Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Breton L. Morgan, M.D., Inc.
(NPI: 1376984435 / PTAN: C721),

and

Breton L. Morgan, M.D.
(NPI: 1508897919 / PTAN: WV3187C721)

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-867

Decision No. CR5014

Date: January 30, 2018

DECISION

The Medicare enrollment and billing privileges of Petitioners, Breton L. Morgan, M.D., Inc. and Breton L. Morgan, M.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(4).[1] The effective date of revocation as to Breton L. Morgan, M.D. is December 7, 2016, 30 days after the November 7, 2016 notice of the reopened and revised initial revocation determination. The effective date of revocation as to Breton L. Morgan, M.D., Inc. is January 29, 2017, 30 days after the December 30, 2016 notice of the reopened and revised initial determination to revoke. 42 C.F.R. § 424.535(g).

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[1] Citations are to the 2016 revision of the Code of Federal Regulation (C.F.R.), unless otherwise stated.

I. Procedural History and Jurisdiction

On November 7, 2016, Palmetto GBA, a Medicare administrative contractor (MAC), notified Petitioner Breton Morgan, M.D. of its reopened and revised initial determination to revoke his Medicare enrollment and billing privileges effective December 7, 2016, and to impose a three-year re-enrollment bar. The MAC cited 42 C.F.R. § 424.535(a)(4) as authority for the revocation. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 13-14. On December 30, 2016, the MAC notified Petitioner Breton L. Morgan, M.D., Inc. of its reopened and revised determination to revoke its Medicare enrollment and billing privileges effective January 29, 2017, and to impose a three-year re-enrollment bar. The MAC cited 42 C.F.R. § 424.535(a)(4) as the authority for revocation. CMS Ex. 2 at 14-15.

Petitioners requested reconsideration on behalf of Petitioner Breton Morgan, M.D. by letter dated January 5, 2017. CMS Ex. 1 at 7-11. Petitioners requested reconsideration on behalf of Breton Morgan, M.D., Inc. by letter dated February 13, 2017. CMS Ex. 2 at 8-12. On March 30, 2017 and May 12, 2017, a CMS hearing officer issued reconsideration determinations upholding revocation pursuant to 42 C.F.R. § 424.535(a)(4) as to each Petitioner. CMS Exs. 1 at 1-6; 2 at 1-7.

Petitioners filed a request for hearing for Breton L. Morgan, M.D. on May 28, 2017. The case was docketed as C-17-731. On July 6, 2017, Petitioners requested a hearing on behalf of Breton L. Morgan, M.D., Inc. and requested consolidation of both cases. The second request for hearing was docketed as C-17-867. Both cases were assigned to me. On July 19, 2017, an Acknowledgment and Prehearing Order (Prehearing Order) was issued in C-17-867 that consolidated C-17-731 and C-17-867 and dismissed C-17-731. There is no dispute that Petitioners' requests for hearing were timely, and I have jurisdiction.

CMS filed a motion for summary judgment and prehearing brief on August 18, 2017 (CMS Br.) with CMS Exs. 1 through 4. On September 16, 2017, Petitioners filed a response in opposition to the CMS motion and a cross-motion for summary judgment (P. Br.) and Petitioners' exhibits (P. Exs.) A through N. On October 2, 2017, CMS filed a combined reply brief in opposition to Petitioners' motion for summary judgment; a motion to exclude P. Exs. B, M, and N; and a motion to deny Petitioners' request for subpoenas (CMS Reply). Petitioners did not respond to the CMS objections to my consideration of P. Exs. B, M, and N or the CMS motion to deny Petitioners' request for subpoenas within 20 days as permitted by 42 C.F.R. § 498.17(b) and Petitioners thereby waived the right to reply. Petitioners did not object to my consideration of CMS Exs. 1 through 4 and they are admitted as evidence. CMS did not object to my consideration of P. Exs. A and C through L and they are admitted as evidence. Pursuant to 42 C.F.R. § 498.60(b)(1), I am to receive in evidence any documents that are relevant and material. Federal Rule of Evidence 401 describes relevant evidence as evidence that has any

tendency to a make a fact of consequence to determining the action more or less probable. The narrow issue before me is whether CMS has a basis to revoke Petitioners' Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 11 (2013); *Fady Fayad, M.D.*, DAB No. 2266 at 16 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16-17, 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). P. Ex. B is the Affidavit of Lori McCoy, Petitioners' office assistant. Ms. McCoy indicates that she participated in the enrollment application that provides the factual basis for revocation cited by CMS. Accordingly, Ms. McCoy's affidavit is clearly relevant, the CMS objection is overruled, and P. Ex. B is admitted. P. Ex. M is an October 8, 2015 letter from the State of West Virginia Department of Health and Human Services (DHHS) advising Petitioners that a Medicaid audit found no irregularity. P. Ex. N is a letter from the West Virginia DHHS dated January 11, 2016, advising Petitioners that the clinic did not need to be licensed as a Chronic Pain Management Clinic at that time. Neither of these documents has any tendency to make a fact of consequence to whether or not CMS had a basis to revoke Petitioners' enrollment and billing privileges more or less probable. Accordingly, I conclude that P. Exs. M and N are not relevant, and they are not admitted as evidence. CMS also objects to my consideration of any evidence offered related to a prior case before me involving Petitioners, which was dismissed as moot and closed. I consider only evidence properly offered by the parties as evidence in this proceeding.

Petitioners' requested that I issue subpoenas duces tecum to AdvanceMed (a contractor to the MAC), the MAC, and CMS requiring the production of:

> Any and all documentation, correspondence, memoranda, and other written and electronic materials, including emails, relating to Breton L. Morgan M.D. and/or Breton L. Morgan M.D. Inc., including but not limited to Dr. Morgan's CMS revocation in 2008, his application for reinstatement in 2013, CMS's attempt to revoke his Medicare privileges in March, 2016, and the revocation of his Medicare privileges, effective December 7, 2016.

Petitioners' List of Exhibits, Witnesses, and Requested Subpoenas filed September 17, 2017 at 3. I am authorized to issue subpoenas in the name of the Secretary by 42 C.F.R. § 498.58. A party requesting the issuance of a subpoena must "[s]pecify the pertinent facts the party expects to establish by the witnesses or documents [that are the target of the subpoena], and indicate why those facts could not be established without use of a subpoena." 42 C.F.R. § 498.58(c)(3). Petitioners' subpoena requests do not specify the pertinent facts Petitioners expect to establish by the documents they want to subpoena or why those facts could not be established without the need for subpoenas. Accordingly, Petitioners' subpoena requests must be denied. Because no subpoenas will issue for the

production of records and because I determine summary judgment is appropriate, Petitioners' requests for subpoenas ad testificandum are moot.

II. Discussion

A. Applicable Law

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

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

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(4), CMS may revoke a supplier's enrollment and billing privileges if CMS determines the "supplier certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program." Generally, when CMS

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[2] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

revokes a supplier's Medicare billing privileges for not complying with enrollment requirements, the revocation is effective 30 days after CMS or its contractor mails notice of its determination to the supplier. 42 C.F.R. § 424.535(g). After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, and advising the supplier of its right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5(*l*)(2). CMS is also granted the right to request ALJ review of a reconsidered determination with which it is dissatisfied. 42 C.F.R. § 498.5(*l*)(2). A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

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

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

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

1. Summary judgment is appropriate.

Both parties assert that summary judgment is appropriate in their favor. A provider or supplier denied enrollment in Medicare or whose enrollment has been revoked has a right to a hearing and judicial review pursuant to section 1866(h)(1) and (j) of the Act (42 U.S.C. § 1395cc(h)(1) and (j)) and 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17); 498.5(*l*). A hearing on the record, also known as an oral hearing, is required under the Act. Act §§ 205(b), 1866(h)(1) and (j)(8) (42 U.S.C. §§ 405(b), 1395cc(h)(1) and (j)(8)); *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing, but

must do so affirmatively in writing. 42 C.F.R. § 498.66. Petitioners have not filed a written waiver of the right to appear and present evidence. Because Petitioners have not waived the right to oral hearing, disposition on the written record alone is not permissible unless summary judgment is appropriate.

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

Summary judgment is appropriate when there is no genuine dispute as to any material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 5 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids

deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005).

There is no genuine dispute as to any material fact in this case. Petitioner Dr. Morgan was convicted of a felony in 2007, and he did not list that conviction on his enrollment application submitted within ten years of the date of that conviction. P. Br. at 4-6; P. Exs. A and I at 13-14. The issues in this case that require resolution are issues of law related to the interpretation and application of the regulations that govern enrollment and billing privileges in the Medicare program and application of the law to the undisputed facts of this case. Summary judgment is appropriate as to both the bases for revocation and the effective date of revocation.

> **2. Certifying as true information on an enrollment application or application to maintain enrollment that is misleading or false, is a basis for revocation of Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(4).**
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> **3. There is a basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because Petitioners failed to list as a final adverse action a 2007 felony conviction on the enrollment application signed July 17, 2013, while certifying that the information in the application was true, correct, and complete.**
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> **4. Revocation of the Medicare enrollment and billing privileges of Petitioner Breton L. Morgan, M.D. is effective December 7, 2016, 30 days from the date of the November 7, 2016 notice of initial determination to revoke. 42 C.F.R. § 424.535(g).**
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> **5. Revocation of the Medicare enrollment and billing privileges of Petitioner Breton L. Morgan, M.D., Inc. is effective January 29, 2017, 30 days from the date of the December 30, 2016 notice of initial determination to revoke. 42 C.F.R. § 424.535(g).**

a. Facts

The material facts are not disputed.

Petitioner Breton L. Morgan M.D. was convicted of a felony in 2007. On May 30, 2008, the Inspector General (I.G.), U.S. Department of Health and Human Services, excluded Petitioner Dr. Morgan from participation in Medicare for five years from about June 19, 2008 to June 19, 2013, based on his felony conviction pursuant to section 1128(a)(3) of the Act. P. Ex. A ¶¶ 2, 8, I at 15, 17; CMS Ex. 1 at 19-20, 35.

CMS revoked Petitioner Dr. Morgan's Medicare enrollment and billing privileges on September 3, 2008, effective April 4, 2006, based on the surrender of his medical license in Ohio. CMS Exs. 1 at 22-23, 2 at 23-24; P. Ex. F.

Following Petitioner Breton L. Morgan, M.D.'s reinstatement by the I.G. on June 19, 2013, he filed a CMS-855I to enroll himself and his practice in Medicare. CMS Exs. 1 at 36-69, 2 at 37-70; P. Ex. I. Dr. Morgan signed the certification statement on the application on July 17, 2013, certifying that the information contained in the application was "true, correct, and complete." CMS Ex. 1 at 64-65, P. Ex. I at 29-30. Under Section 3 of the application titled "Final Adverse Legal Actions/Convictions" Petitioners listed Dr. Morgan's "Medicare Exclusion" date May 30, 2008, and his release or reinstatement by the I.G. on June 18, 2013. CMS Ex. 1 at 49; P. Ex. I at 14. Petitioners attached multiple copies of the I.G. letter dated June 19, 2013, granting Dr. Morgan's reinstatement of his eligibility to participate in Medicare. CMS Ex. 1 at 50, 52, 59, 76; P. Ex. I at 15, 17, 24. There is no dispute that the instructions for Section 3 of the CMS-855I specifically state that "[a]ll applicable final adverse actions must be reported, regardless of whether any records were expunged or any appeals are pending." CMS Ex. 1 at 48; P. Ex. 1 at 13. Section 3 specifically describes the types of convictions that must be listed if they occurred within the ten years preceding the filing of an enrollment or revalidation application. Any felony conviction that would result in mandatory exclusion by the I.G. pursuant to section 1128(a) of the Act that occurred within the ten years preceding the date of filing an enrollment or revalidation application is specifically listed as an adverse action that must be reported under Section 3 of the CMS-855I that Petitioners filed.

Petitioners were enrolled in Medicare and granted billing privileges on October 8, 2013, effective July 17, 2013. CMS Exs. 1 at 79-83, 2 at 80-85; P. Ex. J.

It is undisputed that Petitioner Dr. Morgan filed the enrollment application within ten years of his felony conviction and that the I.G. excluded him pursuant to section 1128(a)(3) of the Act based on that conviction. There is no dispute that Dr. Morgan did not list the felony conviction on the CMS-855I that he certified "true, correct, and complete." CMS Ex. 1 at 48-49, 64-65; P. Ex. I at 13-14, 29-30.

b. Analysis

After the I.G. reinstated Dr. Morgan's eligibility to enroll in Medicare, it was necessary for him to file an enrollment application to enroll in Medicare and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510 (2012). The regulations required that an application submitted must be complete, accurate, and truthful in response to all information requested. 42 C.F.R. § 424.510(d)(2)(i) (2012).

Pursuant to the 2012 revision of 42 C.F.R. § 424.502 in effect on July 17, 2013, when Dr. Morgan signed the enrollment application:

> *Final adverse action* means one or more of the following actions:
>
> (1) A Medicare-imposed revocation of any Medicare billing privileges;
>
> (2) Suspension or revocation of a license to provide health care by any State licensing authority;
>
> (3) Revocation or suspension by an accreditation organization;
>
> (4) A conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i)) within the last 10 years preceding enrollment, revalidation, or re-enrollment; or
>
> (5) An exclusion or debarment from participation in a Federal or State health care program.

(Emphasis in original). The elements of the fourth definition of a final adverse action are: (1) the provider or supplier was convicted; (2) the conviction was of a federal or state offense; (3) the offense was a felony; and (4) the felony conviction was during the period ten years preceding the date of enrollment, revalidation, or re-enrollment. Petitioner Dr. Morgan does not dispute that he was convicted of a felony in 2007 within the meaning of 42 C.F.R. § 424.502(a)(4) (2012). Petitioner Dr. Morgan also does not dispute that he was subject to mandatory exclusion by the I.G. based on that felony pursuant to section 1128(a)(3) of the Act.

Section 3 of the CMS-855I that Petitioner Dr. Morgan signed on July 17, 2013, specifically informed him that a conviction such as his is a final adverse legal action and specified that reporting of such a conviction is required. Further, 42 C.F.R.

§ 424.516(d)(1)(ii) also requires the reporting of adverse legal action. There is no dispute that Dr. Morgan's 2007 felony conviction was not listed on the CMS-855I signed on July 17, 2013. CMS Ex. 1 at 49; P. Ex. I at 14.

CMS and the MAC are authorized to revoke Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) when the "provider or supplier certified as 'true' misleading or false information on the enrollment application." Petitioner Dr. Morgan failed to list his 2007 felony conviction and, as a result, the application he certified by his signature on July 17, 2013, was not true, correct, and complete, but rather was false and misleading because it did not list all adverse actions required to be listed. *See, e.g.*, *Sandra E. Johnson, CRNA*, DAB No. 2708 at 7, 15-16 (2016) (no intent to provide false information required; fact occurred sufficient); *Mark Koch, D.O.*, DAB No. 2610 at 4 (2014) (unintentional or inadvertent omission is not a defense).

Petitioners did not list Dr. Morgan's 2007 felony conviction on the enrollment application signed and certified by Dr. Morgan as true, correct, and complete on July 17, 2013 and filed within ten years of the date of Dr. Morgan's conviction. I conclude that CMS has a basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).

Petitioners' arguments in their defense are without merit.

Petitioners argue they did not submit false or misleading information. P. Br. at 1. The fact that Petitioners did not list Dr. Morgan's 2007 felony conviction as a final adverse legal action in the July 2013 CMS-855I is not disputed. Whether the failure to list the conviction amounts to false or misleading information and is a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(4) is an issue of law that must be resolved against Petitioners. Both the regulations and the CMS-855I clearly required that Petitioners report Dr. Morgan's conviction because that 2007 felony conviction occurred within ten years of Petitioners' 2013 application to enroll in Medicare and it was a conviction for which Petitioner Dr. Morgan was excluded pursuant to section 1128(a) of the Act. CMS Ex. 1 at 48; P. Ex. I at 13; 42 C.F.R. §§ 424.502, 424.510(d)(2)(i), 424.516(d)(1)(ii) (2012). I conclude that because Petitioners did not list Dr. Morgan's conviction as a final adverse legal action, the CMS-855I that was certified by Dr. Morgan's signature on July 17, 2013, and filed by Petitioners in 2013 was not true, correct, and complete but rather was incomplete, false, and misleading.

Petitioners argue that in 2008, CMS revoked Dr. Morgan's Medicare enrollment and billing privileges, and CMS was clearly aware of Petitioner Dr. Morgan's conviction. P. Br. at 2, 5, 7-9. Whether or not CMS had records and was aware of Dr. Morgan's felony conviction in 2007 is not the issue. Petitioners had an affirmative duty under the regulations, of which they were advised by the CMS-855I, to submit a true, complete,

and accurate application. Petitioners violated that affirmative duty. Petitioners offer no explanation for the failure.

Petitioners argue that because the I.G. excluded Dr. Morgan for five years and Dr. Morgan's Medicare enrollment and billing privileges were already revoked for three years, it is improper for CMS to revoke Petitioners privileges again, and would effectively impose a ten-year exclusion which is not authorized. P. Br. at 6-7. The I.G. exclusion and the prior CMS revocation were based on Dr. Morgan's 2007 conviction. The current revocation is based upon Petitioners' failure to file a true, correct, and complete application in 2013, because Petitioners failed to list Dr. Morgan's 2007 felony conviction as a final adverse legal action. I conclude that the prior I.G. exclusion and the prior revocation of Dr. Morgan's enrollment is no bar to the revocation before me as there are separate factual and legal bases for the current revocation.

Petitioners assert that revocation is barred by the affirmative defenses of waiver, estoppel, laches, res judicata, collateral estoppel, and double jeopardy. P. Br. at 9. It is not disputed that the revocation of Petitioners' Medicare enrollment is pursuant to 42 C.F.R. § 424.535(a)(4) based on Petitioners' failure to submit a true, correct, and complete application that listed Dr. Morgan's 2007 felony conviction. The prior CMS revocation of Medicare enrollment and billing privileges on September 3, 2008, was based on Petitioner Dr. Morgan's surrender of his medical license in Ohio. CMS Exs. 1 at 22-23, 2 at 23-24; P. Ex. F. The I.G. exclusion of Petitioner Dr. Morgan pursuant to section 1128(a)(3) was based on his 2007 felony conviction. P. Ex. A ¶¶ 2, 8, I at 15, 17; CMS Ex. 1 at 19-20, 35. The revocation of Petitioner Dr. Morgan's enrollment and billing privileges on September 3, 2008, and his May 30, 2008 I.G. exclusion had different factual and legal bases from the current revocation of Petitioners' Medicare enrollment and billing privileges. Petitioners cite no authority that recognizes the application of waiver, estoppel, laches, res judicata, collateral, estoppel, or double jeopardy on facts such as those presented by this case.

Accordingly, I conclude that there is a basis for revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) and Petitioners have failed to either rebut the prima facie showing or establish an affirmative defense.

Having found that there is a basis for revocation, I have no authority to review the exercise of discretion by CMS to revoke Petitioners' Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 10 (2013); *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16-17, 19 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Summary judgment is also appropriate as to the effective date of revocation. Pursuant to 42 C.F.R. § 424.535(g), revocation becomes effective 30 days after CMS or the CMS

contractor mails notice of its determination to the provider or supplier, except under certain facts not present in this case. The notices of the initial determinations to revoke were dated November 7, 2016 and December 30, 2016. CMS Exs. 1 at 13-16; 2 at 14-17. It is not subject to dispute that the thirtieth day after November 7, 2016, was December 7, 2016, and the thirtieth day after December 30, 2016, was January 29, 2017. Accordingly, I conclude that December 7, 2016 and January 29, 2017 are the correct revocation dates.

The MAC imposed a three-year bar to reenrollment. CMS Exs. 1 at 13-16; 2 at 14-17. When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c). Petitioners argue that a one-year bar to re-enrollment is the longest appropriate pursuant to Medicare Program Integrity Manual, CMS Pub. 100-08 (MPIM), chap. 15, § 15.27.2(E) – the subsection in effect at the time of the reconsidered determination was section 15.27.2(D). P. Br. at 9. Under MPIM, §15.27.2(D)(2) (rev. 688, eff. Jul. 26, 2016), the recommended length of the bar to re-enrollment for exclusion pursuant to 42 C.F.R. § 424.535(a)(4) is three years. The section also states that every case must be judged on its own merits and indicates that CMS retains discretion to impose an appropriate bar to re-enrollment of one to three years.

There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545; 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to ALJ review. *Vijendra Dave, M.D.*, DAB No. 2672 at 10-11 (2016).

To the extent that Petitioners' arguments may be construed as a request for equitable relief, I have no authority to grant such relief. *US Ultrasound*, DAB No. 2302 at 8 (2010). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14.

III. Conclusion

For the foregoing reasons, Petitioners' Medicare enrollment and billing privileges are revoked pursuant to 42 C.F.R. § 424.535(a)(4). The effective date of revocation for Petitioner Dr. Morgan is December 7, 2016, and for his practice is January 29, 2017.

/s/
Keith W. Sickendick
Administrative Law Judge