ALJ's affirmance of CMS's determination to revoke on that basis. Therefore, the revocation would stand, regardless of the existence of any additional bases for revocation. Nonetheless, we agree with the ALJ that the undisputed facts establish two additional bases for revocation, 42 C.F.R. § 424.535(a)(4) and (a)(9).

Petitioners do not dispute that Dr. Wiltz failed to disclose his 2013 felony conviction in an enrollment application form that he signed in 2015. ALJ Decision at 9. Nor do they dispute that they failed to report the conviction in accordance with 42 C.F.R. § 424.516(d)(1)(ii). *Id.* at 10. Therefore, the undisputed facts establish the failure to disclose the conviction in the enrollment application form and to report it timely and, thus, two additional bases for revocation exist, 42 C.F.R. § 424.535(a)(4) and (a)(9).

Petitioners state that Dr. Wiltz failed to report his conviction because he mistakenly believed that it was "not necessary" to do so. NA at 2. Dr. Wiltz states that he was "told to continue with his practice as always so he can make restitution as ordered by the Court." *Id.* But Dr. Wiltz's sentencing obligations arising from his conviction are one thing; his (and his practice's) obligations under the 42 C.F.R. Part 424, subpart P regulations as enrolled suppliers are quite another. Dr. Wiltz had legal notice of his (and his practice's) obligations under the Part 424, subpart P enrollment regulations. Those

regulations require suppliers to report enrollment information, including changes and updates to their enrollment information, and, specifically, to timely report any adverse legal action. 42 C.F.R. §§ 424.510(a), 424.515(a), 424.516(d). Petitioners were also on legal notice that CMS could revoke billing privileges if a supplier certifies as true misleading or false information in an enrollment application or fails to comply with certain reporting requirements. 42 C.F.R. § 424.535(a)(4), (a)(9).

III. The ALJ correctly determined that she did not have authority to review CMS's determination to revoke based on equity reasons; neither does the Board.

Petitioners asked the ALJ to consider the adverse impact revocation of their enrollment and billing privileges would have on the beneficiaries in the rural community in which Dr. Wiltz practices. ALJ Decision at 10. The ALJ stated that, "[t]o the extent Petitioners are arguing that revocation of their Medicare enrollment and billing privileges is inequitable under the circumstances presented, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances." *Id.* at 10, citing *Bussell* at 13. The ALJ went on to state that if, as here, "CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review." *Id.* at 11, citing *Bussell* at 10.

Petitioners raise a similar argument before the Board, stating that revoking their enrollment and billing privileges based on Dr. Wiltz's conviction for what they characterize as a "non-egregious" crime carrying an "extremely light" sentence would impede patient access to primary care physician services. NA at 2; P. Reply at 2. Petitioners also state that Dr. Wiltz, who has a record of distinguished service in the military, has complied with all of the court-imposed sentencing obligations. NA at 2; RFH at 2. Dr. Wiltz again expresses regret for not having been honest with the ATF investigator and states that he "panicked" during the interview with the investigator and "made a very human error in judgment." NA at 2, 3; RFH at 2.

To the extent Petitioners' statements, taken together, may be construed as a request for restoration of their billing privileges on equity grounds, the Board has said that ALJs and the Board are not empowered to grant equitable relief. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 15 (2016) (and cases cited therein).

Conclusion

The Board affirms the ALJ Decision.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member