

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Brenda Lee Jackson
Docket No. A-17-72
Decision No. 2903
October 12, 2018

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Brenda Lee Jackson (Petitioner) appeals the February 17, 2017 decision of the Administrative Law Judge (ALJ). *Brenda Lee Jackson*, DAB CR4794 (2017) (ALJ Decision). In that decision, the ALJ affirmed a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner’s Medicare enrollment and billing privileges due to her felony conviction for Driving Under the Influence of Alcohol or Drugs (DUI), for submitting false or misleading information on her Medicare enrollment application, and for failing to report within 30 days an adverse legal action. ALJ Decision at 2-3. For the reasons discussed below, we affirm the ALJ’s decision.

Legal Background

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act) §§ 1811, 1833.¹ Medicare is administered by CMS, which delegates certain program functions to private contractors that function as CMS’s agents in administering the program – in this case, Wisconsin Physicians Service (WPS). *See* Act §§ 1816, 1842, 1866, 1874, 1874A; 42 C.F.R. § 421.5(b).

The relevant regulations governing Medicare enrollment are found in 42 C.F.R. Part 424, subpart P (§§ 424.500 through 424.570). In order to receive Medicare payment for items or services furnished to program beneficiaries, a provider or supplier must be “enrolled” in Medicare. 42 C.F.R. § 424.505. A key purpose of enrollment is to ensure that

¹ The current version of the Social Security Act can be found at https://www.ssa.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 https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

providers and suppliers comply with eligibility and other requirements for program participation and payment. The regulations at 42 C.F.R. § 400.202 define a “supplier” as “a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare.”

CMS has broad authority to revoke Medicare enrollment and billing privileges of a provider or supplier convicted of felonies that the Secretary determines to be detrimental to the best interests of the program and its beneficiaries. *See* Act § 1866; 42 C.F.R. § 424.535(a). Section 424.535(a) authorizes CMS to revoke the Medicare enrollment of a supplier for any of the “reasons” specified in paragraphs one through 14 of that section. 42 C.F.R. § 424.535(a). The enumerated reasons for revocation include conviction of a felony which CMS determines to be detrimental to the Medicare program and its beneficiaries:

(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:

(3) *Felonies.* (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

The enumerated reasons for revocation also include submission of false or misleading information on a Medicare enrollment form:

False or misleading information. The provider or supplier certified as “true” misleading or false information on the enrollment application ... in the Medicare program.

Section 424.535(a)(4). Another reason for revocation is failing to timely report an adverse legal action:

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.

Section 424.535(a)(9). Physicians and non-physician practitioners must report, within 30 days, any adverse legal action to their Medicare contractor. *See* § 424.516(d)(1)(ii).

The effective date of revocation is determined in accordance with § 424.535(g). That regulation states, in relevant part, that “[w]hen a revocation is based on . . . a felony conviction . . . , the revocation is effective with the date of . . . felony conviction” 42 C.F.R. § 424.535(g); *Dinesh Patel, M.D.*, DAB No. 2551, at 3 (2013). Where the felony conviction occurred prior to but within 10 years of the supplier’s Medicare enrollment, the Board has upheld revocation as of the effective date of the supplier’s Medicare enrollment. *See Neil Niren, M.D. & Neil Niren, M.D., P.C.*, DAB No. 2856, at 6 (2018).

If a supplier has its billing privileges revoked, it is barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. *See* § 424.535(c). 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. *See* § 424.535(c)(1).

Section 1866(j)(8) of the Act provides administrative and judicial hearing rights to suppliers whose Medicare billing privileges are revoked. CMS implemented § 1866(j) by providing administrative hearing rights for revoked suppliers in 42 C.F.R. §§ 424.545 and 405.800, 405.803 and Part 498.

Case Background²

On July 29, 2010, Petitioner, a nurse practitioner in the state of Kansas, was convicted in state court of Driving Under the Influence of Alcohol or Drugs 4th or Subsequent (DUI), in violation of Kansas Statute § 8-1567g. CMS Ex.1. On February 24, 2015, Petitioner submitted a Medicare enrollment form CMS-855I application, in which she failed to disclose her conviction in response to questions pertaining to her past adverse legal history. CMS Ex. 5, at 14-15. She signed the application’s certification statement attesting that the information contained in her application was “true, correct, and complete.” *Id.* at 62-63.

On March 10, 2016, WPS notified Petitioner that CMS had determined to revoke her Medicare enrollment effective January 28, 2015 (Petitioner’s effective date of enrollment), pursuant to 42 C.F.R. § 424.535(a)(3), because it had discovered her July 2010 felony conviction for driving under the influence pursuant to 42 C.F.R. § 424.535(a)(4); because she had submitted false or misleading information in her enrollment application when she certified that the information in her application was

² The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

“true, correct, and complete” without disclosing the 2010 DUI conviction; and pursuant to 42 C.F.R. § 424.535(a)(9), because Petitioner had failed to notify CMS of the adverse legal action within 30 days as required under 42 C.F.R. § 424.516. CMS Ex. 2. CMS also imposed a three-year bar to re-enrollment in the Medicare program.³ *Id.*

Petitioner requested reconsideration, arguing that her conviction was not the kind of felony described in § 424.535(a)(3) of the regulations, and that, therefore, she neither provided false or misleading information by certifying the truth of the contents of her enrollment application nor failed to report an adverse legal action in violation of § 424.516 of the regulations. Therefore, Petitioner argued, CMS did not have a legal basis to revoke her Medicare enrollment under §§ 424.535(a)(3), (a)(4) or (a)(9). *See* CMS Ex. 3.

On July 8, 2016, a WPS hearing officer issued a reconsidered determination upholding the initial determination on the same three grounds. CMS Ex. 4. The hearing officer concluded that CMS had a legal basis under §§ 424.535(a)(3), (a)(4) and (a)(9) to revoke Petitioner’s Medicare enrollment. *Id.* The hearing officer reasoned that CMS may revoke Petitioner’s Medicare enrollment and billing privileges pursuant to § 424.535(a)(3) because conviction of a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries includes, but is not limited to, the criminal offenses enumerated in the regulation at § 424.535(a)(3)(ii)(A)-(D). *See id.* at 1. Although DUI is not one of the enumerated offenses, the hearing officer nonetheless concluded, following review of “all the files, submitted with the reconsideration request, . . . that [Petitioner’s] felony conviction is detrimental to the best interest of the Medicare program and its beneficiaries.” *Id.* at 2. In addition, Petitioner provided false or misleading information, the hearing officer concluded, when she certified as true the enrollment application in which she answered “no” to the question whether she had any adverse legal history. *Id.* Further, the hearing officer concluded that a felony conviction is an adverse action and, therefore, § 424.516(d)(1)(ii) required Petitioner to disclose her conviction within 30 days and that she had failed to do so. *Id.* Petitioner requested an ALJ hearing.

In her Request for Hearing (RFH), Petitioner made one central argument from which the others derived: her felony conviction was not the type of conviction to warrant revocation; therefore, she did not submit false or misleading information in her enrollment application when she failed to disclose the conviction when required to list any adverse legal action, and she did not fail to report an adverse legal action as required by 42 C.F.R. § 424.516. RFH at 2.

³ On appeal, Petitioner does not challenge the effective date of revocation or the three-year re-enrollment bar. Therefore, we do not discuss these matters any further in this decision.

CMS moved for summary judgment, arguing that Petitioner disputed neither the fact of her conviction nor that it occurred within 10 years of her Medicare enrollment. CMS Brief in Support of its Motion for Summary Judgment at 4. CMS further argued that Petitioner did not contend that she disclosed the fact of her felony conviction on her Medicare enrollment application where required. *Id.* at 7. CMS rejected Petitioner's argument that her conviction was not one of the types enumerated in § 424.535(a)(3)(ii) so she was not obligated to report her felony DUI conviction, arguing instead that CMS had discretion to revoke Medicare enrollment and billing privileges regardless of whether the particular crime is specified in the regulation's enumerated crimes. *Id.* at 5 (citing *Stanley Beekman, D.P.M.*, DAB No. 2650, at 7 (2015)). CMS argued that it had reasonably determined that Petitioner's fourth DUI conviction⁴ was detrimental to the best interests of the Medicare program and its beneficiaries. *Id.* at 6 (citing CMS Ex. 4, at 2).

Petitioner opposed CMS's summary judgment motion, arguing that whether Petitioner's felony posed "any immediate risk to the Medicare program and its beneficiaries" is a disputed material fact because her felony was unlike the financial or other types of crimes CMS relied upon in reaching its revocation determination. Petitioner's Response to Motion for Summary Judgment.

The ALJ sustained CMS's revocation determination in his decision on the written record, having received CMS's five exhibits and Petitioner's four exhibits into the administrative record. ALJ Decision at 1. He concluded that CMS had three valid bases for revocation: 1) felony conviction within the ten years preceding enrollment; 2) providing false or misleading information on her enrollment application; and 3) the failure to report the fact of her conviction within 30 days. *Id.* at 2-3. The ALJ reasoned that although DUI was not among the types of cases expressly listed in the regulation as examples of crimes on which revocation could be based, "CMS has the discretion to determine, on a case-by-case basis, whether a particular felony conviction – even if it is for a crime that is not one of the listed examples in 42 C.F.R. § 424.535(a)(3) – justifies revocation of billing privileges." *Id.* at 2 (citing *Fady Fayad, M.D.*, DAB No. 2266, at 8 (2009), *aff'd Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E. D. Mich. 2011)). In addition, the ALJ found that Petitioner's application responses were false when she answered "no" when required to state whether in the past ten years "she had experienced an adverse legal action," "despite having been convicted of felony [DUI] during that period." *Id.* The ALJ also found that Petitioner had failed to report within 30 days the fact that she was convicted of DUI within the past ten years, as is required by 42 C.F.R. § 424.516(d)(1)(ii). *Id.* at 3. The ALJ rejected Petitioner's contentions that her failure to report her felony DUI conviction

⁴ See P. Ex. 2, at 5 (Petitioner admits in a 2007 employment application to four prior DUI *arrests* resulting in three prior *convictions*, making the 2010 conviction her fourth).

was “inadvertent” and that she “failed to recognize the legal significance of her conviction,” reasoning that the 2010 conviction was her fourth DUI and that therefore she should have understood the significance of this latest conviction. *Id.* (citing P. Ex. 2, at 5). The ALJ was similarly unpersuaded by Petitioner’s argument that CMS had failed to present testimony or other evidence of Petitioner’s DUI conviction’s detrimental effect on the Medicare program, contrasted with her written direct testimony (with supporting exhibits) that her conviction had no detrimental effect on the Medicare program. *Id.* This appeal followed.

Standard of Review

The Board’s standard of review on a disputed factual issue is whether the ALJ decision or ruling is supported by substantial evidence in the record. *Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program* (at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html>). The standard of review on a disputed issue of law is whether the ALJ decision or ruling is erroneous. *Id.*

Petitioner’s Request for Review

On appeal, Petitioner argues that the ALJ erred by not holding a hearing to take live testimony, contending that she was denied the opportunity to “provide other information that the ALJ would have found [] relevant to the issues and which would have had an influence on his decision to rule in favor of Petitioner.”⁵ Petitioner’s Request for Review of ALJ Decision (RR) at 1. Petitioner also argues that she did not provide false and misleading information on her Medicare enrollment application, or intentionally omit her negative legal history, because a third-party independent contractor, not Petitioner herself, prepared the application for her and neglected to ascertain the extent of her negative legal history. *Id.* at 2. Petitioner argues, moreover, that she did not fail to report her conviction to her Medicare contractor within 30 days because she was convicted of DUI approximately five years prior to applying to enroll in Medicare (and thus had no contractor to which to report the conviction).⁶ *Id.* at 3. The ALJ erred, Petitioner claims, when he concluded that Petitioner said she failed to recognize the legal significance of

⁵ While the language of § 1866(j)(8) of the Act does not specifically refer to hearing rights for enrolled providers and suppliers whose billing privileges are revoked, CMS has interpreted it as providing hearing rights in such cases. *Conchita Jackson, M.D.*, DAB No. 2495, at 2 (2013) (citing *e.g.*, 42 C.F.R. § 498.1(g); 72 Fed. Reg. 9479 (March 2, 2007)).

⁶ We explain in subsection three in the analysis section of this Decision why we need not adjudicate this aspect of CMS’s revocation determination to resolve this appeal.

her conviction, because evidence in the record shows she disclosed her conviction to the Kansas state nursing licensing board and on her employment applications. *Id.* Further, Petitioner contends that the ALJ erred when he concluded that “her assertion of innocent error” was not credible. *Id.* Finally, Petitioner argues that no evidence suggests “that the conviction placed the Medicare program or its beneficiaries at *immediate risk*.” *Id.* at 4 (emphasis in original). She asserts that to the extent that her argument to the ALJ was unclear:

[S]he does not deny the conviction for DUI nearly 5 years before preparation and submission of her application by someone other than her. She does not deny that the adverse action was omitted, albeit, inadvertently and innocently; and she does not deny she did not report the adverse legal action within 30 days to her Medicare contractor, even though she did not have a Medicare contractor at the time.

Id. Subsequently, she again framed the issue before the Board as a question of immediate risk:

The only thing left to address is did the conviction place the Medicare program or its beneficiaries at *immediate risk*?

Id. at 5 (emphasis in original). Petitioner also argues that there is no evidence that her five-year-old felony DUI conviction is detrimental to the best interests of the Medicare program and its beneficiaries, and that while the regulation provides that “CMS *may* revoke privileges for conviction of felonies,” “it doesn’t say CMS *must* revoke.” *Id.* (italics in original) (footnote omitted).

Analysis

A. *The ALJ Decision upholding revocation based upon sections 424.535(a)(3) and (a)(4) is supported by substantial evidence in the record and is free from legal error.*

1. The ALJ correctly decided that the record established a qualifying felony conviction for purposes of revocation under 42 C.F.R. § 424.535(a)(3).

Petitioner argues that her crime, driving under the influence, was not detrimental to the interests of the Medicare program and its beneficiaries. RR at 5. Specifically, Petitioner argues that the ALJ erred when he relied on the Board’s decision in *Fady Fayad, M.D.*, on the ground that the *Fayad* decision is not on point because the felony in that case was

against the government.⁷ *Id.* at 1. However, the Board has repeatedly held that if the conviction is for a crime other than one of the enumerated felonies, CMS may make the determination, on a case-by-case basis, whether the felony conviction at issue is detrimental to the Medicare program and its beneficiaries. *See, e.g., Saeed A. Bajwa, M.D.*, DAB No. 2799, at 10 (2017) (citing *Fayad* court decision as holding that “prefacing a list with the word ‘including’ indicates that the list is illustrative, not exclusive and, concluding, therefore, that the fact that conspiracy to defraud was not one of the listed offenses did not render the Secretary’s decision erroneous.” 803 F. Supp. 2d at 704); *see also* § 424.535(a)(3)(i).

We find no error in the ALJ’s reliance on the reasoning in *Fayad* because it is consistent with the application of the regulation to the facts in this case. When CMS revised the Medicare regulations (effective February 2015) establishing requirements for provider and supplier enrollment, it expressly declined to automatically exclude “felonies relating to drugs, alcohol, or traffic violations” from the purview of § 424.535(a)(3)(i) of the regulations. *See* 79 Fed. Reg. 72,500, 72,510 (Dec. 5, 2014) (preamble). Rather than expand the scope of the regulation to include all felonies, CMS instead modified “the list of felonies in each section such that any felony conviction that we determine to be detrimental to the best interests of the Medicare program and its beneficiaries would constitute a basis for denial [of enrollment] or revocation.” *Id.* at 72,509. CMS reasoned that due to “the serious nature of any felony conviction, our authority in §§ 424.530(a)(3)(i) and 424.535(a)(3)(i) should not be restricted to the categories of felonies identified in (a)(3)(i).” *Id.* at 72,509-72,510. Further, CMS explained that it takes the severity of the underlying offense into account when determining whether denial or revocation is warranted, and that “each case will be carefully reviewed on its own merits and . . . we will act judiciously and with reasonableness in our determinations.” *Id.* at 72,510. CMS also saw the “need for flexibility with respect to the application of §§ 424.530(a)(3)(i) and 424.535(a)(3)(i)” and stated that CMS does “not believe that felonies relating to drugs, alcohol, or traffic violations cannot be detrimental to the best interest of Medicare beneficiaries, and thus should be automatically excluded from the purview of §§ 424.530(a)(3) and 424.535(a)(3).” *Id.* Therefore, CMS could conclude, on the facts of a particular case, that felony DUI is detrimental to the Medicare program and establishes the legal basis for revocation.

Here, CMS concluded that Petitioner’s felony DUI conviction was detrimental to the Medicare program. CMS Ex. 4, at 2 (“A discretionary review of all the files, submitted with the reconsideration request, has been conducted and it has been determined that [Petitioner’s] conviction is detrimental to the best interest of the Medicare program and its beneficiaries.”). In reaching this conclusion, CMS reviewed Petitioner’s

⁷ *Fayad* was convicted of a felony for conspiracy to defraud the United States. *See Fayad* at 4.

reconsideration request (CMS Ex. 3). *Id.* CMS noted that Petitioner’s 2010 conviction was for a fourth or subsequent DUI under Kansas law. *Id.* As noted above, CMS takes “the severity of the underlying offense” into account in determining whether a felony conviction is detrimental to the Medicare program and its beneficiaries. 79 Fed. Reg. 72,510. Petitioner has not produced any evidence to show that CMS failed to consider the severity of the felony or that it otherwise failed to exercise its discretion in reaching its determination that Petitioner’s felony conviction was detrimental to Medicare and therefore a legal basis for revocation under § 42 C.F.R. § 424.535(a)(3).

Petitioner also argues that there is no evidence that her felony conviction “placed the Medicare program or its beneficiaries at immediate risk.” RR at 1. However, CMS was not required to prove that Petitioner’s felony was one that placed the Medicare program or its beneficiaries at immediate risk. The regulation provides that various types of felony convictions have been categorically determined to warrant revocation of a provider’s or supplier’s Medicare enrollment and billing privileges. *See* 42 C.F.R. § 424.535(a)(3)(ii)(A)-(D). In addition to felony crimes against persons, financial crimes, and felonies which would result in mandatory exclusion from Federal health care programs, CMS also may revoke a provider’s enrollment if the felony “placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.” 42 C.F.R.

424.535(a)(3)(ii)(C). In this case, CMS did not base the revocation on a claim that Petitioner’s felony was in the latter category. Instead, CMS made a case-by-case determination that Petitioner’s felony DUI conviction was detrimental to the Medicare program and its beneficiaries, thereby obviating any need for CMS to also find that Petitioner’s felony conviction posed an immediate risk. Accordingly, Petitioner’s arguments that her DUI conviction may not form the legal basis for revocation are unavailing.

We therefore conclude that the ALJ correctly determined that CMS had a valid basis to revoke Petitioner’s billing privileges under section 424.535(a)(3).

2. The ALJ correctly decided that the evidence establishes a lawful basis for revocation under 42 C.F.R. § 424.535(a)(4) because Petitioner certified false or misleading information on her Medicare supplier enrollment application.

Petitioner admits that she omitted the 2010 DUI from her Medicare enrollment application where required to disclose adverse legal actions. RR at 4. Petitioner contends, however, that she innocently and inadvertently omitted her 2010 DUI conviction from her Medicare enrollment application because a third-party (“independent contractor”) had prepared the application and failed to ascertain whether she had an adverse legal action to report. *Id.* at 2. Section 424.535(a)(4) provides, in pertinent part, for revocation of Medicare enrollment for:

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.

Petitioner signed the certification statement of her Medicare enrollment application on February 24, 2015. CMS Ex. 5, at 62 (“I have read the contents of this application, and the information contained herein is true, correct, and complete.”); 63. Section three of the application, comprising pages 12-13, instructs applicants to identify their criminal convictions and other adverse legal actions and provides a space in which to list them. *Id.* at 49-50. Where the application form posed the question: “Have you, under any current or former name or business identity, ever had a final adverse legal action listed on page 12 of this application imposed against you?” Petitioner checked a box next to the word “NO.” *Id.* at 50. Petitioner left blank the remainder of section three of the application she certified on February 24, 2015. *Id.* By certifying the application without disclosing her 2010 DUI conviction, Petitioner certified as true an application which falsely asserted that she had no adverse legal actions to disclose.

Petitioner’s explanation for omitting the 2010 DUI conviction from her Medicare enrollment application is unavailing. In her written direct testimony, Petitioner contends that, unlike in previous employment applications which were “very general and simply ask[ed] about any felonies or diversion agreements[,]” “section 3 on page 12 of the CMS application . . . inquires specifically about specific crimes [such as] fraud, embezzlement, financial crimes, extortion, income tax evasion, insurance fraud, or any felony that placed the Medicare program or its beneficiaries at immediate risk.” P. Ex. A at 2, ¶ 8; *see also* CMS Ex. 5, at 49. Although Petitioner is correct that DUI (like myriad other felonies) is not listed on the enrollment application, that fact is immaterial to the issue before us. First, page 12 of the application directs applicants to disclose convictions, stating:

The provider, supplier, or any owner of the provider or supplier was, within the last 10 years preceding enrollment or revalidation of enrollment, convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. Offenses include

CMS Ex. 5, at 49. This language is similar to the language of the regulation at 42 C.F.R. § 424.535(a)(3). Thus, applying the reasoning articulated by the District Court in *Fayad v. Sebelius*, 803 F. Supp. 2d at 704, prefacing a list with the word “include” indicates that the list is illustrative, not exclusive. Therefore, the fact that DUI was not one of the listed offenses did not mean CMS erred when it determined that Petitioner’s DUI was the kind of felony requiring disclosure on a Medicare supplier enrollment application. Further, as courts and the Board have recognized, Medicare providers and suppliers, as participants

in the program, have a duty to familiarize themselves with Medicare requirements. *Gulf South Med. & Surgical Inst., & Kenner Dermatology Clinic, Inc.*, DAB No. 2400, at 9 (2011), *aff'd*, *Gulf South Med. & Surgical Inst., et al.*, 2:11-cv-02353 (E.D. La. Oct. 17, 2012); *John Hartman, D.O.*, DAB No. 2564, at 3 (2014) (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984) (“[T]hose who deal with the [g]overnment are expected to know the law[.]”)); *see also Thomas M. Horras & Christine Richards*, DAB No. 2015, at 34 (2006) (officer and principal of provider had responsibility to be aware of and adhere to applicable law and regulations), *aff'd*, *Horras v. Leavitt*, 495 F.3d 894 (8th Cir. 2007). Moreover, CMS made clear in the Subpart P regulations why the provider or supplier, or an individual authorized to bind the provider or supplier both legally and financially to the conditions of Medicare enrollment, must sign the enrollment application, stating:

The signature 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.

§ 424.510(d)(3). Petitioner, not the independent contractor, was duty bound to understand what she was causing the credentialing company to submit on her behalf to Medicare, and she authorized its submission by signing the application despite its omission of pertinent adverse legal actions. Petitioner cannot therefore pass blame to the independent contractor for her failure to familiarize herself with Medicare enrollment regulations. Had she done that due diligence, she should have known that her felony conviction was one which CMS could consider detrimental to Medicare (although CMS was not obliged to so consider it) and that she was required to disclose it in order to permit CMS to perform its discretionary determination about her case. We therefore conclude that the ALJ correctly determined that CMS had a valid basis to revoke Petitioner’s billing privileges under section 424.535(a)(4).

3. We need not consider whether Petitioner failed to report an adverse legal action within 30 days following her 2010 DUI conviction because substantial evidence in the record supports revocation on two other bases.

We affirm the ALJ Decision upholding revocation in this case under §§ 424.535(a)(3) and (a)(4). Each basis independently supports CMS’s revocation determination and Petitioner has provided no reason to reverse the ALJ Decision as to these two bases. *See Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (The only issue before an ALJ and the Board in enrollment cases is whether CMS has established a “legal basis for its actions.”); *accord Beekman*, at 10. Concluding that CMS was authorized to act under one of the bases for revocation enumerated in the regulations is all that is necessary to uphold revocation. *Donna Maneice, M.D.*, DAB No. 2826, at 8 (2017) (“CMS needs to establish only one ground for revocation.”). Accordingly, we need not consider whether a legal basis for revocation existed in this case under § 424.535(a)(9).

B. *The ALJ did not err by deciding the case on the written record without taking live testimony.*

Petitioner takes exception to several procedural facets of the ALJ's review. None of Petitioner's exceptions are cause to reverse the ALJ Decision. Petitioner argues:

The ALJ erred in determining that no purpose would be served by convening an in-person hearing. By doing so, Petitioner has been deprived of an opportunity to present her case and provide other information that the ALJ would have found . . . relevant to the issues and which would have had an influence on his decision to rule in favor of Petitioner.

RR at 1. The hearing procedures in subpart D of 42 C.F.R. Part 498, which applied here, generally contemplate an oral hearing at which witnesses will testify and may be cross-examined, unless the parties have waived their right to a hearing in writing. *See* 42 C.F.R. § 498.66. As the Board has stated, “[w]e do not lightly uphold any limitation on statutory hearing rights. However, . . . under certain circumstances, decision on the written record is appropriate even if the parties have not submitted a written waiver of their hearing rights.” *Marcus Singel, D.P.M.*, DAB No. 2609, at 5 (2014) (citing *Big Bend Hosp. Corp., d/b/a Big Bend Med. Ctr.*, DAB No. 1814, at 13 (2002), *aff'd*, *Big Bend Hosp. Corp. v. Thompson*, 88 F. App'x 4 (5th Cir. 2004)) (citation omitted). In *Big Bend*, the Board gave as an example a case where “the proffered testimony, even if accepted as true, would not make a difference.” *Id.*

In this case, the ALJ received the parties' exhibits into evidence, including Petitioner's Exhibits 1-4, comprising Petitioner's written direct testimony and supporting documents.⁸ ALJ Decision at 1. CMS offered no witness testimony and did not seek to cross-examine Petitioner. *Id.* The Board has addressed this issue in several cases, concluding that holding a hearing is unnecessary where all direct testimony is submitted in writing and neither party seeks to cross-examine witnesses, as the hearing would not add new evidence to the record, and that not holding a hearing in such an instance also raises no due process concerns. *See, e.g., Ronald J. Grason, M.D.*, DAB No. 2592, at 3 (2014) (noting that ALJ decided case on written record where neither party sought to cross-examine witnesses), *aff'd*, *Grason v. Burwell*, No. 14-2267 (D. Ill. Feb. 23, 2016), *aff'd*, 659 F. App'x 899 (7th Cir. 2016); *Keller Orthotics, Inc.*, DAB No. 2588, at 4 (2014)

⁸ In her appeal to the Board, Petitioner contends that she required an in-person hearing in order to “provide other information that the ALJ would have found . . . relevant to the issues and which would have had an influence on his decision to rule in favor of Petitioner.” RR at 1. The ALJ notified the parties of the procedures for the pre-hearing exchange of evidence and argument in his Acknowledgment and Prehearing Order, at 3-4. Petitioner had the opportunity to submit any “other information” “relevant to the issues” using those procedures. Petitioner was aware of and had followed those procedures to submit Petitioner's Exhibits 1-4, which the ALJ accepted.

(same). Petitioner submitted written testimony in this case, and the Board has previously determined in proceedings conducted under the Part 498 regulations that an ALJ has discretion to require direct testimony in written form, so long as the right to effective cross-examination is protected and no prejudice is shown. *HeartFlow, Inc.*, DAB No. 2781, at 17-18 (2017). In his Acknowledgment and Pre-Hearing Order, the ALJ notified the parties that he would “accept [a witness’s] written direct testimony as a statement in lieu of in-person testimony.” Ack. & Pre-Hr. Order at 5. In addition, the ALJ notified the parties that he would convene an in-person hearing *only* if a party filed admissible, written direct testimony *and* the opposing party asked to cross-examine that testimony. *Id.* at 6 (italics added). CMS elected not to cross-examine Petitioner. ALJ Decision at 1. Petitioner did not object to this process, even though she was aware that her written direct testimony had been accepted in place of her live testimony. Moreover, Petitioner was on notice that CMS’s decision not to cross-examine Petitioner eliminated the need for an in-person hearing. As we stated in *Singel*, where there is no challenge to the proffered testimony, there was nothing to be gained from holding an in-person hearing. *Singel* at 5-6. Accordingly, the ALJ was not required to convene such a hearing, despite Petitioner’s request for one.

Petitioner further contends that the ALJ erred when he found not credible Petitioner’s assertion that her omission of her felony DUI conviction from her enrollment application was an “innocent error” and concluded that she simply failed to recognize the legal significance of her conviction. RR at 3. In his decision, the ALJ explained his misgivings about the credibility of Petitioner’s explanation for not reporting her felony DUI conviction, stating:

She was convicted of a *felony* offense, a serious crime under Kansas law. Her conviction, for violation of [the Kansas statute] was her fourth conviction for driving while under the influence.

ALJ Decision at 3. The Board generally defers to an ALJ’s findings on credibility of witness testimony unless there are compelling reasons not to do so. *Cedar Lake Nursing Home*, DAB No. 2390, at 9 (2011), *aff’d*, *Cedar Lake Nursing Home v. U.S. Dep’t of Health & Human Servs.*, 481 F. App’x 880 (5th Cir. 2012); *Woodland Oaks Health Care Facility*, DAB No. 2355, at 7 (2010); *Koester Pavilion*, DAB No. 1750, at 16, 21-22 (2000). The Board finds such credibility determinations are appropriately made by the ALJ, even where, as here, a witness has not testified in person before the ALJ, because credibility can involve more than simply evaluating witness “demeanor” or other behavior apparent from in-person observation. *See Life Care Ctr. of Tullahoma*, DAB No. 2304, at 24 (2010) (*citing Ginsu Prods., Inc. v. Dart Industr., Inc.*, 786 F.2d 260, 263 (7th Cir. 1986) (“[F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the

witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it.”)), *aff'd*, *Life Care Ctr. Tullahoma v. Sec'y of U.S. Dep't of Health & Human Servs.*, 453 F. App'x 610 (6th Cir. 2011); *see also Michael D. Dinkel*, DAB No. 2445, at 10 (2012). Petitioner has offered no compelling reason for the Board not to defer to the ALJ's credibility determination in this case. The fact that the ALJ did not hear live testimony makes the ALJ's credibility determinations no less valid.

In *Dinkel*, the Board reasoned that “[t]he ALJ as factfinder is expected to consider the evidence and provide a rational explanation for rejecting or assigning less weight to evidence that tends to conflict with the findings made.” *Id.* at 12. The ALJ did that here. As we mentioned above, the evidence in the administrative record shows that Petitioner deflected responsibility for omitting from her Medicare enrollment application information about her 2010 felony DUI conviction to the third-party credentialing company which her employer had engaged to process her Medicare enrollment. P. Ex. A at 1, ¶¶ 2-5 (“Had I been asked, I would have reported to [the credentialing company] that I had felony convictions for DUI, just like I disclosed in the past, including to the Kansas Board of Nursing.”). Petitioner then argued that the CMS application asked about specific crimes relating to “immediate risk to the Medicare program and its beneficiaries” which did not apply to her, contrasted with other more general applications she had completed. *See id.* at 2 ¶ 8. On review, the Board determines whether the contested finding could have been made by a reasonable fact-finder “tak[ing] into account whatever in the record fairly detracts from [the] weight” of the evidence that the ALJ relied upon. *The Malaria & Rheumatic Disease Research Inst., Inc.*, DAB No. 2872, at 14 (2018) (and the cases cited therein). Here we conclude that a reasonable fact-finding about Petitioner's credibility on this point has been made. Further, Petitioner's contention that she understood the legal significance of her conviction (evinced by the fact that she had reported it to the Kansas Nursing Board and to employers) contradicts her claim that omitting her felony DUI conviction from her Medicare enrollment application was innocent error. We conclude that it was reasonable, in view of Petitioner's history of DUI convictions, for the ALJ to disbelieve Petitioner's testimony that, while she understood the seriousness of her 2010 DUI conviction, she innocently concluded that the application did not require its disclosure.

Conclusion

For the reasons stated above, we affirm the ALJ's decision upholding the revocation of Petitioner's Medicare enrollment effective January 28, 2015.

/s/
Constance B. Tobias

/s/
Leslie A. Sussan

/s/
Christopher S. Randolph
Presiding Board Member