Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ian J. Griffith, PT
(PTAN: 340299ZAVL)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-690

Decision No. CR4817

Date: March 24, 2017

Novitas, a Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Ian J. Griffith, PT (Petitioner) after it determined that Petitioner had committed a felony offense that was detrimental to the best interests of the Medicare program and its beneficiaries. While I affirm the revocation of Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3), I find that the effective date of the revocation should be 30 days after the initial notice of revocation, on May 4, 2016.

I. Background and Procedural History

Petitioner is a physical therapist who was enrolled as a supplier of services in the Medicare program. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 2 at 1. At the time Petitioner enrolled in the Medicare program in February 2014, Petitioner answered in the affirmative a question asking the following: "Have you, under any current or former name or business entity, ever had a final adverse action listed on page

12 of this application imposed against you?" [1] CMS Ex. 1 at 14. Petitioner completed a section asking him to "report each final adverse legal action, when it occurred, the Federal or State agency or the court/administrative body that imposed the action, and the resolution, if any." CMS Ex. 1 at 14. In doing so, Petitioner listed "Fines + 3 yrs probation" taken by the Cumberland Co. court" on January 12, 2009. CMS Ex. 1 at 14. The instructions directed that Petitioner attach "a copy of the final adverse legal action documentation and resolution." CMS Ex. 1 at 14. Petitioner attached a copy of two documents relating to his conviction. CMS Ex. 1 at 31-32. The first document bears a caption of "IN RE: SENTENCING" and "ORDER OF COURT." CMS Ex. 1 at 31 (capitalization in original). The Order lists the court and case docket number, along with a charge of "Unlawful delivery or manufacture or possession with intent to deliver a Schedule 1 controlled substance." [2] CMS Ex. 1 at 31 (capitalization in original). The Order directs the following:

> AND NOW, this 13th day of January, 2009, the Defendant having appeared for sentence and the Court being in receipt of a sentencing report, sentence is that he pay the costs of prosecution and that he undergo a period of supervised probation for 36 months subject to the following special conditions:
>
> 1. That he not use any illegal drugs.
> 2. That he be and remain in good behavior.
> 3. That he successfully graduate from Shippensburg University by August 2009.
> 4. That he comply with all other directions of his probation officer.

CMS Ex. 1 at 31. Petitioner also attached a letter from Tara Karper, Department Clerk, Cumberland County Adult Probation. CMS Ex. 1 at 32. Ms. Karper stated the following:

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[1] Page 12 of the application lists various convictions that must be reported on the enrollment application. As relevant here, the form instructs the applicant to report "[a]ny felony or misdemeanor conviction under Federal or State law relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." CMS Ex. 1 at 13.

[2] A cursory internet search of the terms "Pennsylvania" and "unlawful delivery or manufacture or possession with intent to deliver a Schedule 1 controlled substance" reveals that the offense listed on the sentencing order is a felony offense. *http://www.pacode.com/secure/data/204/chapter303/s303.15.html* (last visited February 24, 2017). The Pennsylvania General Assembly refers viewers to the *www.pacode.com* website. *http://www.legis.state.pa.us/cfdocs/legis/CH/Public/pcde_index.cfm* (last visited February 24, 2017). Petitioner does not dispute he has a felony conviction.

> Ian Griffiths [sic] was released from supervision on docket # CP-21-CR-1309-2008 on his max date, 1/13/2012. His fines and costs were paid in full on 12/1/2009.
>
> If you have any further questions, you may contact the Cumberland County Adult Probation Office directly at [telephone number].

CMS Ex. 1 at 32.

In a letter dated April 16, 2014, Novitas informed Petitioner that it had approved his enrollment application and assigned a Provider Transaction Access Number (PTAN), at which time it also approved his request to reassign benefits to Maryland SportsCare & Rehab, LLC. CMS Ex. 2 at 1-2.

Approximately two years later, on April 1, 2016, an employee of CMS's Center for Program Integrity (CPI) directed that Petitioner's Medicare enrollment be revoked due to his October 2008 felony conviction. CMS Ex. 3 at 2. Documentation provided by CPI shows that a Police Criminal Complaint charged that Petitioner violated section 780-113(a)(3) of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act. CMS Ex. 3 at 6. The Police Criminal Complaint form includes instructions for the affiant to "set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) violated, without more, is not sufficient." CMS Ex. 3 at 6. However, the complainant did not list any facts, but rather, simply stated that Petitioner violated section 780-113(a)(3) because he "did knowingly deliver Marijuana, a Schedule 1 controlled substance." CMS Ex. 3 at 6. On October 28, 2008, Petitioner entered a guilty plea to the charge of unlawful delivery or manufacture or possession with intent to deliver a Schedule 1 controlled substance. CMS Ex. 3 at 8. CPI furnished a Pennsylvania Court Report that indicates that Petitioner was convicted of a felony by guilty plea. CMS Ex. 3 at 11-13.

Novitas informed Petitioner on April 4, 2016 that it had revoked his Medicare enrollment and billing privileges. CMS Ex. 4. Novitas explained that "[t]he Centers for Medicare & Medicaid Services has been made aware of your October 28, 2008 felony conviction of one count of Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Schedule I, Controlled Substance, in violation of §780-113(a)(30) of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, in the Court of Common Pleas of Cumberland County, Pennsylvania." CMS Ex. 4 at 1 (emphasis omitted). The letter explained that pursuant to 42 C.F.R. § 424.535(g), the effective date of a revocation based on felony conviction is the date Petitioner was found guilty, and therefore, the revocation would be effective on the date of Petitioner's enrollment. CMS Ex. 4 at 1. Novitas also informed Petitioner that it had established a three-year enrollment bar, effective 30 days from the date of the letter. CMS Ex. 4 at 2. Novitas further explained

that "in accordance with 42 CFR 424.565, Novitas Solutions is assessing an overpayment because the physician or non-physician practitioner continued to furnish services to Medicare beneficiaries after a final adverse action precluded enrollment in the Medicare program." CMS Ex. 4 at 2.

Petitioner, with apparent assistance from counsel, submitted a request for reconsideration in which he contended that revocation is not mandated and that he had previously reported the adverse action to Novitas. CMS Ex. 5 at 1-7. Petitioner also challenged the fairness of the revocation, contending that Novitas had properly approved his enrollment application in 2014 and that an overpayment sanction is not authorized. CMS Ex. 5 at 1-7. Petitioner explained that he had disclosed his conviction at the time he submitted an enrollment application, stating:

> I previously provided evidence to Novitas that the conviction related to an arrest in college, before I enrolled in a physical therapy educational program; and, years before I became a licensed physical therapist, obtained a job as a licensed physical therap[ist], and enrolled in Medicare to be able to treat Medicare beneficiaries.
>
> I urge that it was appropriate at the time Novitas reviewed information about my conviction; and, it is still appropriate at this time to make a determination that the offense is not "detrimental to the best interests of the Medicare program and its beneficiaries."
>
> * * *
>
> The enrollment regulations require reporting of my final adverse action and I complied with those reporting requirements. In my initial enrollment application to Medicare, signed on January 22, 2014, I checked the "Yes" box in Section 3 of the CMS 855I form, confirming a prior final adverse action and enclosed a copy of the Sentencing Order from the Court of Common Pleas of Cumberland County. The Sentencing Order confirmed the offense I was convicted of and that I was given a sentence that included 36 months of probation and the payment of a fine and court costs. More importantly, the Sentencing Order confirms that even the court determined that I should pursue my education adding a special condition that I graduate from Shippensburg University by August 2009, which I did. Also, enclosed with the CMS 855I filing as a letter confirming that as of December 1, 2009, I had paid the fine and court costs and as of January 13, 2012, I was released from probation.

CMS Ex. 5 at 3-4. Petitioner explained that pursuant to 42 C.F.R. § 424.535(a)(1)(ii), the contractor is to request additional documentation to determine compliance. CMS Ex. 5 at 4. Petitioner contended that Novitas did not request additional documentation, and that the contractor's decision "was reasonable based on the facts of the case and the latitude that the regulations provide CMS and its contractors to make such a determination." CMS Ex. 5 at 4. Petitioner also disagreed with the retroactive nature of the revocation and the resulting overpayment.[3] CMS Ex. 5 at 6-7.

Novitas issued a reconsidered determination on June 24, 2016, in which it stated it is "unable to remove the revocation." CMS Ex. 6 at 2. While the reconsidered determination did not address Petitioner's specific arguments, the determination stated that "[i]t is determined to be in the best interest for the Medicare program and its beneficiaries that this revocation is upheld as Schedule I drugs are serious and their effects are harmful to those who use them." CMS Ex. 6 at 3.

Petitioner filed a request for an administrative law judge (ALJ) hearing on July 5, 2016. CMS submitted a brief and motion for summary judgment (CMS Br.), and Petitioner submitted a brief (P. Br.). The parties, with leave, submitted a reply brief (CMS Reply) and sur-reply brief (P. Sur-Reply). CMS submitted a supplemental brief (CMS Supp. Br.), and Petitioner submitted a reply to CMS's supplemental brief (P. Reply). CMS submitted seven exhibits (CMS Exs. 1 to 7), and Petitioner submitted eight exhibits (P. Exs. 1 to 8). In the absence of any objections, I admit CMS Exs. 1 to 7 and P. Exs. 1 to 8. Neither party submitted written direct testimony, and therefore a hearing is unnecessary for the purpose of cross-examination. Acknowledgment and Pre-Hearing Order, §§ 8, 9, and 10. I consider the record in this matter to be closed, and this case is ready for a decision on the merits.[4]

II. Issues

1. Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

2. If so, whether the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges should be January 22, 2014.

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[3] I recently addressed, in *David R. Sterling, DPM, PC,* DAB No. CR4788 at 5-6 (2017), that I lack jurisdiction to review an overpayment on appeal.

[4] CMS has argued that summary disposition is appropriate. It is unnecessary in this instance to address the issue of summary disposition, as neither party has requested an in-person hearing.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2).

IV. Findings of Fact, Conclusions of Law, and Analysis[5]

1. ***On October 28, 2008, Petitioner entered a plea of guilty to a charge of unlawful delivery or manufacture or possession with intent to deliver a Schedule 1 controlled substance, which is a felony offense.***

2. ***Petitioner's felony conviction is for an offense that would result in mandatory exclusion under section 1128(a) of the Social Security Act.***

3. ***An offense listed in 42 C.F.R. § 424.535(a)(3)(ii)(D) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.***

4. ***CMS has the statutory and regulatory authority to revoke Petitioner's Medicare enrollment and billing privileges.***

Petitioner is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program, a supplier must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke a supplier's enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535(a).

Pursuant to subsection 424.535(a)(3)(ii), CMS explicitly has determined that four categories of felony offenses are *per se* detrimental to the best interests of the Medicare program and its beneficiaries and CMS may revoke a supplier's billing privileges and supplier agreement if the supplier was convicted in the previous 10 years. 42 C.F.R. § 424.535(a)(3)(i). Petitioner's offense is one listed under the regulation because the same offense could have resulted in exclusion under 42 U.S.C. § 1320a-7(a)(4). *See* 42 C.F.R. § 424.535(a)(3)(ii)(D).

Section 4302 of the Balanced Budget Act of 1997 provided for the Secretary of the Department of Health and Human Services (Secretary) added the following sentence to 42 U.S.C. § 1395u(h):

> The Secretary may refuse to enter into an agreement with a physician or supplier under this subsection, or may terminate or refuse to renew such

[5] My findings of fact and conclusions of law are set forth in italics and bold font.

> agreement, in the event that such a physician or supplier *has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries.*

P.L. 105-33, Section 4302; 42 U.S.C. 1395u(h) (emphasis added). Thus, the Secretary has the authority, pursuant to 42 U.S.C. 1395u(h), to terminate a Medicare agreement if a physician or supplier has been convicted of a felony offense that the Secretary has determined is detrimental to the best interests of the program or its beneficiaries. 42 U.S.C. § 1395u(h). Congress has also given the Secretary the broad authority to "make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [she] is charged under the Act." 42 U.S.C. § 1302(a). The Secretary was therefore authorized to implement rulemaking, through 42 C.F.R. § 424.535(a)(3), that identifies the types of offenses he has determined are detrimental to the best interests of the Medicare program and its beneficiaries.

CMS may revoke a supplier's enrollment based on the existence of a felony conviction, as set forth in 42 C.F.R. § 424.535(a)(3), which currently provides:

> (3) *Felonies.* (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 C.F.R. [§] 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.
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> (ii) Offenses include, but are not limited in scope or severity to—
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> * * *
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the [Social Security] Act.

42 C.F.R. § 424.535(a)(3)(ii)(D).

A mandatory exclusion from all federal health care programs, as referenced above, is set forth in section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4), which states:

> **(a) Mandatory exclusion**
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):
>
> ****
>
> **(4) Felony conviction relating to controlled substance**
>
> Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

In the present case, in order to determine whether an offense is per se detrimental to the best interests of the Medicare program and its beneficiaries, I only need to look to the nature of Petitioner's felony conviction and determine whether the felony conviction is for the type of criminal offense that would subject an individual to mandatory exclusion by the IG pursuant to section 1128(a) of the Act. To make this determination, it is not necessary for Petitioner to have been actually excluded under section 1128(a) of the Act.

Pursuant to section 1128(a)(4) of the Act, a mandatory exclusion is warranted if an individual has a felony conviction relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 U.S.C. § 1320a-7(a)(4). Petitioner entered a plea of guilty to the felony offense of unlawful delivery or manufacture or possession with intent to deliver a Schedule 1 controlled substance. CMS Exs. 1 at 31-32; 3 at 11-13. The Secretary's implementing regulations state that section 1128(a)(4) applies to anyone who "[i]s, or has ever been, a health care practitioner, provider, or supplier," or "[i]s, or has ever been, employed in any capacity in the health care industry." 42 C.F.R. § 1001.101(d)(1), (3). Petitioner argues that he was not employed in the medical field at the time of his conviction, rendering section 424.535(a)(3) inapplicable because he could not have been excluded at that time. While Petitioner cannot be excluded if he is not a person who could be subject to exclusion, such as a health care practitioner, there is no reason to conclude that section 1001.101(d)(1), (3) was meant to shield him from revocation based on prior conduct just because he lacked current employment in the medical field at the time of conviction. Further, it would be impractical and unnecessary to exclude every person who has been convicted of a felony offense, regardless of their involvement in the health care industry or a federal health care program. It is logical that the exclusion authority is limited to individuals who have a relationship to the health care industry. The fact that Petitioner

was a college student at the time of his offense and would not have been subject to exclusion at that time does not obviate the fact that he has a felony conviction related to the distribution of a controlled substance.

Petitioner argues that the decision in the case of *Barry Ray, M.D.,* DAB No. CR 3655 (2015) is "directly on point," in that another ALJ determined that revocation was inappropriate when a criminal offense was not per se detrimental to the best interests of the Medicare program and its beneficiaries.[6] P. Br. at 9. However, in this case, Petitioner's drug offense falls squarely within section 1128(a)(4), 42 U.S.C. § 1320(a)(4); Petitioner was convicted of a felony involving an attempted sale of marijuana to an undercover officer, and exclusion is warranted for a "felony *relating to* the unlawful manufacture, *distribution*, prescription, or dispensing *of a controlled substance.*" 42 U.S.C. § 1320(a)(4) (emphasis added). Section 424.535(a)(3)(ii) clearly indicates that revocation can be imposed due to certain "offenses," and Petitioner's offense is the type of felony offense that would result in mandatory exclusion under section 1128(a) of the Act. 42 C.F.R. § 424.535(a)(3)(ii)(D).

Petitioner has previously admitted that he committed a felony involving the unlawful delivery of a controlled substance, stating: "The offense involved an arrest when I was a college student and attempted to sell marijuana to a friend who came to make the purchase accompanied by an undercover police officer." CMS Ex. 5 at 3. The evidence shows that Petitioner was a young college student at the time of the offense, and the record lacks specific details regarding the offense, such as the quantity of marijuana or its street value.[7] It is even possible that Petitioner's offense may pale in comparison to the felony offenses that are frequently seen in exclusion and revocation actions. However, regardless of the severity of an offense, the Secretary has determined that a felony offense that is subject to exclusion under section 1128(a)(4) is per se detrimental to the best interests of the Medicare program and its beneficiaries. Unfortunately for Petitioner, the question before me is not whether CMS or Novitas was required to exercise discretion in order to determine that the offense was not per se detrimental, but rather, whether CMS or Novitas was *authorized* to revoke Petitioner's Medicare enrollment and billing privileges. While it may be questionable how revocation of this physical therapist's Medicare enrollment under these circumstances will protect the Medicare program and its beneficiaries, as opposed to causing numerous beneficiaries to need to find a new physical therapist who participates in the Medicare program, I recognize that "ALJs and

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[6] Both parties cite to numerous administrative law judge decisions in their briefing. I am not bound by administrative law judge decisions, and therefore, I will not address all of these decisions.

[7] The Pennsylvania Code indicates that certain offenses involving small quantities of marijuana are misdemeanor offenses. 35 P.S. § 780-113(a)(31).

the Board are authorized to review only whether CMS had a legal basis to revoke Petitioner's Medicare billing privileges, not CMS's exercise of discretion to do." *Lorrie Laurel, PT,* DAB No. 2524 at 7 (2013), citing *Letantia Bussell, M.D.* DAB No. 2196 at 12-13 (2008); *see* 42 C.F.R. 498.3.

Petitioner contends that Novitas lacked the authority to revoke his Medicare enrollment and billing privileges because such action is a "constructive reopening" of his previously approved Medicare enrollment application. Petitioner's argument that CMS is not permitted, pursuant to 42 C.F.R. § 498.30, to revoke his Medicare enrollment after more than one year had elapsed since approval of his application, is without merit. P. Br. at 10-16. The regulation authorizing CMS to revoke enrollment and billing privileges clearly empowers CMS to revoke Medicare enrollment and billing privileges when a supplier has a felony conviction that is detrimental to the best interests of the program. 42 C.F.R. § 424.535(a)(3). That regulation does not indicate that it can be superseded by section 498.30 if more than a year has elapsed since the approval of the application, and such a provision would eviscerate section 424.535(a)(3) and prevent CMS from correcting errors or revoking enrollment based on new information. The Board recently addressed a similar argument, explaining:

> It is important to note that the Medicare statute and regulations do not require CMS to take action within a specified time frame after discovering information about a Medicare enrollee's conviction. CMS may revoke at any time based on a conviction if the regulatory elements in section 424.535(a)(3) are satisfied. The only legally mandated time limit is the requirement in section 424.535(a)(3) that *the conviction* occur within 10 years preceding enrollment or revalidation of enrollment. Also absent from the statute and regulations is any limitation on CMS's authority to issue a revocation based on prior action or inaction by the Medicare program with respect to the supplier's enrollment status. *Cf. Central Kansas Cancer Institute*, DAB No. 2749, at 10 (2016) (finding that section 424.535(a) authorized CMS to exercise its revocation authority under section 424.535(a)(3) "regardless of any prior decision by itself or its contractor not to exercise it").

Horace Bledsoe, M.D. and Bledsoe Family Medicine, DAB No. 2753 at 9 (2016). While 42 C.F.R. § 498.30 limits reopening to a one-year period following an initial determination, Novitas did not reopen Petitioner's initial determination. 42 C.F.R. § 498.30. CMS is not limited to the one-year period following the initial determination to revoke Medicare enrollment and billing privileges. *See Lorrie Laurel, PT*, DAB No. 2524 at 7 (2013).

While I uphold the revocation of Petitioner's billing privileges, I nonetheless point out that CMS is incorrect in its assertion that Petitioner did not fully disclose the nature of his conviction when he initially submitted his enrollment application. Petitioner completed the application as instructed, and he provided a copy of the sentencing order containing the charge, sentence, and case docket number relating to his felony conviction. CMS Ex. 1 at 31. Petitioner also provided a letter from a clerk at the court, and the clerk provided her contact information. CMS Ex. 1 at 32. While CMS argues that "Petitioner never volunteered the fact that he was convicted of a felony until after Novitas issued its April 4, 2016 notice of revocation," the CMS Form 855I application did not ask Petitioner to indicate whether his conviction was for a felony offense. In fact, the application directed him to report "[a]ny *felony or misdemeanor* conviction under Federal or State law relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." CMS Ex. 1 at 13 (emphasis added).

CMS also incorrectly contends that "Novitas did not have a full understanding of the felony conviction when it approved Petitioner's application," yet provides no support for this assertion. If there was a question regarding whether Petitioner had a felony conviction, a simple internet search or a telephone call to the court employee who authored the letter attached to Petitioner's enrollment application would have confirmed that Petitioner had a felony conviction. *See* CMS Ex. 1 at 32. Or, a request for additional information from Petitioner would have presumably revealed that he had a felony conviction. I can only presume that the individual who initially approved Petitioner's enrollment application considered that Petitioner's offense was related to the sale of marijuana while he was a college student more than a half decade prior, and that the individual exercised his or her discretion to allow Petitioner's enrollment because he or she determined the felony conviction was not per se detrimental to the best interests of the program and its beneficiaries. CMS has not presented evidence or compelling arguments that the initial determination was a product of misinformation, lack of information, or error.

I reiterate that I do not review the contractor's action through the lens of whether I would have made the same determination, but instead, I review whether the contractor had the authority to revoke enrollment. I therefore conclude that Novitas properly revoked Petitioner's Medicare enrollment and billing privileges.

5. The effective date of the revocation should be May 4, 2016.

At the time of Petitioner's conviction, the provider and supplier enrollment and revocation regulations that were then in effect directed that all revocations were prospective, meaning that a revocation would be effective 30 days following notice of the revocation. 71 Fed. Reg. 20,754, 20,780 (April 21, 2006); *see* 42 C.F.R. § 424.535(g). In 2008, the Secretary proposed rulemaking that changed the effective date of revocations because providers and suppliers were not timely reporting adverse legal actions:

> While physician and NPP organizations and individual practitioners are required to report changes within 90 days of the reportable event, in many cases, there is little or no incentive for them to report a change that may adversely affect their ability to continue to receive Medicare payments. For example, physician and NPP organizations and individual practitioners purposely may fail to report a felony conviction as described in § 424.535(a)(3), or other final adverse action, such as a revocation or suspension of a license to a provider of health care by any State licensing authority, or a revocation or suspension of accreditation, because reporting this action may result in the revocation of their Medicare billing privileges. Thus, unless CMS or our designated contractor becomes aware of the conviction or final adverse action through other means, the change may never be reported by a physician and NPP organization or individual practitioner. Alternatively, if CMS or our designated contractor becomes aware of the conviction or final adverse action after the fact, we have lacked the regulatory authority to collect overpayments for the period in which the physician and NPP organizations and individual practitioners should have had their billing privileges revoked.

73 Fed. Reg. 69,725, 69,777 (Nov. 19, 2008). To address this problem, the same proposed rulemaking included a regulatory revision in which revocations based on felony convictions would be retroactive to the date of conviction. 73 Fed. Reg. at 69,865-66, 69,940-41.

Novitas applied the latter version of the regulation and determined that Petitioner's revocation should be retroactively effective on January 22, 2014, the date of his enrollment, since he was not yet enrolled in Medicare on the date of his October 28, 2008 conviction. CMS Exs. 4, 6.

The Board addressed a similar situation that involved the application of the same version of the regulation that was in effect at the time of Petitioner's conviction. *Robert F. Tzeng, M.D.*, DAB No. 2169 (2008). In the *Tzeng* case, the petitioner had argued that the application of section 424.535(a)(3), which did not exist at the time of his conviction, had an impermissible retroactive effect. *Robert F. Tzeng, M.D.*, DAB No. 2169 at 5. However, after applying the retroactivity test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994), the Board determined that the prior version of section 424.535(a)(3), as it applied to Dr. Tzeng's case, had no such retroactive effect because of its prospective implementation at that time. The Board explained:

> Landgraf held that a law is not retroactive merely because it is applied in a case arising from conduct that predates the law's enactment or because it "upsets expectations based in prior law[.]" 511 U.S. at 269 & n.24. Rather, a law operates retroactively if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at 280; see also 511 U.S. at 270 (stating that a court must ask "whether the new provision attaches new legal consequences to events completed before its enactment"). The conclusion that a particular law operates retroactively should reflect a "judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id. at 270. In turn that judgment should be informed or guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations[.]" Id.
>
> We conclude that section 424.535(a)(3), as applied to Dr. Tzeng, does not have retroactive effect. To the contrary, the regulation's effect — loss of enrollment and billing privileges beginning on February 17, 2007 — is wholly prospective. The regulation does not invalidate or impose additional requirements regarding payment claims made before its effective date, nor does it alter, or have the effect of altering, Dr. Tzeng's enrollment status in the period between the commission of his felony offense and the revocation's effective date.

Robert F. Tzeng, M.D., DAB No. 2169 at 13.

In the present case, Novitas applied the 2009 version of 42 C.F.R. § 424.535(g), which includes the current requirement for retrospective revocation of enrollment based on a felony conviction that is detrimental to the best interests of the Medicare program and its beneficiaries. However, as previously discussed, at the time of Petitioner's guilty plea and conviction in 2008, the former version of section 424.535(a)(3) required that enrollment be revoked *prospectively*. 42 C.F.R. § 424.535(g). The record indicates that, at the time of his conviction, Petitioner had intended to attend physical therapy school upon graduation from college. *See* CMS Ex. 5 at 3 ("Because of my conviction, I lost my scholarship to attend a highly sought after physical therapy educational program and had to pay for my education at another accredited institution that was willing to give me a second chance.") When Petitioner entered his plea of guilty, he did so at a time when then-existing law would not have subjected him to the possibility of a retroactive revocation of Medicare enrollment based on a 2008 criminal conviction. Rather, Petitioner, in the event of a later revocation, would have only faced the possibility of a prospective revocation 30 days in the future if the conviction was later determined to be detrimental to the best interests of the program and its beneficiaries. This scenario is akin to the situation posed in the *Tzeng* case, and the Board explained that the 2006 version of

the regulation that required prospective revocation did not attach any new legal consequences to Dr. Tzeng's felony act as contemplated by *Landgraf*. *Robert F. Tzeng, M.D.*, DAB No. 2169 at 13.

Similarly here, application of the former version of section 424.535(a)(3) does not, in any way, add new legal consequence to Petitioner's felony act; at every time since he was convicted, section 424.535(a)(3) indicated that he could be subject to revocation of his Medicare enrollment if CMS determined that his felony offense was detrimental to the best interests of the Medicare program and its beneficiaries. The implementation of the latter version of the regulation following Petitioner's October 28, 2008 felony conviction created a new legal consequence following his conviction, namely that Petitioner could potentially provide services to Medicare beneficiaries and retrospectively not be entitled to reimbursement for those same services.[8] As such, the effective date provision that was in effect at the time of Petitioner's conviction, 42 C.F.R. § 424.535(g) (2006), is the appropriate version of the regulation to be applied.[9] Therefore, the effective date of Petitioner's revocation is May 4, 2016, which is 30 days after the initial determination revoking his Medicare enrollment.[10]

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[8] While I do not have jurisdiction over overpayment issues, I acknowledge Petitioner's assertion that "Novitas has already issued overpayment demands in excess of $100,000.00." P. Sur-Reply at 7.

[9] I have amended the effective date of Petitioner's revocation based on the date of his conviction. One of my colleagues, in a similar scenario in which the date of conviction was subsequent to the regulatory amendment, commented that "it is worth noting that the purpose behind the retroactive revocation of Medicare billing privileges set forth in section 424.535(g) is not served by retroactively revoking Petitioner in this case." *Donna Maneice, M.D.*, DAB No. CR4804 at 13 (2017). The ALJ further remarked that "because there is no flexibility in the regulations, I have no choice but to uphold the effective date of revocation of Petitioner's Medicare enrollment and billing privileges, but I find the timing of the revocation to be both unfortunate and unfair." *Donna Maneice, M.D.*, DAB No. CR4804 at 15. I share the ALJ's opinion regarding the current version of 42 C.F.R. § 424.535(g) with respect to the present case.

[10] Novitas, a Medicare administrative contractor, issued the reconsidered determination in this case. I am familiar with another case, recently docketed as C-17-342, in which CPI, rather than a Medicare administrative contractor, issued a reconsidered determination that revised the effective date of a revocation from May 4, 2007 to September 16, 2016. In support of revising the effective date, CPI explained that since the petitioner had been convicted in May 2007, it would be appropriate to apply the version of section 424.535(g) that was in effect at that time, which resulted in a revocation dated September 16, 2016 rather than May 4, 2007. While I fully acknowledge that CPI's determinations are case-specific and do not bind CMS to take the

6. The three-year enrollment bar is not reviewable.

Petitioner argues that CMS improperly established a three-year reenrollment bar. P. Br. at 17-19. Petitioner argues that "CMS' determination that a revocation based on a felony conviction necessitates a three-year enrollment bar is an arbitrary and capricious decision that demands review under the due process protections by the [Administrative Procedure Act]." P. Br. at 19.

The Board has explained that "CMS's determination regarding the duration of the re-enrollment bar is not reviewable." *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The Board explained that "the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b)." *Id.* The Board further explained that "[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation's text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier's re-enrollment bar." *Id.* The Board discussed that a review of the rulemaking history showed that CMS did not intend to "permit administrative appeals of the length of a re-enrollment bar." *Id.*

While Petitioner acknowledges CMS's argument that there is no authority to appeal the establishment of an enrollment bar, Petitioner offers no authority supporting that an ALJ has the authority to review this issue. In fact, Petitioner states that he "is not arguing that he has a legal basis to appeal a properly established enrollment bar." P. Br. at 18. Rather, Petitioner acknowledges that he is arguing that "due process protections prevent CMS from establishing arbitrary policies and then arguing such arbitrary policies are beyond review during the appeals process." I offer no opinion regarding whether Petitioner's criticism of its inability to challenge the duration of the reenrollment bar has merit, and I reiterate that I have no authority to review this issue on appeal. Therefore, I do not disturb the three-year reenrollment bar.

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same action in other cases, I recognize that CMS has, at least on one occasion, agreed that the version 42 C.F.R. § 424.535(g) that was in effect at the time of a felony conviction is applicable, rather than the current version of the regulation.

V. Conclusion

For the foregoing reasons, I affirm the determination revoking Petitioner's Medicare enrollment and billing privileges. The effective date of the revocation is May 4, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge