

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hatem M. Dajani, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-90

Decision No. CR3612

Date: January 30, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor Wisconsin Physicians Service Insurance Corporation (WPS), determined to revoke Petitioner Hatem M. Dajani, M.D.'s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). WPS took this action based on Petitioner's July 16, 2009 guilty plea to a wire fraud offense, which WPS determined was detrimental to the best interests of the Medicare program and its beneficiaries. WPS imposed a three-year re-enrollment bar commencing on the date of Petitioner's conviction.

For the reasons set forth below, I sustain the revocation of Petitioner's enrollment and billing privileges as of July 16, 2009. I have no authority to consider whether a three-year re-enrollment bar is appropriate because the imposition and duration of a re-enrollment bar is not an appealable initial determination.

I. Procedural Background

WPS revoked Petitioner's Medicare enrollment and billing privileges on June 20, 2013, effective July 16, 2009. WPS cited 42 C.F.R. § 424.535(a)(3) as the basis for the revocation. WPS stated that it took this action because on July 16, 2009 Petitioner pled guilty to wire fraud. CMS Ex. 1. WPS imposed a three-year re-enrollment bar

commencing on July 16, 2009, the date of Petitioner's conviction. CMS Ex. 1; 42 C.F.R. § 424.535(c).

On June 27, 2013, Petitioner requested reconsideration. CMS Ex. 2. On August 12, 2013, a WPS hearing officer upheld the revocation. In evaluating the evidence, the hearing officer explained that:

According to our records on July 16, 2009, you pleaded guilty to wire fraud. This offense has been determined to be detrimental to the best interest of the program and its beneficiaries. The reconsideration request indicated that you were granted unrestricted Medicare privileges to practice medicine when you joined Riverview Hospital in Wisconsin Rapids. WPS Medicare only received a CMS-855R application for you to join this group. We did not receive a CMS-855I application reporting the adverse legal action.

The hearing officer then determined that Petitioner "has not provided evidence to show that you have fully compliance [*sic*] with the standards for which you were denied. Therefore we cannot grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number." CMS Ex. 3.

Petitioner filed a timely request for hearing on October 10, 2013. Petitioner does not dispute that he was convicted, but he raises equitable and other defenses discussed below. The case was assigned to me for hearing and decision on October 28, 2013, and I issued an Acknowledgment and Pre-hearing Order (Order) on that date. In the Order, I set dates for the parties to exchange arguments and evidence. I informed the parties that I would only schedule a hearing if a party filed written direct testimony, and the opposing party then requested cross-examination. Order ¶ 10.

On December 2, 2013, CMS filed a motion for summary judgment and pre-hearing brief (CMS Br.), accompanied by 41 exhibits (CMS Exs. 1-41). CMS did not list any witnesses or file written direct testimony. Petitioner did not object to CMS's exhibits, and I admit CMS Exs. 1-41.

On January 6, 2014, Petitioner filed a cross-motion for summary judgment and pre-hearing brief (P. Br.), accompanied by four exhibits (P. Exs. 1-4), including Petitioner's written direct testimony.¹ CMS did not object to Petitioner's exhibits, and I admit P. Exs. 1-4.

¹ Petitioner also filed a motion to strike CMS's motion for summary judgment and pre-hearing brief, arguing that CMS's pre-hearing exchange was untimely filed on December 2, 2013, because my Order stated it must be filed on or before December 1, 2013. I deny

On January 15, 2014, CMS responded to Petitioner's motion to strike CMS's pre-hearing brief and motion for summary judgment. On January 27, 2014, CMS responded to Petitioner's cross-motion for summary judgment and pre-hearing brief (CMS Response). CMS did not request to cross-examine Petitioner.

While reviewing the briefs and exhibits, I discovered a discrepancy between WPS's initial determination to revoke Petitioner's enrollment and billing privileges and the WPS hearing officer's reconsidered determination. The hearing officer's determination did not refer to "revocation" of Petitioner's enrollment and billing privileges but rather to a "denial" of enrollment under 42 C.F.R. § 424.530(a)(3). To address this inconsistency, I gave the parties the opportunity to file supplemental briefs. November 7, 2014 Order for Supplemental Briefing (Supplemental Order).

Based on the joint stipulations the parties then filed, I decide this case based on a June 20, 2013 revocation of Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535. My Order states that I will only hold a hearing if a party files admissible written direct testimony and the opposing party asks to cross-examine the witness. Order ¶ 10. I do not find it necessary to convene an in-person hearing here because CMS did not file admissible written direct testimony, and CMS has not asked to cross-examine Petitioner, the only witness for whom Petitioner filed written direct testimony. Accordingly, the record is closed. Having considered all of the documentary evidence, I issue this decision based on the full merits of the written record and find it unnecessary to rule on summary judgment. Order ¶¶ 10, 11.

II. Discussion

A. Issues

1. Whether CMS is authorized to revoke Petitioner's Medicare enrollment and billing privileges; and, if so,
2. Whether I have the authority to consider Petitioner's three-year re-enrollment bar.

Petitioner's motion. December 1, 2013 was a Sunday. The Civil Remedies Division Procedures reflect that a document is filed timely if it is filed on the next business day after a Saturday, Sunday, or legal holiday.

B. Substantive Background

The facts that follow are not disputed unless otherwise noted. Petitioner is both a pharmacist (receiving his pharmacy degree in 1998) and a medical doctor (receiving his medical degree in 2005). CMS Ex. 13, at 26, 33. Petitioner is licensed to practice medicine in Indiana, Ohio, and Wisconsin. CMS Ex. 40, at 1-5. This case concerns Petitioner's felony conviction for wire fraud and its impact on his Medicare enrollment and billing privileges.

On December 3, 2014, the parties filed joint stipulations, agreeing that:

1. WPS issued two separate determinations based upon the same felony conviction, which CMS found . . . to be a detrimental felony offense: (i) a June 5, 2013 denial of Dr. Dajani's enrollment application under 42 C.F.R. § 424.530(a)(3)(i)(B); and (ii) a June 20, 2013 revocation under 42 C.F.R. § 424.535(a)(3)(i)(B). CMS Exs. 1 & 39.
2. Dr. Dajani requested reconsideration of the June 20 revocation.
3. The August 12, 2013 decision states that the WPS Hearing Officer interpreted the reconsideration request as seeking reconsideration of the prior June 5 denial.
4. In her August 12, 2013 decision, the Hearing Officer found that Dr. Dajani's felony offense "has been determined to be detrimental to the best interest of the program and its beneficiaries." CMS Ex. 3, at 1.
5. By January 2014, the parties had fully briefed cross-motions for summary judgment as to whether this Tribunal should uphold the June 20 revocation.
6. As reflected in this Tribunal's order of November 7, 2014, there have been subsequent developments in the Board's guidance regarding appeals from reconsideration determinations under 42 C.F.R. § 498.5(l)(2).
7. The parties believe that ruling on the pending cross-motions regarding the June 20 revocation would preserve their resources and the resources of this Tribunal, rather than remanding or dismissing the matter until such time as the hearing officer issues a reconsideration decision that expressly addresses the June 20 revocation decision.
8. Thus, the parties agree that the ALJ's review of the June 20 revocation decision, without reference to any errors and omissions in the hearing

officer's August 12 reconsideration decision, would not constitute prejudicial error to either party under the specific circumstances of this case.

9. As for the reenrollment bar imposed in the June 20 revocation determination (and not the June 5 denial determination), the parties disagree as to whether this Tribunal could or should review or revise the reenrollment bar.

10. However, the parties agree that the ALJ may address their respective jurisdictional and other arguments regarding the reenrollment bar without reference to the hearing officer's decision, or any statements or omissions therein.

For the foregoing reasons, the Parties ask that this Tribunal proceed with addressing the Parties' pending cross-motions for summary judgment.

While an internal medicine resident in Wisconsin, Petitioner also worked part-time as a staff pharmacist for Walgreens, a drug store chain, at various locations in Wisconsin. CMS Ex. 20, at 47-48. After his residency, Petitioner moved to Ohio for a cardiology fellowship, but he continued to bill Walgreens for hours that he did not work. Walgreens discovered the fraud, and on March 26, 2009, the U.S. Attorneys' office for the Northern District of Ohio filed a criminal information against Petitioner alleging one count of wire fraud (18 U.S.C. § 1343). CMS Ex. 5. The information specifically alleges that:

From on or about May 12, 2008, through on or about October 6, 2008, in the Northern District of Ohio . . . and elsewhere . . . [Petitioner] devised and executed a fraudulent scheme whereby he would call his Walgreen's home store in Oconomowoc, Wisconsin, and report hours he had purportedly worked along with the store location. In fact, as the defendant well knew and believed, he had not worked any hours for Walgreen's during that period of time.

CMS Ex. 5, at 1-2. Walgreens paid Petitioner \$86,517.61 in gross wages to which he was not entitled based on Petitioner's false reports. CMS Ex. 5, at 2.

On April 16, 2009, Petitioner pled guilty to felony wire fraud, a Class C felony offense, punishable by a maximum sentence of up to 20 years imprisonment (or longer, in certain circumstances) (18 U.S.C. §§ 1343, 3559(a)(3)). CMS Ex. 4, at 2; CMS Ex. 6, at 8. On July 16, 2009, the presiding judge entered a judgment of conviction, sentencing Petitioner to two years of probation. CMS Ex. 7, at 2-3. On July 30, 2010, Petitioner moved to terminate the remainder of his probation, and on August 4, 2010, the judge granted the motion. CMS Ex. 8, at 1; CMS Ex. 9, at 1.

Petitioner continued to work as a cardiology fellow in Ohio through March 2010 but had to resign because of his conviction. CMS Ex. 13, at 26, 35; CMS Ex. 20, at 39, 47. From November 2008 through November 2009, in addition to his work as a cardiology fellow, Petitioner also worked as a *locum tenens* at various Ohio hospitals. CMS Ex. 13, at 26; CMS Ex. 20, at 47.

Petitioner did not lose his medical licenses based on his conviction. Wisconsin took no action on his license (CMS Ex. 13, at 36); Ohio imposed a 30-day stayed suspension (CMS Ex. 16, at 3-6) and required him to provide a copy of the stayed suspension order to current and future employers and “third party payors” (Medicare is a third party payor); and Indiana put him on “indefinite probation” and required him to comply with Ohio’s order. On September 21, 2012, Indiana ended Petitioner’s probation. CMS Ex. 38, at 13-14; Hearing Request at 24-29.

Following his guilty plea, Petitioner filed several Medicare enrollment applications (the CMS Form 855I individual enrollment application and CMS Form 855R reassignment application) with Medicare contractors serving Indiana, Ohio, and Wisconsin. The CMS Form 855I application specifically asks, in Section 3, if an applicant has had any final adverse legal actions (such as convictions, exclusions, revocations and suspensions) taken against them. Specifically with regard to a conviction for a felony financial crime, Section 3 cites as financial crimes “extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pre-trial diversions” *E.g.*, CMS Ex. 13, at 9. If an applicant answers “yes” to this question, the applicant is instructed to report on the form “each final adverse action, when it occurred, the Federal or State agency or the court/administrative body that imposed the action, and the resolution, if any.” *Id.* at 10. The applicant must also “[a]ttach a copy of the final adverse action documentation and resolution.” *Id.* In contrast, the 855R, which pertains to the reassignment of benefits, does not ask about adverse legal actions or contain a requirement equivalent to Section 3 of the 855I.

Petitioner did not specifically list his guilty plea or felony conviction in Section 3 on any of the 855Is he submitted to Medicare contractors after his guilty plea, nor did he attach a copy of the court’s July 16, 2009 judgment of conviction. Instead, he enclosed documents generally referencing his criminal proceedings. Specifically:

- **Approval of Petitioner’s April 2009 Ohio enrollment application:** Petitioner signed certification statements in an 855I and 855R as of April 10, 2009, and submitted them to Palmetto GBA, a Medicare contractor, six days before he pled guilty. CMS Exs. 10, at 19; 11, at 2-3. Petitioner indicated in Section 3 of the 855I that he had no adverse legal actions to report. CMS Ex. 10, at 9. Petitioner submitted the applications to the Medicare contractor, Palmetto GBA, on April 24 and the contractor received them on April 27.

CMS Exs. 11, at 9; 12, at 9. Petitioner's conviction occurred on July 16, 2009. Medicare regulations require physicians to report adverse legal actions within 30 days. 42 C.F.R. § 424.516(d)(1)(ii). Petitioner did not amend Section 3 of the 855I to reflect his guilty plea. According to CMS, CGS Administrators, Palmetto GBA's successor in Ohio, found no evidence that Petitioner ever reported the felony conviction to Ohio Medicare. CMS Br. at 6. Petitioner does not assert that he reported his conviction to Palmetto GBA within 30 days of the conviction. Instead, Petitioner argues that he did not report the conviction within 30 days because he was no longer practicing in Ohio at that time. P. Br. at 5. However, evidence of record suggests that he was practicing medicine in Ohio until at least March 2010. CMS Ex. 8, at 2; CMS Ex. 13, at 26, 35; CMS Ex. 20, at 39, 47; P. Ex. 2, at 1; Hearing Request at 4 n.6; 5 n.9.

- **Denial of Petitioner's July 15, 2010 Wisconsin enrollment application:** Petitioner signed and submitted an 855I and 855R to WPS.² CMS Exs. 13; 14. Petitioner marked a box on the 855I that he had a final adverse action taken against him, but he did not specifically list his July 16, 2009 conviction and wrote "See Attached" in Section 3. CMS Ex. 13, at 10. In the attachment he included a statement discussing his conviction and letters supporting him which apparently were sent to the Ohio Board in response to potential disciplinary action the Ohio Board might take against him as a result of his conviction. CMS Ex. 13, at 35-40. The Ohio Board's order itself, however, was not sent to WPS until July 28, 2010. CMS Ex. 15; *see* CMS Ex. 16 (Ohio Board letter of July 14, 2010 forwarding certified copies of Ohio Board documents, including the Board's order, to Petitioner). Based on these documents, by letter dated September 24, 2010, WPS denied Petitioner's application based on his 2009 felony conviction. CMS Ex. 17, at 1; CMS Ex. 18, at 1.
- **Approval of Petitioner's September 28, 2010 Indiana enrollment application:** Petitioner signed and submitted an 855I and 855R to National Government Services (NGS), a Medicare contractor. CMS Exs. 19, 20. In Section 3 of the 855I he did not list his July 16, 2009 conviction but did list

² Petitioner states that he did not disclose the Ohio Board's July 14, 2010 order (imposing a 30-day suspension and requiring him to provide a copy of the stayed suspension order to current and future employers and third party payors) to WPS because Section 3 only requires disclosure of "Final Adverse Actions" regarding exclusions, revocations or suspensions, and the Ohio Board did not suspend his medical license. P. Br. at 6-7. In this decision I need only focus on whether CMS was authorized to revoke Petitioner's enrollment and billing privileges based on his conviction.

the July 14, 2010 Ohio Board's stayed suspension of his medical license. CMS Ex. 20, at 14. He also enclosed a copy of the Ohio Board's order referencing his wire fraud conviction and other documents referencing the conviction but did not attach a copy of the court's judgment itself. NGS received the applications on October 1, 2010. CMS Exs. 19, 20. In reviewing Section 3, an NGS agent apparently questioned Petitioner's reported "stayed suspension" adverse action, and when consulted, another NGS agent apparently decided that Petitioner was "ok, as long as his IN license is ok and not on the GSA or OIG List. He has several active OH ptans, so he should be ok."³ CMS Ex. 21, at 8. NGS then approved his Medicare enrollment in Indiana. CMS Ex. 22. Petitioner later submitted an 855R to reassign his benefits and NGS approved the application. CMS Exs. 23, 24.

- Denial of Petitioner's June 6, 2012 Indiana revalidation application:** NGS received Petitioner's revalidation 855I on June 11, 2012. CMS Ex. 26. Petitioner did not explicitly disclose his July 16, 2009 conviction in Section 3. CMS Ex. 26, at 15. The application lists only his "stayed suspension" of July 14, 2010. CMS Ex. 26, at 15. Section 17 of the application instructed that he must submit a copy of any final adverse action document. While he enclosed a copy of the July 14, 2010 Ohio Board's order and other documents referencing the criminal proceedings, he did not submit a copy of the criminal judgment. CMS Ex. 26, at 35-42. After reviewing the submission, on June 14, 2012, NGS requested additional information, including a specific request regarding Section 3 of the 855I to "complete the section as necessary." CMS Ex. 28. On June 26, 2012, NGS sent a letter to Petitioner's employer that it had processed Petitioner's original revalidation application. CMS Ex. 29. However, in November 2012, Petitioner's employer submitted a revised revalidation 855I to NGS's successor, WPS. Petitioner signed this document as of October 31, 2012. CMS Ex. 38. In Section 3 he listed only the July 14, 2010 stayed Ohio Board suspension, not his felony conviction. Again, he did not include a copy of the court's judgment. CMS Ex. 38, at 6, 13-29. On June 5, 2013, WPS informed Petitioner that his application was denied. WPS denied the November 2012 revalidation application pursuant to 42 C.F.R. § 424.530(a)(3). WPS noted specifically that "On July 16, 2009 you plead [*sic*] guilty to wire fraud. You are still within 10 years of the felony. It is for

³ Petitioner argues that I should not consider these communications because they are hearsay and do not prove anything. P. Br. at 8. I am not precluded from considering hearsay in this administrative proceeding. In determining its weight, I consider "the degree of [its] reliability, based on relevant indicia of reliability and whether the hearsay is corroborated by other evidence in the record as a whole." *Gateway Nursing Ctr.*, DAB No. 2283, at 6 (2009), citing *Omni Manor Nursing Home*, DAB No. 1920, at 17 (2004).

this reason your application is denied and revalidation cannot occur.” CMS Ex. 39, at 1.

- Approval, and then Denial, of Petitioner’s 2012 Wisconsin Applications:** On August 24, 2012, WPS received an 855R to reassign Petitioner’s Medicare benefits to Riverview Hospital Association (Riverview). WPS found a problem with the application because Petitioner was not enrolled in Wisconsin and had not included an 855I. CMS Ex. 31. On September 4, 2012, WPS requested an 855I for the Riverview location. CMS Ex. 32. However, on August 29, 2012, Petitioner signed and submitted an 855I and 855R for another Wisconsin location, the Mayo Clinic Health System – Franciscan Medical Center (Franciscan). CMS Exs. 33, 34. Petitioner did not list his felony conviction in Section 3 of the 855I. In fact, he did not list any adverse legal action against him, checking “No” when asked whether he had a final adverse legal action taken against him. CMS Ex. 33, at 6. After receiving the 855I for Franciscan, WPS decided to forego its earlier request for an 855I for Riverview. On September 19, 2012, WPS approved the Franciscan application, and on September 20, 2012, the Riverview application. CMS Ex. 31, at 4; CMS Ex. 33, at 5, 9; CMS Ex. 35; CMS Ex. 36; CMS Ex. 37. Petitioner asserts that he does not know why the information regarding his conviction was not included in the Franciscan 855I application. He explains that his employer prepared the 855I, and he asserts that he was only provided “the last page to sign by the hospital administrative staff at the Mayo Clinic at the time the packet was submitted to WPS.” P. Ex. 1, at 2. In the 855I, Petitioner certified by his signature that, among other things, he “read the contents of [the] application, and the information contained herein is true, correct, and complete.” Petitioner also certified that he read and understood the penalties for falsifying information and that the “deliberate omission, misrepresentation, or falsification of any information contained . . . [in the application] . . . may be punished by criminal, civil, or administrative penalties” CMS Ex. 33, at 8-9. Although he acknowledges it was his responsibility to ensure the accuracy of the information contained in his enrollment application, he asserts that he believed the hospital, which had knowledge of his conviction, would submit the appropriate documentation to WPS. He explains he was surprised to learn his supplemental information had not been submitted. However, he asserts that WPS already had information regarding his conviction, as it denied his July 2010 application based on that application. P. Br. at 11-13; P. Ex. 1, at 2.

C. Findings of Fact and Conclusions of Law

An Administrative Law Judge's proper role under section 424.535(a)(3) is to determine whether CMS has sufficient legal grounds for a revocation determination. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 17 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). To uphold revocation under 42 C.F.R. § 424.535(a)(3), I must find that Petitioner was: 1) convicted of a felony offense; 2) that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries; and 3) that occurred within 10 years of his Medicare enrollment or the revalidation of his enrollment. *See Abdul Razzaque Ahmed, M.D.*, 710 F. Supp. 2d 167, 173; *Fady Fayad, M.D.*, Docket No. 2266 (2009). If CMS proves this, and "the supplier's conviction was the basis for the challenged revocation," then I must "sustain the revocation, regardless of other factors, such as the scope or seriousness of the supplier's criminal conduct and the potential impact on Medicare beneficiaries, [considerations] that CMS might reasonably have weighed in exercising its discretion." *Fayad*, DAB No. 2266, at 16, citing *Ahmed*, DAB No. 2261, at 16-17, 19. I "may not substitute [my] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances." *Ahmed*, DAB No. 2261, at 19. The crime need not be based on the specific crimes enumerated in 42 C.F.R. § 424.535(a)(3)(i)(A)-(D), and CMS is not precluded "from making a case-specific, or adjudicative, determination that a crime or category of crime not specified in the regulation is detrimental to the best interests of Medicare." *Fayad*, DAB No. 2266, at 8.

Revocation based on a felony conviction is effective on the date of the conviction. 42 C.F.R. § 424.535(g). Petitioner, a physician, is considered a supplier to Medicare. 42 C.F.R. § 400.202. After CMS revokes a supplier's enrollment and billing privileges, the supplier cannot participate in Medicare from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar must last for a minimum of one year but cannot exceed three years. 42 C.F.R. § 424.535(c). When a supplier's billing privileges are revoked, any "agreement in effect at the time of revocation is terminated effective with the date of revocation." 42 C.F.R. § 424.535(b).

1. Petitioner was convicted of a federal felony offense.

The record shows, and Petitioner does not dispute, that on April 16, 2009, Petitioner pled guilty to a committing wire fraud, a Class C felony offense. CMS Ex. 4, at 2; CMS Ex. 6, at 8. On July 16, 2009, the presiding Judge entered a judgment of conviction and sentenced Petitioner to two years of probation. CMS Ex. 7, at 1-3; P. Hearing Request; P. Br.

2. *Petitioner's conviction occurred within 10 years preceding Petitioner's enrollment or revalidation of enrollment.*

Petitioner's July 16, 2009 conviction occurred within 10 years preceding WPS's June 20, 2013 revocation of Petitioner's Medicare enrollment and billing privileges.

3. *Petitioner's felony offense is a financial crime under 42 C.F.R. § 424.535(a)(3)(i)(B).*

CMS determined, and I agree, that Petitioner's conviction for wire fraud is for a financial crime, and I "must treat a revocation based on that crime as a reasonable and permissible exercise of the discretion granted to [CMS] under section 424.535(a)(3)[.]" *Ahmed*, DAB No. 2261, at 11-12 citing *Letantia Bussell, M.D.*, DAB No. 2196, at 9-10, 12-13 (2008). Further, Petitioner does not dispute in either his hearing request or his brief that his conviction is for a financial crime pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B).

4. *CMS's determination to revoke Petitioner, because Petitioner's felony offense is detrimental to the best interests of the Medicare program and its beneficiaries, was within CMS's discretion, and I may not review its decision to exercise that authority.*

Petitioner disputes that his felony offense is detrimental to the best interests of Medicare. He asserts that that his felony offense was an aberration and that he is trustworthy enough to be enrolled in Medicare. Petitioner stresses that the judge who presided over his criminal case placed Petitioner on probation and "recognized that [Petitioner's] actions were an unfortunate departure from an otherwise exemplary life, and . . . [the judge] believed that [Petitioner] deserved the opportunity to practice medicine." P. Br. at 19. Petitioner asserts that his inability to participate in Medicare will severely limit his ability to practice medicine and thus frustrate the judge's goals for him. Moreover, the Indiana, Ohio, and Wisconsin medical licensing Boards all supported his continued practice of medicine because they did not suspend or revoke his licenses. He argues further that private insurance companies still approved his applications notwithstanding his felony conviction. P. Br. at 1, 19-20.

Petitioner further asserts that his felony offense did not impact the Medicare program or its beneficiaries, and his revocation will deny his Medicare patients access to his quality medical care. Petitioner stresses that CMS should have considered the "forthright and honest manner in which he accepted responsibility for his actions and how he went the 'extra mile' to report his convictions." P. Br. at 1-2. Petitioner disputes CMS's suggestion that by submitting multiple enrollment applications Petitioner is trying to trick Medicare or slip through a crack in the system. Petitioner argues that instead he is "desperate[ly]" attempting "to gain employment, put his past behind him and try[ing] to become a contributing member of society." P. Br. at 13.

CMS has decided to revoke Petitioner because Petitioner's felony fraud offense is detrimental to the Medicare program, and I have no authority to question its exercise of discretion here. Petitioner, while employed as a pharmacist and thus a health care professional, fraudulently obtained money from his employer by claiming remuneration for hours he did not work. It is reasonable for CMS to question whether it should allow him the privilege of direct billing for Medicare beneficiaries. Even assuming Petitioner's conduct did not directly harm the Medicare program or its beneficiaries, CMS's decision to revoke his enrollment and billing privileges need not be based solely on a specific act or acts directly harming the program. *See Lorrie Laurel, PT*, DAB No. 2524, at 4-5 (2013).

Petitioner's argument that his enrollment and billing privileges should not be revoked because other entities such as state licensing boards and insurers chose not to sanction him, because others support his continued practice of medicine, and because his patients will lose his services, does not compel Medicare to enroll him. While Petitioner asserts that he has been "forthright" and "honest" and went the "extra mile" in reporting his conviction to Medicare, Petitioner's assertions are not persuasive. In none of the 855Is he filed following his conviction did he specifically cite his conviction. Further, in none of the attachments to his 855Is did he attach a copy of the judgment of conviction. Petitioner argues that hospital employers who completed his enrollment applications failed to accurately respond to Section 3 of his enrollment applications, without Petitioner's knowledge and contrary to his instructions. P. Br. at 15 n.4. However, an applicant for Medicare enrollment must not be able to shirk responsibility for application responses by blaming a third-party assistant or employer. Petitioner specifically certified to the truthfulness of those statements in his applications.

5. CMS is not estopped from revoking Petitioner's enrollment and billing privileges.

Petitioner argues that revocation of his enrollment and billing privileges is inappropriate because NGS approved his Indiana participation in Medicare on October 1, 2010, approved his reassignment on February 11, 2011, and revalidated his enrollment on June 26, 2012. He states all of these enrollment actions took place following his felony conviction and with the contractor's full knowledge of the conviction.⁴ Petitioner stresses that WPS enrolled him in Wisconsin with knowledge of his felony offense because it had once denied him enrollment based on the felony offense. By approving his

⁴ Petitioner also clarifies that, contrary to the June 20, 2013 notice of revocation, Petitioner did not continue to bill Medicare for services he provided after the date of a loss of licensure because his licenses to provide health care in Indiana, Ohio, and Wisconsin were never suspended or revoked in those states. P. Br. at 16.

participation, Petitioner argues that the contractors and CMS waived the ability to later revoke his enrollment and billing privileges. P. Br, at 10-15.

Petitioner also explains how he relied on the approval of his enrollment application, submitted Medicare claims, and now may be subject to an overpayment and may have to re-pay the claims. This is particularly unfair in Petitioner's view as the Medicare contractors involved had the discretion not to revoke or deny his applications. *See* P. Br. at 11-12, 15, 17. These arguments amount to a claim of equitable estoppel.

To establish a claim of equitable estoppel:

[T]he party seeking relief must, at minimum, show that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in "affirmative misconduct." *See Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Estate of James v. U.S. Dept. of Agriculture*, 404 F.3d 989, 995 (6th Cir. 2005); *Tennessee Dept. of Health and Environment*, DAB No. 1082 (1989).

Rosewood Living Ctr., DAB No. 2019, at 13 (2006). Petitioner has not met any of the elements for equitable estoppel here. He does not allege CMS, or its contractors, made a factual misrepresentation and does not assert that he relied on such misrepresentation. There is no evidence that any government employee or agent engaged in affirmative misconduct and no ground to find that CMS or its contractors made a knowing waiver. Petitioner offers no precedent for CMS or the contractor having waived the ability to revoke his enrollment and billing privileges. Rather, Petitioner's own conduct in not ensuring complete and accurate responses to Section 3 of the 2012 Indiana 855I and the 2012 Wisconsin 855I suggests that Petitioner understood that he was subject to denial or revocation due to his conviction. I also do not have the authority to consider retroactive payment consequences that CMS takes into consideration when exercising its discretion. *Laurel*, DAB No. 2524, at 7-8.

6. I have no authority to reduce Petitioner's three-year re-enrollment bar.

The re-enrollment bar after a revocation is a minimum of one year and a maximum of three years. 42 C.F.R. § 424.535(c). Petitioner argues that the three-year re-enrollment bar is not appropriate in his case because Petitioner did not wrongfully bill Medicare after the date of his conviction. Petitioner asserts that, even assuming the revocation of his enrollment and billing privileges is appropriate, a three-year bar as opposed to a one-year bar is not.

The imposition and duration of the re-enrollment bar are not appealable initial determinations, and thus I do not have the authority to consider them. My authority is limited to determining whether CMS had a basis to revoke Petitioner's enrollment and billing privileges. *See* 42 C.F.R. §§ 424.535(c), 498.3(b)(17); *David Tolliver, M.D.*, DAB CR2281, at 12-13 (2010).

III. Conclusion

CMS, through its contractor WPS, had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges because of his July 16, 2009 conviction for wire fraud. Accordingly, I sustain CMS's revocation and the three-year re-enrollment bar. Petitioner's revocation is retroactive to his date of conviction.

/s/
Joseph Grow
Administrative Law Judge