Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Central Kansas Cancer Institute
Docket No. A-16-76
Decision No. 2749
November 14, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Central Kansas Cancer Institute (CKCI or Petitioner) requests review of an administrative law judge decision affirming the Centers for Medicare & Medicaid Services' (CMS's) determination to revoke its Medicare enrollment and billing privileges. *Central Kansas Cancer Institute*, DAB CR4567 (2016). The ALJ affirmed the revocation after concluding that 42 C.F.R. § 424.435(a)(3) authorized CMS to revoke Petitioner's Medicare supplier enrollment and billing privileges based on the conviction of its owner for felony aggravated battery on April 30, 2009. We affirm the ALJ Decision for the reasons explained below.

Legal Background

Providers and suppliers must enroll in the Medicare program in order to participate in the program. 42 C.F.R. §§ 424.500, .502, .505. Petitioner is a supplier for purposes of the Medicare enrollment requirements. 42 U.S.C. § 1395x(d); 42 C.F.R. § 400.202 (defining "supplier" as a physician or other practitioner or entity other than a provider of services that furnishes items or services under Medicare). Suppliers have "billing privileges" – that is, the right to claim and receive Medicare payment for items or services provided to Medicare beneficiaries – only when enrolled in the Medicare program. 42 C.F.R. § 424.505. "Physicians . . . and physician . . . practitioner organizations" must report to the Medicare (CMS) contractor within 30 days certain "reportable events," including "any adverse legal action." *Id.* § 424.516(d)(1)(ii).

The regulations in 42 C.F.R. Part 424, subpart P set out the requirements for establishing and maintaining Medicare billing privileges, and section 424.535(a) sets out the bases on which CMS may revoke a "currently enrolled . . . supplier's Medicare billing privileges and any corresponding . . . supplier agreement . . . ." Section 424.535(a)(3) provides for revocation of the enrollment and billing privileges of a supplier when the "supplier, or

any owner or managing employee of the . . . supplier was, within the preceding 10 years, convicted . . . of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries."[1] A list of "[o]ffenses" covered by the regulation includes, "but [is] not limited in scope and severity to[,] . . . [f]elony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted . . . ." 42 C.F.R. § 424.535(a)(3)(ii)(A).

When a revocation is based on a felony conviction, the revocation is effective the date of the conviction. *Id*. § 424.535(g). Once revocation occurs, the supplier is "barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," a minimum of one year or a maximum of three years. *Id.* § 424.535(c). A supplier may appeal a determination by CMS to revoke its Medicare enrollment under the procedures in 42 C.F.R. Part 498 but must first ask CMS for "reconsideration" of the initial revocation determination. *Id.* §§ 498.5(1), 498.22. A provider dissatisfied with the reconsidered determination may request a hearing before an ALJ. *Id.* § 498.40. Either party may seek Board review of an unfavorable ALJ decision. *Id.* § 498.80.

Case Background[2]

The Conviction of Petitioner's Owner and CMS's Revocation Action

Petitioner is a radiation oncology practice enrolled as a supplier in the Medicare program. ALJ Decision at 1. On April 30, 2009, a Kansas court convicted Dr. Russell L. Reitz, M.D., CKCI's sole owner, of aggravated felony battery, a level VII offense against a person under Kansas law. *Id.* at 1-2.[3] Dr. Reitz acknowledged "'that the battery resulted from an altercation with another man in a personal matter involving this man's

[1] This wording of section 424.535(a)(3) became effective in February 2015, prior to CMS's revocation action. *See* 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The previous wording, which was in effect when Petitioner's owner was convicted, was slightly different, but the differences are not material to our decision. *See* 42 C.F.R. § 424.535(a)(3) (Oct. 1, 2014) (stating that CMS may revoke the enrollment of a supplier when the "supplier, or any owner of the . . . supplier within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries").

[2] The facts stated in this section are from the ALJ Decision and the record and are stated only to provide background, not to replace the ALJ's findings. Unless otherwise noted, the facts stated are undisputed.

[3] The ALJ Decision contains a footnote explaining that the court's judgment entry contained a typographical error in the cited statute. ALJ Decision at 2 n.1. That entry stated that Dr. Reitz was convicted under "Kan. Stat. Ann. § 21-3414(1)(A)(c)." *See* CMS Ex. 5, at 1. However, the felony aggravated battery statute in place at the time was actually Kansas Annotated Statutes § 21-3414(a)(1). Petitioner does not dispute his conviction, the crime of which he was convicted (felony aggravated battery), or the statutory basis for the crime as clarified by the ALJ.

relationship with [h]is ex-wife.'" *Id.* at 2, *citing* P. Ex. 6, at 3. The court ordered Dr. Reitz to serve a 12-month prison sentence and 24 months of probation, but then suspended the prison sentence. *Id*., *citing* CMS Ex. 5, at 2. In September 2010, over the objection of the State of Kansas, the court granted Dr. Reitz's motion for early termination of probation. *Id*. at 2-3, *citing* P. Ex. 8, at 2-12. The Kansas State Board of Healing Arts suspended Dr. Reitz's medical license but reinstated it on October 23, 2010. *Id*. at 2, *citing* P. Ex. 7, at 2.

Between May 2011 and April 28, 2015, CKCI submitted various documents to Wisconsin Physicians Service (WPS), CMS's Medicare contractor,[4] beginning with an Electronic Funds Transfer (EFT) Authorization Agreement. *Id*. at 3, *citing* P. Ex. 9, at 4-5. On May 17, 2011, WPS notified Petitioner that it needed to submit additional information in order for WPS to process the EFT Authorization Agreement. *Id.* The additional information consisted of IRS verification of CKCI's legal business name and specified portions of the CMS application Form CMS-855I needed "to update [CKCI's] Organizational [National Provider Identifier.]" *Id*., *citing* P. Ex. 9, at 6. WPS informed Petitioner that it would not be able to process the EFT Authorization Agreement if Petitioner did not submit the additional information by June 16, 2011, and that Petitioner then "would be subject to revalidation procedures." *Id.*

CKCI submitted two different document sets in response to this request, one dated June 11, 2011 (submitted on June 14, 2011), the other dated July 6, 2011. *Id*., *citing* P. Ex. 7, at 22, 23. These different sets included "portions of two different Form CMS-855Is," including "two unique versions" of the sections dealing with final adverse actions and certification statement. *Id*., *citing* P. Ex. 9, at 15-17, 21-22. Both versions, albeit in somewhat different language, indicated that a final adverse action involving aggravated battery had been taken against Dr. Reitz but that probation had ended, and both versions also indicated that the State had suspended Dr. Reitz's medical license; however, only the first version indicated that the suspension had ended in September 2010. *Id*., *citing* P. Ex. 9, at 15-16.

On July 26, 2011, WPS approved CKCI's EFT Authorization Agreement, sending CKCI a notice that stated, in important part, that WPS had "'approved [its] CMS-855 application to change [its] Medicare enrollment information.'" *Id.*, *citing* P. Ex. 9, at 1. The notice letter "specified that the updated information consisted of '[s]ignature verification for EFT & Updated NPI to PECOS.'" *Id*. The notice letter "did not indicate that the contractor had revalidated CKCI's enrollment or had updated any information

[4] Throughout its Request for Review, Petitioner refers to WPS as the "MAC" which we understand to mean the "Medicare administrative contractor," which is WPS.

regarding final adverse actions."[5] *Id*., *citing* P. Ex. 9, at 1-3. The letter advised CKCI that in order to maintain enrollment in the Medicare program, "it needed to submit updates and changes to its enrollment information to include reporting 'final adverse legal actions, such as felony convictions' within specified timelines." *Id*. at 4, *quoting* P. Ex. 9, at 2-3.

On or about April 28, 2015, Petitioner submitted an enrollment revalidation application to WPS. *Id*., *citing* CMS Ex. 4. In that application, Petitioner "reported that its owner, Dr. Reitz, had a final adverse action of 'unrelated felony conviction' on April 30, 2009, and that the resolution was a '12 mo. sentence suspended.'" *Id*., *quoting* CMS Ex. 4, at 14. The application also mentioned the suspension and reinstatement of Petitioner's license. *Id.* On July 22, 2015, after receiving CKCI's revalidation application, WPS notified Petitioner that its Medicare enrollment and billing privileges were being revoked effective April 30, 2009. *Id*., *citing* CMS Ex. 1. WPS's revocation notice letter cited the April 30, 2009 felony conviction of Petitioner's owner as authorizing revocation under 42 C.F.R. § 424.535(a)(3). *Id.* The notice letter also identified Petitioner's failure to timely report Dr. Reitz's felony conviction as a basis for the revocation under 42 C.F.R. § 424.535(a)(9).[6] CMS Ex. 1. The notice letter further informed Petitioner that it was barred from applying to re-enroll in the Medicare program for a period of three years, effective 30 days from the postmark date of the letter. ALJ Decision at 4, *citing* CMS Ex. 1, at 1-2.

On August 14, 2015, Petitioner wrote WPS and, as quoted by the ALJ, stated the following:

> While we are still considering pursuing reconsideration of your decision, we are hoping this matter can be resolved without doing so by the Institute terminating its "business relationship" with Dr. Reitz on or before August 21, 2015. Dr. Reitz is currently the primary owner of the Institute's (the provider's) practice.

[5] Although Petitioner claims this notice letter constituted an "initial determination" to continue CKCI's enrollment (Request for Review (RR) at 4), a claim the ALJ rejected, Petitioner does not dispute the ALJ's findings as to what the notice letter actually stated.

[6] The ALJ concluded that given her determination that the revocation was authorized under section 424.535(a)(3), she did not need to determine whether Petitioner was required to timely inform CMS of its owner's felony conviction. ALJ Decision at 6, n.6. The ALJ further concluded that because it was unnecessary to reach this issue, she did not need to address Petitioner's request for a subpoena for "any and all records in WPS' possession containing disclosure of the . . . conviction . . ." *Id.* Petitioner does not challenge these conclusions on appeal, and the ALJ was correct that finding the revocation authorized on one of the regulatory bases was sufficient to uphold it. We also note that the documents Petitioner submitted to WPS in June and July 2011 which Petitioner alleges gave notice of Dr. Reitz's conviction were submitted more than two years after Dr. Reitz's conviction, not "within 30 days" as section 42 C.F.R. § 424.516(d)(1)(ii) requires.

> As you know, under 42 C.F.R. § 424.535(e), if a revocation is based on an owner's commission of a felony, the revocation can be reversed if the owner terminates his business relationship with the provider within 30 days of the notice of the revocation.

Id. at 5, *citing* P. Ex. 1, at 2.

On August 24, 2015, Dr. Reitz, as the owner of Petitioner, and J.M., M.D., and J.M., OTD, on behalf of the "Purchaser," entered into a "Letter of Intent for Purchase of Stock."[7] *Id*., *citing* P. Ex. 3, at 2-6.

On September 1, 2015, Petitioner requested reconsideration of the July 22, 2015 revocation determination. *Id*., *citing* CMS Ex. 2. In its letter requesting reconsideration, Petitioner did not deny that its owner, Dr. Reitz, had been convicted of a felony against a person. *Id*., *citing* CMS Ex. 2, at 1-4. Petitioner stated, however, that Dr. Reitz had "'terminated all business affiliation with CKCI.'" *Id*., *quoting* CMS Ex. 2, at 3. Petitioner also stated that "Dr. Reitz 'has been diligently pursuing buyers of the practice since August 14.'" *Id.*

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

Petitioner filed its hearing request on September 16, 2015. On the same day, Petitioner entered into an "'Asset Purchase Agreement.'" *Id*., *quoting* CMS Ex. 5, at 3-41. "The Asset Purchase Agreement effectuated the sale of Petitioner from Dr. Reitz to JMac Radiation Oncology and Diagnostics, LLC (JMac). *Id*. at 6, *citing* CMS Ex. 5, at 3-41.

The ALJ Proceeding

The ALJ based her decision on the written record, after concluding that an in-person hearing was not necessary since CMS had not requested an opportunity to cross-examine Dr. Reitz, the only witness for whom written direct testimony had been submitted. ALJ Decision at 6. The record included the parties' briefs, CMS Exhibits 1-6, and Petitioner

[7] The ALJ also noted, correctly, that the record contained an unsigned "Confidentiality and Non-Disclosure Agreement," dated August 17, 2015, showing negotiations regarding a sale of Petitioner but that the potential buyers identified in that document were not the ultimate purchasers. ALJ Decision at 5 n.4. We note that the ALJ misidentified the exhibit containing this exhibit as "CMS Ex. 4 at 1-2." The document is actually in CMS Exhibit 5, at 1-2.

Exhibits 1-9. *Id.* The ALJ stated that the issue before her was limited to whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to section 424.535(a)(3) based on the April 30, 2009 felony conviction of Dr. Reitz. *Id.*

The ALJ concluded that the revocation was authorized under this regulation because

- Dr. Reitz owned CKCI on the date of his conviction and continuously until September 16, 2015.
- A jury in Riley County, Kansas, convicted Dr. Reitz of one count of aggravated battery, a level VII felony, on April 30, 2009.
- Dr. Reitz's felony conviction is for a crime against a person pursuant to 42 C.F.R. § 424.535(a)(3).
- An offense listed in 42 C.F.R. § 424.535(a)(3) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.

ALJ Decision at 8. The ALJ further found that "[t]he effective date of the revocation, April 30, 2009, is governed by . . . [t]he regulation at 42 C.F.R. § 424.535(g) [which] states that when a revocation is based on a felony conviction, the revocation of the supplier's billing privileges is effective as of the date of the felony conviction." *Id.* at 11. The ALJ thus concluded that "Petitioner's revocation became effective on April 30, 2009, the date of Dr. Reitz's conviction." *Id*.

In making her findings and conclusions, the ALJ noted that Petitioner "does not dispute" Dr. Reitz's 2009 conviction for felony aggravated battery and also "does not dispute that [Dr. Reitz's] crime . . . was a felony crime against a person as contemplated by [section 424.535(a)(3)(ii)(A)]." *Id*. at 8, 9 n.10. That section, the ALJ noted, explicitly identifies "'[f]elony crimes against persons, such as murder, rape, assault, and other similar crimes'" as one of four categories of felony offenses that the Secretary has determined are *per se* detrimental to the Medicare program and its beneficiaries. *Id*. at 9, *quoting* 42 C.F.R. § 424.535(a)(3)(ii)(A). Thus, Dr. Reitz's April 30, 2009 conviction of a "felony crime against a person" was sufficient to uphold the revocation of Dr. Reitz's Medicare enrollment and billing privileges and Petitioner's, since Dr. Reitz owned Petitioner at the time of his conviction.[8] The ALJ also noted Petitioner's concession that its "'grounds for appealing the sanction at issue here are limited.'" *Id*. at 8, *citing* P. Br. at 2.

[8] The ALJ noted that WPS revoked Dr. Reitz's enrollment and billing privileges in a separate action which was also appealed and decided in CMS's favor by the ALJ. ALJ Decision at 4 n.3; *see Russell L. Reitz, M.D.*, DAB CR4566 (2016). Dr. Reitz appealed that decision to the DAB, which affirmed the ALJ decision. *See Russell L. Reitz, M.D.*, DAB No. 2748 (November 14, 2016).

Discussion

On appeal, as below, Petitioner does not dispute that it was owned by Dr. Reitz until September 16, 2015 or that Dr. Reitz was, within 10 years preceding the revocation, convicted of a felony offense that under the applicable regulations allowed CMS to revoke Petitioner's Medicare enrollment and billing privileges and to impose a re-enrollment bar. Petitioner's principal arguments on appeal are (1) that the regulation authorizing revocation of his billing privileges is not authorized by statute and (2) that the ALJ erred in concluding that "CKCI has not demonstrated that reversal of its revocation could have been authorized pursuant to 42 C.F.R. §424.[5]35(e)." Request for Review (RR) at 5-6. We reject these and Petitioner's other arguments for the reasons stated below.

With respect to Petitioner's argument that section 424.535(a)(3), on which CMS relied to revoke Petitioner's Medicare enrollment and billing privileges, is not authorized by statute, we note that the ALJ rejected this argument below. The ALJ concluded that she was bound by the regulation regardless of whether there was any merit to Petitioner's argument that the statutes did not authorize the revocation of its enrollment and billing privileges. ALJ Decision at 10, *citing 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (holding that ALJs and the Board "may not invalidate either a law or regulation on any ground"). Given Petitioner's concession that the felony conviction of Dr. Reitz, its owner, provided the grounds for CMS's revocation, we, like the ALJ, must apply the regulatory authority and uphold the revocation.

However, the ALJ also concluded, and we agree, that Petitioner's argument is not supported by the applicable statutes. *See* ALJ Decision at 9-10. Petitioner argued below that the portions of the enrollment regulations that pertain to revocation for felony convictions were not authorized rulemaking implementing 42 U.S.C. § 1395cc(b)(2)(D). The cited statutory section codifies Section 4302 of the Balanced Budget Act of 1997, P.L. 105-33 (August 5, 1997) which authorizes the Secretary of Health and Human Services to refuse to enter into or to terminate agreements with providers of services who have been convicted of felonies that the Secretary determines are detrimental to the Medicare program or its beneficiaries. The ALJ construed Petitioner's argument as one that revocation actions based on felony convictions are authorized only against providers of services, not suppliers such as Petitioner. ALJ Decision at 9-10. The ALJ correctly pointed out that the same section of the Balanced Budget Act also added language to another statutory section (section 1842(h)) that expressly made revocation on this ground applicable to "a physician or supplier." *Id*. at 10, *citing* P.L. 105-33, § 4302(b), *codified at* 42 U.S.C. § 1395u(h)(8). The ALJ further pointed out that Congress gave the Secretary "broad authority to 'make and publish such rules and regulations . . . as may be

necessary to the efficient administration of the functions with which [she] is charged under the Act.'" *Id.*, *quoting* 42 U.S.C. § 1302(a); *see also* 42 U.S.C. §§ 1395hh(a)(1), 1395cc(j)(1)(A) (according the Secretary rulemaking authority specifically related to provider and supplier enrollment).

On appeal, Petitioner does not challenge the ALJ's conclusion that 42 U.S.C. § 1395u(h) expressly makes CMS's authority to revoke Medicare agreements based on felony convictions applicable to physicians and suppliers. Instead, Petitioner states that it "is aware of the difference between a provider and a supplier[ ]" and "knows that as a Medicare Part B medical clinic, it is treated as a Part B supplier under many provisions of the Medicare Act and regulations." RR at 2. Petitioner argues, however, that regardless of whether CKCI is a provider or a supplier, "Congress has not authorized CMS to 'revoke' CKCI's 'billing privileges.'" *Id*. Petitioner states as follows:

> In fact, the statute that the ALJ cites as authority for the MAC's decision, 42 U.S.C. § 1395u(h), authorizes the Secretary *only* to terminate "an agreement with a physician" if "such a physician" has been convicted of certain felonies. It does not address and therefore does not authorize (1) "revoking the billing privileges" of the offending physician, (2) terminating any separate agreement with a clinic owned by the offending physician, or (3) revoking the billing privileges of the clinic owned by the offending physician. Yet, the MAC's July 22, 2015 sanction letter (see footnote 1) is now somehow being construed as including all three unauthorized sanctions.

Id. at 2-3. For that reason, Petitioner argues, CMS's exercise of its regulatory authority to revoke his billing privileges was not expressly authorized by statute and violates the Administrative Procedure Act. *Id*., *citing* 5 U.S.C. § 558(b).

We begin by noting that Petitioner did not make arguments (2) and (3) in either its hearing request or its briefs before the ALJ. A party appearing before the Board is not permitted to raise on appeal issues that could have been raised before the ALJ but were not. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, "Completion of the Review Process," ¶ (a)("The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not."), http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. Accordingly, these arguments are not properly before the Board. In any event, these arguments are clearly refuted by the plain language of section 424.535(a)(3), which authorizes revocations for felony convictions for all Medicare suppliers (and Petitioner concedes it is one) regardless of whether the conviction was the supplier's own conviction or the conviction of an owner or manager of the supplier.

With respect to argument (1), we find no basis for the distinction Petitioner attempts to draw between authority to terminate a supplier agreement and authority to terminate a supplier's billing privileges. Section 424.535 clearly provides for revocation of both the supplier's "Medicare billing privileges and any corresponding . . . supplier agreement . . . ." This authority is consistent with the provisions of subpart P of Part 424 (Requirements for Establishing and Maintaining Medicare Billing Privileges) which provide that in order to bill Medicare, a physician (or other supplier) must submit an enrollment application, and CMS must approve the application and enroll the provider in the Medicare program. 42 C.F.R. §§ 424.500, .502, .505. If a supplier is not currently enrolled in the Medicare program, it may not bill for services to Medicare beneficiaries. *Id.* Accordingly, CMS's authority to revoke a supplier's Medicare enrollment necessarily requires, as well, revocation of the supplier's approval to bill the Medicare program.

Petitioner also asserts that WPS, CMS's contractor, was not authorized to take the discretionary action to revoke its Medicare agreement and billing privileges because, Petitioner contends, it is unconstitutional for a federal department to authorize a private contractor to take a discretionary action. RR at 2, 3-4. Once again, this is an argument that Petitioner did not make to the ALJ, and Petitioner has not made any showing here that it could not have done so; accordingly, the issue is not properly before the Board. S*ee, e.g., Guidelines; Mohammad Nawaz, M.D., et al.*, DAB No. 2687, at 10 n.12 (2016); *Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (applying the Board's Appellate Division Guidelines to exclude arguments not raised before ALJs).

We also find Petitioner's suggestion that WPS does not have authority to act on behalf of CMS with respect to revocations inconsistent with the argument Petitioner makes elsewhere in its Request for Review that the ALJ and Board should conclude that CMS is bound by WPS's action in July 2011, which Petitioner characterizes as WPS's having made an "initial determination" to continue Petitioner's Medicare agreement when it approved the EFT authorization form. RR at 4-5. In addition to noting this inconsistency, we reject Petitioner's characterization of WPS's July 26, 2011 letter as an "initial determination" binding CMS. The ALJ found that the letter "approved Petitioner's EFT Authorization Agreement," pursuant to an application for EFT authorization that Petitioner had submitted to WPS in May 2011. ALJ Decision at 3, *citing* P. Ex. 9 at 1. We agree with that finding as well as with the ALJ's finding that "[t]he letter did not indicate that the contractor had revalidated Petitioner's enrollment or had updated any information regarding final adverse actions." *Id.*, *citing* P. Ex. 9, at 1-3. Petitioner does not dispute that WPS issued its July 26, 2011 letter in response to Petitioner's request for EFT authorization, not in response to an application to revalidate Petitioner's (or Dr. Reitz's) enrollment in the Medicare program. Indeed, it is undisputed that Petitioner did not submit a revalidation application until April 28, 2015, which WPS rejected on July 22, 2015 based on Dr. Reitz's conviction and his failure to timely report it.

But even assuming WPS's earlier letter constituted an "initial determination" to approve Petitioner's continuing enrollment, we find no legal basis for Petitioner's statement that it was "the epitome of arbitrariness" for CMS to subsequently revoke Petitioner's enrollment and billing privileges. RR at 5. The regulations clearly authorized CMS to revoke Petitioner's enrollment and billing privileges based on its owner's felony conviction provided only that the conviction must have occurred within 10 years of the revocation, which it did. We find nothing in the regulations that would prevent CMS from lawfully exercising this authority, as it did, regardless of any prior decision by itself or its contractor not to exercise it. *Cf. Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 20 (2009) (holding that a revocation cannot be arbitrary or capricious where it is "based on a legally proper interpretation and application of section 424.535(a)(3)"), *aff'd, Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010). Moreover, Petitioner's argument is at base one for equitable estoppel. The Board, as stated earlier, is bound by the regulations, and may not choose to overturn the agency's lawful use of its regulatory authority based on principles of equity. *See, e.g., Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395, at 10 (2011); *see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 52 at 59-66 (1984) (citing as "well settled" the rule "that the Government may not be estopped on the same terms as any other litigant" and rejecting a Medicare provider's claim that the Secretary was estopped from collecting an overpayment because of erroneous advice given by a fiscal intermediary).

We also reject Petitioner's argument that revoking his billing privileges retroactive to the date of his conviction is not authorized by statute. RR at 5. Once again, the ALJ and the Board are bound by the Secretary's regulations which expressly provide that when a revocation is based on a felony conviction, the revocation takes effect on the date of the conviction. 42 C.F.R. § 424.535(g). Petitioner is free to make his *ultra vires* argument to a court, but we may not invalidate a regulation. Petitioner's appeal, we note, does not directly challenge the length of the re-enrollment bar which, in any event, is not an issue subject to review by ALJs and the Board. *Vijendra Dave, M.D.*, DAB No. 2672, at 8-12 (2016).

Petitioner's final argument is that the ALJ erred in concluding that "[Petitioner] has not demonstrated that reversal of its revocation could have been authorized pursuant to 42 C.F.R. § 424.535(e)." RR at 5. That regulation, in relevant part, provides as follows:

> *Reversal of revocation*. If the revocation was due to adverse activity (sanction, exclusion, or felony) against an owner . . . of the . . . supplier furnishing Medicare reimbursable services, the revocation may be reversed

> if the . . . supplier terminates and submits proof that it has terminated its business relationship with that individual within 30 days of the revocation notification.

42 C.F.R. § 424.535(e). The ALJ concluded that Petitioner had not made the showing required to invoke CMS's discretion to reverse under that regulation because Dr. Reitz continued to own Petitioner more than 30 days after the revocation notice was issued on July 22, 2015. Petitioner did not dispute this fact below and does not dispute it here. Furthermore, the record confirms that Dr. Reitz did not terminate his ownership of Petitioner until September 16, 2015 when he entered into an Asset Purchase Agreement which effected a sale of Petitioner to JMac Radiation Oncology and Diagnostics, LLC (JMac). RR at 5-7; CMS Ex. 4, at 3-41.

Petitioner challenges the ALJ's conclusion that Petitioner could not have "terminated its business relationship" within the meaning of section 424.535(e) as long as Dr. Reitz retained his ownership interest. The ALJ stated, "Common sense, along with basic business principles, dictates that the only way for a company to completely *terminate* a business relationship with its owner is for the owner to no longer own the company." ALJ Decision at 12 (italics in original). Petitioner argues that contrary to what the ALJ concluded, this is not "common sense" because "[a]nyone who has ever sold a business or even a home knows full well that it takes more than 30 days to find a buyer *and* complete the sale of the business or house" and that "[i]n any event, completing the sale is different from terminating a business relationship."[9] RR at 6. Petitioner also faults the ALJ for her reliance on "unidentified 'basic business principles.'" *Id.*, *quoting* ALJ Decision at 12.

We find no merit in Petitioner's argument. The ALJ's reading of the phrase "terminated its business relationship" as requiring sale of the ownership interest where, as here, that is the business relationship at issue, is entirely reasonable since, as Petitioner does not dispute, an owner of a business continues to have a legally enforceable relationship with the business as long as he or she continues to own it. Petitioner's reliance on Dr. Reitz's

[9] Petitioner questions why WPS's reconsideration decision letter "does not even mention this issue [potential reversal of the revocation] even though the issue was stressed by [Petitioner] in its request for reconsideration and in an earlier letter to [WPS] seeking confirmation that certain steps to be undertaken would satisfy the requirements of the regulation." RR at 6, *citing* P. Ex. D. It is irrelevant to our decision whether WPS mentioned or considered this issue since, as the ALJ stated, "'nothing in the language of section 424.535(e) requires CMS to demonstrate that it considered whether to exercise its discretionary authority [under that regulation].'" ALJ Decision at 12 n.11, *citing Main Street Pharmacy, LLC*, DAB No. 2349, at 8 (2010). We also find no significance in the fact that the reconsideration decision letter did not mention the request for reversal since Petitioner did not submit its reconsideration request until September 1, 2015, after the time for any potential reversal of the revocation had expired.

affidavit, RR at 7, misses this point. Dr. Reitz stated, "On August 14, 2015, Petitioner terminated its business relationship with me by my agreeing not to see or treat patients at CKCI and by stopping all payments to me for such services." P. Ex. 2, at 5 ¶ 10. This statement, even assuming its truth, ignores the fact that because he owned the business, Dr. Reitz's legal relationship – including ownership rights and obligations – persisted until sale of his ownership interest despite whatever daily contacts Dr. Reitz may or may not have had with it. Petitioner cites no authority for the proposition that where, as here, the business relationship that exists between the convicted individual and the supplier consists of ownership by the convicted individual, the phrase "terminated its business relationship" in section 424.535(e) can be satisfied by anything short of the convicted individual's sale of his or her ownership interest. We also note that the evidence cited by Dr. Reitz in support of his statement undercuts that statement. The August 14, 2015 letter which Dr. Reitz (and Petitioner) alleges informed WPS of the alleged "termination" of the business relationship states only that Petitioner "hopes this matter [the revocation] can be resolved without [seeking reconsideration] by the Institute terminating its 'business relationship' with Dr. Reitz on or before August 21, 2015." P. Ex. 1, at 1. This is at best a statement of intent to terminate the relationship on some date after August 14, 2015, not a statement that it was, in fact, terminated on that date or any other date prior to the sale date of record.

For all of these reasons, we affirm the ALJ's conclusion that Petitioner did not show it terminated its business relationship with Dr. Reitz within 30 days of the revocation notice, and, therefore, the regulatory conditions needed for CMS to exercise its discretion to reverse a termination of enrollment and billing privileges under section 424.435(e) were not met in this case.[10]

[10] In light of our conclusion, we need not decide here whether ALJs and the Board are ever authorized to review a decision by CMS not to exercise its discretion under section 424.535(e) to terminate a provider or supplier's enrollment and billing privileges. *See Main Street Pharmacy, LLC* at 8.

Conclusion

For the reasons stated above, we affirm the ALJ Decision sustaining CMS's revocation of Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3).

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member