

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

Main Street Pharmacy, LLC
Docket No. A-10-86
Decision No. 2349
December 13, 2010

**FINAL DECISION ON REVIEW OF
HEARING OFFICIAL DECISION**

Main Street Pharmacy, LLC (MSP) requests review of the June 18, 2010 decision by Board Member Leslie A. Sussan (Board Member).¹ *Main Street Pharmacy, LLC*, DAB CR2160 (2010). The Board Member granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), upholding the revocation of MSP's Medicare billing privileges effective September 22, 2008.

For the reasons stated below, we uphold the revocation of MSP's billing privileges but modify the rationale.

Applicable Law

Title XVIII of the Social Security Act (Act) establishes the Medicare program.² The Secretary of Health and Human Services (Secretary) administers Medicare through contractors. 42 U.S.C. § 1395u(a). Section 1866(j) of the Act requires the Secretary to promulgate regulations for a process for the enrollment of Medicare providers and suppliers, including the right to a hearing and judicial review in the event of denial or revocation of Medicare billing privileges.

The regulations at 42 C.F.R. Part 424, subpart P, set out the requirements for enrollment and reporting of changes to enrollment information. "Providers and suppliers must meet and maintain these enrollment requirements to bill either the Medicare program or its beneficiaries for Medicare covered services or supplies." 42 C.F.R. § 424.500.

¹ Pursuant to 42 C.F.R. § 498.44, the Board Member was designated as the hearing official to hear provider and supplier enrollment appeals under 42 C.F.R. Part 498, subpart P and was assigned this case to issue a hearing decision.

² The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

Section 424.535 lists the bases on which CMS may revoke a provider's or supplier's Medicare billing privileges and provider or supplier agreement. 42 C.F.R. § 424.535(a). The grounds for revocation include a felony conviction of a provider, supplier, or any owner of a provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, wherein CMS has determined the offense to be detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). Under section 424.535(a)(3)(i)(B), such offenses include “[f]inancial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes” Section 424.535(e) provides that if a revocation was due to a felony conviction of an owner, “the revocation may be reversed if the provider or supplier terminates and submits proof that it has terminated its business relationship with that individual within 30 days of the revocation notification.”

Section 424.57 of the regulations lists special payment rules and billing privileges requirements for suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). To receive Medicare billing privileges, a DMEPOS supplier must meet and maintain each of the 25 supplier enrollment standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(25).³ *Ita Udeobong, d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324, at 2 (2010). Section 424.57(c)(1) sets forth supplier standard one, which requires suppliers to operate and furnish Medicare-covered items in compliance with all applicable federal and state licensure and regulatory requirements. Section 424.57(c)(2) sets forth supplier standard two, which requires a supplier to “report to CMS any changes in information supplied on the application within 30 days of the change.” CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS (or its agent) determines that the supplier is not in compliance with any of these supplier enrollment standards. 42 C.F.R. § 424.57(d); *A to Z DME, LLC.*, DAB No. 2303, at 3 (2010); *see also 1866ICPayday.com*, DAB No. 2289, at 13 (2009) (“failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges”).

A supplier whose Medicare enrollment has been revoked under section 424.535(a) may ask for reconsideration of that revocation by a contractor hearing officer. 42 C.F.R. §§ 424.545(a); 498.5(l); 498.22(a); 405.874(c). If the supplier is dissatisfied with the reconsideration determination, the supplier may request a hearing pursuant to 42 C.F.R. Part 498, subpart D. 42 C.F.R. §§ 498.3(b)(17); 498.40. If dissatisfied with the ALJ decision, the supplier has a right to Departmental Appeals Board review of that decision. 42 C.F.R. § 498.80.

Background

The following undisputed facts are drawn from DAB CR2160 and the record.

³ “Enrollment” means the process that Medicare uses to establish a supplier's eligibility to submit claims for Medicare-covered services and supplies. 42 C.F.R. § 424.502. DMEPOS suppliers enrolled in Medicare receive a supplier number conveying Medicare billing privileges. *Id.*; 42 C.F.R. §§ 424.57(a), (b)(2).

MSP, an Ohio pharmacy, was opened in March 2004 by co-owners Brian L. Martin and Kristina Gundler. MSP enrolled in Medicare as a DMEPOS supplier. In March 2008, Mr. Martin was indicted on multiple counts of federal health care fraud for filing false Medicaid drug claims. Neither Ms. Gundler nor MSP itself were charged with these crimes. CMS Ex. 10, at 43-51.

By notice dated June 16, 2008, the Ohio Medicaid agency suspended MSP's Medicaid provider number because of Mr. Martin's indictment. In a letter dated September 15, 2008, Ms. Gundler notified CMS of the indictment and suspension.

On September 22, 2008, Mr. Martin was convicted on multiple counts of federal health care fraud. On October 3, 2008, Ms. Gundler purchased Mr. Martin's share in MSP and became the sole owner of MSP. CMS Ex. 10, at 52-77; CMS Ex. 5.

In a letter dated August 6, 2009, Medicare contractor, National Supplier Clearinghouse (NSC), notified MSP that its Medicare supplier number would be revoked 30 days from the postmark on the letter. NSC cited multiple Medicare regulations to support its action and stated that the revocation would be retroactive to the date of the felony conviction, September 22, 2008. Under the heading, "Reasons for Revocation of your Supplier Number," the letter stated:

Supplier standard number *one* states that a supplier "operates its business and furnishes Medicare-covered items in compliance with all applicable Federal and State licensure and regulatory requirements." *According to the United States Department of Justice (DOJ), your company was convicted on September 22, 2008 of federal health care fraud charges.*

CMS Ex. 8, at 1 (emphasis in original).

On August 21, 2009, Ms. Gundler filed a request for reconsideration with NSC, stating that the revocation was improper because the felony conviction was against Mr. Martin, not MSP or herself, and Mr. Martin had sold his ownership in the business to her in October 2008. CMS Ex. 4. Ms. Gundler included a copy of the purchase agreement with her request.

On November 27, 2009, an NSC Medicare Hearing Officer issued a reconsideration determination upholding the revocation. CMS Ex. 1. The Hearing Officer stated that MSP was not compliant with supplier standard one, at section 424.57(c)(1). The Hearing Officer acknowledged Ms. Gundler's argument that the felony conviction was against Mr. Martin and not her or MSP, and that Mr. Martin sold his MSP ownership share to her in October 2008. The Hearing Officer, however, "noted that there [was] not a copy of the CMS 855S change of information in the file to reflect [the] change of ownership as required." CMS Ex. 1, at 2. While the purchase agreement "substantiate[d]" the change in ownership, the Hearing Officer stated, "the NSC was not properly notified of the change." *Id.* The Hearing Officer further stated that her request for additional documentation from MSP "went unanswered." *Id.* In addition, the

Hearing Officer stated that Mr. Martin was convicted in federal court of 37 counts of defrauding the Ohio Medicaid program. “As cited in 42 CFR 424.435 and specifically 424.535(a)(3)(i)(B),” the Hearing Officer stated, “the revocation is a result of a felony conviction that included the crime of insurance fraud” *Id.* Further, the Hearing Officer stated, while Ms. Gundler explained in her request for reconsideration that neither she nor MSP “was involved in the felony conviction,” neither the request for reconsideration nor case file explained “Ms. Gundler’s status during the time period Mr. Martin was convicted” *Id.*

On January 12, 2010, MSP filed a Medicare Enrollment Application (form CMS-855S) reporting Mr. Martin’s conviction and the change of ownership. CMS Ex. 10, at 16, 25.

On January 19, 2010, MSP requested a hearing on the revocation, appealing the reconsideration determination pursuant to 42 C.F.R. Part 498, subpart D. The Board Member granted CMS’s summary judgment motion, determining that there were no material factual disputes and that “CMS had a valid basis to revoke [MSP’s billing privileges] based on the felony conviction.” DAB CR2160, at 5. The Board Member further determined that “CMS was not required to reverse the revocation.” *Id.* at 6. Finally, the Board Member rejected MSP’s contention that CMS had violated MSP’s due process rights. *Id.* at 8.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Andrew J. Elliott, M.D.*, DAB No. 2334, at 2 (2010); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997). If a moving party carries its initial burden, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Industrial Co. v. Zenith Radio*, 474 U.S. 574, 587 (1986) (quoting Fed. R. Civ. Pro. 56(e)). In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the nonmoving party, drawing all reasonable inferences from the evidence in that party’s favor. *Madison Health Care, Inc.*, DAB No. 1927 (2004). Our standard of review on a disputed conclusion of law is whether the decision below is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

Analysis

On appeal to the Board, Ms. Gundler represents MSP pro se. Ms. Gundler asks the Board to consider the difficulties she has encountered because of her business relationship with Mr. Martin, and to take into account her cooperation in the federal investigation and

prosecution of Mr. Martin. Ms. Gundler states that her failure to timely submit a CMS 855S form showing the October 2008 change of ownership was not because she “was trying to hide something or intentionally file false claims but simply because [she] didn’t know it was a requirement.” P. Br. at 1. Ms. Gundler states that she went “out of [her] way to assist the Federal Prosecutors” and is now “being punished over an honest mistake [she] made over one form.” *Id.*

For the reasons explained below, these contentions are not sufficient to reverse the revocation.

1. *CMS had a valid basis to revoke based on the felony conviction.*

As explained above, we address de novo whether summary judgment is appropriate. DAB No. 2334, at 2; DAB No. 1918. In support of its motion for summary judgment, CMS argued that the revocation was proper under section 424.535(a)(3) due to the September 22, 2008 felony conviction of then co-owner, Mr. Martin. CMS Motion for Summary Judgment at 6-9. CMS argued in the alternative that the revocation was proper based on sections 424.57(c)(1) and 424.57(c)(2). Specifically, CMS contended, MSP failed to report the October 2008 change in MSP’s ownership within 30 days of that transaction, as required by supplier standard two; consequently, MSP was not operating in compliance with all applicable regulations, as required by supplier standard one. *Id.* at 10-11.

MSP argued that Mr. Martin’s conviction should not be imputed to MSP itself because neither Ms. Gundler nor MSP were convicted of the felony. On appeal to the Board, Ms. Gundler maintains that “neither [she] nor the pharmacy was involved with the conviction.” P. Br. at 1. With respect to MSP’s failure to notify CMS of the October 2008 change of ownership within 30 days of the transaction, MSP argued that it should have been provided an opportunity to correct this deficiency before the revocation decision was made, as required under section 424.535(a)(1) of the regulations. Ms. Gundler states on appeal to the Board that her failure to timely notify CMS of the ownership change using the proper form was due to her lack of knowledge of the requirement.

On review of the record evidence and the parties’ pleadings, we concur in the determination that there are no material facts in dispute. Most notably, it is undisputed that on September 22, 2008, Mr. Martin was convicted on multiple counts of federal health care fraud, and that at that time, he was a co-owner of MSP.

Applying the governing regulations to these undisputed facts, we conclude that CMS had a valid basis to revoke MSP’s Medicare billing privileges based on Mr. Martin’s felony conviction. Most relevant, section 424.535(a)(3) permits CMS to revoke a supplier’s billing privileges if the following conditions are met: (1) the supplier or any owner of the supplier was convicted of a felony offense; (2) CMS has determined that the felony offense is detrimental to the best interests of the Medicare program and its beneficiaries; and (3) the conviction occurred within 10 years of the supplier’s enrollment or

revalidation of enrollment in Medicare. Section 424.535(a)(3)(i)(B) provides that the offenses subject to the regulation include “[f]inancial crimes, such as . . . insurance fraud.” In this case, all three conditions of section 424.535(a)(3) were met. Specifically, MSP does not dispute that Mr. Martin was an owner of MSP at the time he was convicted of the felony; that CMS determined that this felony was detrimental to the best interests of the Medicare program because it involved insurance fraud (submitting false Medicaid claims under MSP’s Medicaid number); and that the September 22, 2008 conviction occurred within 10 years of MSP’s enrollment or revalidation of enrollment in Medicare.

Furthermore, MSP’s arguments opposing the revocation based on the felony conviction are unavailing. In light of the plain language of section 424.535(a)(3), the fact that neither Ms. Gundler nor MSP itself was convicted of the felony offense is of no consequence because Mr. Martin was an owner of MSP at the time of his felony conviction. In addition, when a revocation is based on the felony conviction provision at section 424.535(a)(3), the supplier is not entitled to an opportunity for correction. As CMS has explained, felony conviction revocations “do not lend themselves to a corrective action plan.” 73 Fed. Reg. 69,864 - 69,865 (2008). Thus, the revocation of MSP’s billing privileges based on Mr. Martin’s felony conviction was legally valid under section 424.535(a)(3).

The decisions below cited DMEPOS supplier standard one at section 424.57(c)(1), as well as section 424.535(a)(3), to support the revocation. CMS Ex. 8, at 1; CMS Ex. 1, at 2; DAB CR2160, at 5-6. As summarized above, section 424.57(c)(1) requires the supplier to operate “its business and furnish[] Medicare-covered items in compliance with all applicable Federal and State licensure and regulatory requirements.” Under section 424.57(d), “CMS will revoke a supplier’s billing privileges if it is found not to meet” this standard. The initial and reconsideration decisions stated that MSP failed to meet supplier standard one because of the September 22, 2008 felony conviction. CMS Ex. 8, at 1; CMS Ex. 1, at 2. The Board Member concluded that Mr. Martin’s felony conviction “demonstrates on its face that a business is not being operated in compliance with applicable Federal and state regulatory requirements.” DAB CR2160, at 5. In addition, the Board Member found that NSC “did not cite section 424.535(a)(3) as a separate basis for revoking MSP’s enrollment.” *Id.* at 6. Nevertheless, the Board Member stated, section 424.535(a)(3) informed her “understanding of what it means for a supplier not to be operating in compliance with Federal regulatory requirements.” *Id.* Specifically, the Board Member stated, “Section 424.535(a) is a Federal regulatory requirement.” *Id.* Because the felony conviction of any owner of a supplier under section 424.535(a)(3) constitutes a violation of a federal regulatory requirement, she continued, “[i]t therefore follows that MSP is in violation of standard 1, . . . even though the supplier entity was not itself convicted of the felony.” *Id.*

In light of our conclusion that the revocation of MSP’s billing privileges is legally valid based on section 424.535(a)(3) and Mr. Martin’s felony conviction, as CMS argued in support of its motion for summary judgment, we do not reach the question whether MSP

also was in violation of section 424.57(c) based on either the felony conviction or the failure to timely and properly report the October 2008 change in MSP's ownership.⁴ Consistent with our determination that the revocation was valid under the felony crimes provision of the regulations, both the initial and reconsideration determinations specifically cited sections 424.535 and 424.535(a)(3)(i)(B) and the September 2008 federal health care fraud conviction in support of the revocation. CMS Ex. 8, at 1; CMS Ex. 1, at 2. Furthermore, neither determination indicated that the felony conviction provision could not be relied on alone to support the revocation. Because this provision most directly addresses the underlying rationale for the action – the felony health care fraud conviction of a supplier owner – we uphold the revocation determination based on section 424.535(a)(3). Insofar as our determination modifies the rationale supporting the revocation, MSP was given ample opportunity to respond to it below, in opposing CMS's summary judgment motion.

For the reasons described above, we conclude that CMS had a valid basis to revoke MSP's Medicare billing privileges. Specifically, the revocation was proper based on the September 22, 2008 felony conviction of Mr. Martin and section 424.535(a)(3) of the regulations.

2. *CMS was not required to reverse the revocation of MSP's billing privileges.*

CMS further argued in support of summary judgment that it was not required to reverse the revocation of MSP's billing privileges under section 424.535(e), as MSP alleged on appeal. Section 424.535(e) states that if a revocation is due to adverse activity, such as a felony conviction of a supplier owner, "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." CMS argued that the regulation is permissive, not mandatory, and that a reviewing tribunal has no authority to substitute its judgment for CMS's discretion. Moreover, CMS averred, even if its exercise of discretion were subject to review, CMS did not abuse its discretion in deciding not to reverse the revocation in this case.

MSP contended that there was no evidence that CMS exercised its discretion under section 424.535(e). Further, MSP argued, even if there were such evidence, CMS abused its discretion because MSP notified CMS of the ownership change within 30 days of the revocation notice, and "MSP's only mistake was its failure to submit a timely CMS 855S showing the change in ownership and conviction." MSP Answer to CMS Motion for Summary Judgment at 2. On appeal to the Board, Ms. Gundler maintains that she "did not submit the proper form to show change of ownership" because she "just didn't know

⁴ We note, however, that section 424.535(a) lists the grounds on which CMS may rely to revoke a supplier's billing privileges; these grounds are not themselves regulatory requirements with which a provider or supplier must comply. The reasons for revocation include, at section 424.535(a)(1), a supplier's noncompliance with the enrollment requirements or with the enrollment application standards for its supplier type, together with a failure to submit a plan of correction. As previously discussed, the application certification standards for DMEPOS suppliers are set forth at section 424.57(c) of the regulations. *Ita Udeobong* at 2; *A to Z DME* at 3.

about that form.” P. Br. at 1. She asks the Board “to see [her] as a person not an entity that ‘didn’t submit proper documentation’ and [to] reconsider the decision.” *Id.* at 2.

We conclude that section 424.535(e) is permissive in nature. Specifically, the use of the term “may” in the regulation implies that CMS’s authority to reverse a revocation is discretionary, even when a supplier terminates its business relationship with the convicted individual and submits proper notice of the ownership change within 30 days of the revocation notice. *See Alden-Princeton Rehabilitation and Health Care Center, Inc.*, DAB No. 1709 (1999) (use of the word “may” in a regulation implies that discretion was intended); *Maine Department Of Human Services*, DAB No. 516 (1984) (use of the word “may” in a statute rather than “shall” implies discretion on the part of the Secretary). We further conclude that nothing in the language of section 424.535(e) requires CMS to demonstrate that it considered whether to exercise its discretionary authority under the regulation or to document its reasons for choosing not to do so.

We also concur with the Board Member’s conclusion that it is unnecessary to resolve the question of whether an abuse of discretion is ever subject to review under section 424.535(e) because MSP “presented no persuasive reason to view CMS’s declining to reverse this revocation as abusive, arbitrary or capricious.” DAB CR2160, at 7. That is, even accepting under the summary judgment standard that Ms. Gundler was entirely innocent of the felony crimes, that she fully cooperated in the investigation and prosecution of Mr. Martin, and that she in effect became a victim of Mr. Martin’s actions, CMS would have reasonable grounds for deciding not to reverse the revocation. Ms. Gundler’s acknowledged failure to timely report the conviction and change of ownership, as required under section 424.57(c)(2), would provide reasonable grounds for CMS to “lack confidence in MSP sufficient to reinstate it after the former co-owner’s felony conviction.” DAB CR2160, at 7. Indeed, as MSP’s owner, Ms. Gundler “had a corresponding responsibility to be aware of and adhere to applicable law, regulations, and policies” governing supplier participation in Medicare. *Thomas M. Horras*, DAB No. 2015, at 34 (2006). Ms. Gundler’s acknowledged failure to know that she was required to report the change of ownership to CMS within 30 days provides additional support for the conclusion that CMS had reasonable grounds not to reverse the revocation of MSP’s billing privileges under section 424.535(e).

Accordingly, we conclude that CMS was not required to reverse the revocation of MSP’s billing privileges pursuant to section 424.535(e) under the circumstances of this case.

3. *MSP’s due process rights were not violated.*

MSP argued below that its due process rights were violated because the Hearing Officer’s reconsideration determination upheld the revocation on materially different grounds than those cited in the initial determination. P. Request for Hearing at 2-4. Specifically, MSP contended that the Hearing Officer found “that the deficiency cited in the Initial Revocation Notice (that MSP was convicted of a felony offense) was incorrect,” but sustained the revocation based on: 1) MSP’s failure to file a CMS 855S showing the transfer of ownership in MSP; and 2) Ms. Gundler’s “alleged failure to explain her status

during the time period of Martin’s criminal conviction” *Id.* at 3. MSP argued that “it never had the opportunity to defend itself against the grounds cited by the Hearing Officer.” *Id.* at 3.

However, MSP did not accurately characterize the reconsideration determination. As described above, the initial determination notice specifically cited to sections 424.535(a) and 424.535(a)(3)(i)(B) and stated that the revocation was based on a report to CMS from DOJ that the “company was convicted . . . on September 22, 2008 of federal health care fraud charges.” CMS Ex. 8, at 1. While the Hearing Officer found that the felony conviction was against Mr. Martin, and not MSP itself, the Hearing Officer concluded: “As cited in 42 CFR 424.535 and specifically 424.535(a)(3)(i)(B) the revocation is a result of a felony conviction that included the crime of insurance fraud” CMS Ex. 1, at 2. At least one basis for the initial determination and the reconsideration determination was the same – the September 22, 2008 felony conviction involving the submission of false claims under the Medicaid program and the regulation governing felony convictions of a supplier or supplier owner. Thus, the initial and hearing officer determinations provided sufficient detail for MSP/Ms. Gundler to understand the nature of the deficiencies supporting CMS’s decision to revoke MSP’s Medicare billing privileges. *See* 42 C.F.R. § 405.874(b)(1)(i) (2008).

Conclusion

For the reasons stated above, we uphold the decision below, granting summary judgment in favor of CMS and sustaining the revocation of MSP’s billing privileges effective September 22, 2008.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member