Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Saeed Bajwa, M.D.,
(NPI: 1922085497/PTAN: 34664E)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-550

Decision No. CR4732

Date: November 10, 2016

DECISION

The Medicare enrollment and billing privileges of Petitioner, Saeed Bajwa, M.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(3) as promulgated effective February 3, 2015, based on his conviction within the preceding ten years of a felony offense that the Centers for Medicare & Medicaid Services (CMS) determined was detrimental to the best interests of the Medicare program and its beneficiaries.[1]

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[1] References are to the 2015 revision of the Code of Federal Regulations (C.F.R.), the revision in effect at the time of the initial determination, the reopened and revised initial determination, and the reconsidered determination in this case. Section 424.535(a)(3) was amended effective February 3, 2015 by a final notice of rule making published at 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The amendment was published in the C.F.R. on October 1, 2015. It is publication in the Federal Register, not the C.F.R., that gives final regulations of the Secretary of the Department of Health and Human Services (Secretary) the force and effect of law. Social Security Act (Act) § 1871 (42 U.S.C. § 1395hh).

I. Background

National Government Services (NGS), a Medicare Administrative Contractor for CMS, notified Petitioner by letter dated November 16, 2015, that NGS reopened and revised its October 16, 2015 initial determination to revoke Petitioner's Medicare enrollment and billing privileges. NGS advised Petitioner that his Medicare enrollment and billing privileges were revoked effective April 21, 2015, pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 1 at 32. NGS stated that the revocation was based on Petitioner's April 21, 2015 felony conviction in the U.S. District Court for the Eastern District of Virginia (District Court) of one count of false statements in violation of 18 U.S.C. § 1001(a)(2). NGS advised Petitioner that he was subject to a 3-year enrollment bar, beginning 30 days after the postmark date of NGS's notice letter. CMS Ex. 1 at 34.

On January 11, 2016, Petitioner requested reconsideration of the November 16, 2015 reopened and revised initial determination to revoke his Medicare enrollment and billing privileges. CMS Ex. 1 at 17-28. On April 11, 2016, NGS upheld the revocation on reconsideration. CMS Ex. 1. The hearing officer cited 42 C.F.R. § 424.535(a)(3)(ii)(B), which authorizes revocation based on certain felony convictions of financial crimes, the same basis for revocation cited by the reopened and revised initial determination. The hearing officer also cited 42 C.F.R. § 424.535(a)(9), which authorizes revocation based on failure to report final adverse legal action. CMS Ex. 1 at 1. In its prehearing brief and motion for summary judgment, CMS discusses that the initial determination dated October 16, 2015, cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation. However, CMS acknowledges that that basis was not cited by the November 16, 2015, reopened and revised determination. CMS does not mention that 42 C.F.R. § 424.535(a)(9) was again cited as a basis for revocation on reconsideration and CMS does not urge me to find that 42 C.F.R. § 424.535(a)(9) is a basis for revocation in this case. CMS Prehearing Brief and Motion for Summary Judgment at 23, 25; CMS Reply. Accordingly, I conclude that CMS has abandoned any argument that 42 C.F.R. § 424.535(a)(9) is a basis for revocation of Petitioner's enrollment and billing privileges, despite the citation of that regulatory provision in the reconsidered determination. CMS also does not argue before me that Petitioner's conviction was for a financial crime subject to 42 C.F.R. § 424.535(a)(3)(ii)(B).

On May 12, 2016, Petitioner timely filed a request for hearing before an administrative law judge (ALJ) with exhibits A through O.[2] On May 16, 2016, the case was assigned to

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[2] Exhibits A through O are not admitted or considered evidence. Petitioner had the opportunity to submit properly marked documentary evidence as part of the prehearing development of this case under the Acknowledgement and Prehearing Order dated May 16, 2016 (Prehearing Order) para. II.D and II.I and the Civil Remedies Division

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me for hearing and decision, and the Acknowledgement and Prehearing Order was issued at my direction.

On June 14, 2016, CMS filed a combined prehearing brief and motion for summary judgment (CMS Br.) with CMS Exs. 1 through 26. CMS filed a revised prehearing brief and motion for summary judgment on June 15, 2016.[3] On July 7, 2016, Petitioner filed his prehearing brief (P. Br.) with Petitioner's exhibits (P. Exs.) 1 through 9. On August 1, 2016, CMS filed its reply brief (CMS Reply). The parties did not object to my consideration of the exhibits offered and all are admitted as evidence. [4]

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as NGS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[5] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner, a physician, is a supplier.

(Footnote continued.)

Procedures (CRDP) §§ 13, 14. A copy of the CRDP was served with the Prehearing Order.

[3] CMS did not request leave to file its revised pleading. However, Petitioner did not object. The revised pleading is accepted and considered rather than the pleading filed the day before.

[4] Each party complained about one or more of the other party's exhibits, but neither actually filed or stated any objections. See e.g., P. Br. at 7, n.6; CMS Br. at 34, n.13. CMS also introduced a large amount of documentary evidence that has at most minimal relevance to provide some factual background. CMS also asserted facts in its pleadings that are not material to the disposition in this case. Although Petitioner has not objected and thereby waived objection, I do not consider the facts that are not material and clearly relevant to disposition of this case.

[5] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services,"
(Footnote continued next page.)

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

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination, specifying the conditions or requirements the supplier failed to meet, and advising of the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). CMS also has the right under the regulations to request a hearing. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

(Footnote continued.)

commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

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

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

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

1. Summary judgment is appropriate.

CMS requested summary judgment. Petitioner agreed that summary judgment is appropriate. P. Br. at 1, n.1. CMS filed a list of proposed witnesses on June 14, 2016. Petitioner did not offer a list of proposed witnesses or argue that testimony was important to resolve any genuine dispute as to any material fact.

A supplier whose enrollment has been revoked has a right to a hearing and judicial review. A hearing on the record is required under the Act. Act §§ 205(b), 1866 (h)(1), (j) (42 U.S.C. § 1395cc(h)(1), (j)); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing and to cross-examine CMS witnesses, or otherwise consented to a decision based only upon the documentary evidence or pleadings.

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

Summary judgment is appropriate when there is no genuine dispute as to any material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer

must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Petitioner concedes that summary judgment is appropriate in the absence of any genuine dispute as to any material fact. P. Br. at 1, n.1. Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) that require a hearing in this case. CMS identified possible witnesses but does not assert it is necessary for me to hear the witnesses to resolve a disputed issue of material fact. I conclude summary judgment is appropriate. The issues in this case that require resolution are issues of law related to the interpretation and application of the regulations that govern enrollment and billing privileges in the Medicare program and application of the law to the undisputed facts of this case. The issues raised by Petitioner related to revocation under 42 C.F.R. § 424.535(a)(3) must be resolved against him as a matter of law. The undisputed facts

show that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges.

2. Petitioner's April 21, 2015 conviction of a felony offense is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)

3. Pursuant to 42 C.F.R. § 424.535(g), Petitioner's Medicare enrollment and billing privileges are revoked effective April 21, 2015, the date of Petitioner's conviction.

4. There was no retroactive application of 42 C.F.R. § 424.535(a)(3) in this case.

5. Petitioner has not shown that the CMS determination to revoke in this case was arbitrary, capricious, or an abuse of discretion as the evidence shows that CMS and its contractor acted within the scope of the authority delegated by the Act and regulations.

6. The fact that NGS issued the reopened and revised initial determination and the reconsidered determination revoking Petitioner's Medicare enrollment and billing privileges does not invalidate the revocation or constitute a defense.

7. Petitioner has no right to review of the duration of the re-enrollment bar.

a. Facts

Petitioner is a neurologist licensed to practice medicine in the State of New York. P. Br. at 2; CMS Ex. 1 at 37. There is no dispute that Petitioner participated in Medicare prior to the revocation of his enrollment.

In November 2013, a federal grand jury issued a two count indictment charging Petitioner with conspiracy and making false statements. On November 7, 2014, Petitioner and his counsel signed a plea agreement in which Petitioner agreed to plead guilty to a single count of making a false statement in violation of 18 U.S.C. § 1001 in the criminal case pending against him in the District Court. CMS Ex. 1 at 258. The agreement provided that upon acceptance of the plea the prosecution would move to have the remaining count of the indictment dismissed. CMS Ex. 1 at 261. Petitioner agreed as part of his plea agreement that he was guilty and he agreed to the statement of facts filed with the plea agreement. CMS Ex. 258-59. Petitioner stipulated and agreed as part of the statement of facts that on July 19, 2011, he "knowingly and willfully made a material false and

fraudulent statement and representation in a matter within the jurisdiction of the executive branch of the Government of the United States." CMS Ex. 1 at 37-38. Petitioner admitted that he told agents of the Federal Bureau of Investigation (FBI) that:

> [N]either he nor any of his relatives or friends ever received reimbursements for any contributions that he made to the KAC [Kashmir American Council] or any other organization, and that he never received anything in return for any donation he made, except for a tax deductible statement.

CMS Ex. 1 at 38. Petitioner admitted that he also failed to disclose that some of the money involved was later distributed per his direction or "earmark." Petitioner stipulated and agreed that his statement to the FBI was false and misleading because it suggested he had no control over the purported donation he made, when actually he did have control. Petitioner agreed that the statement and representations he made to the FBI were material to an on-going FBI and IRS investigation. CMS Ex. 1 at 38.

On April 21, 2015, Petitioner was convicted pursuant to his plea of one felony count of making false statements in violation of 18 U.S.C. § 1001(a)(2). CMS Ex. 1 at 266. Petitioner was sentenced to probation for two years, an assessment of $100, and a fine of $25,000. CMS Ex. 1 at 267-69.

Petitioner's April 21, 2015, conviction was clearly within ten years preceding the November 16, 2015 reopened and revised determination revoking Petitioner's Medicare enrollment and billing privileges.

b. Analysis

I conclude that CMS has made a prima facie showing of a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). I further conclude, based on the undisputed facts and drawing all inferences in Petitioner's favor, that Petitioner cannot meet its burden to rebut the prima facie case or establish an affirmative defense by a preponderance of the evidence. 42 C.F.R. § 424.545(c); *Batavia*, DAB No. 1904.

Petitioner argues that CMS and its contractor NGS incorrectly applied 42 C.F.R. § 424.535(a)(3) as promulgated effective February 3, 2015. Petitioner implies that there would have been no basis for revocation under a prior version of the regulation in effect at the time of Petitioner's criminal offense on or about July 19, 2011. Petitioner's theory is that it was legal error for CMS and NGS to retroactively apply 42 C.F.R. § 424.535(a)(3) that was effective February 3, 2015, to Petitioner's July 19, 2011 conduct. P. Br. at 11-26.

Petitioner is in error. There was no improper retroactive application of the regulation in this case. Section 1871(e)(1)(A) of the Act provides:

> A substantive change in the regulations, manual instructions, interpretive rules, statements of policy, or guidelines of general applicability under this title [Title XVIII] shall not be applied (by extrapolation or otherwise) retroactively to items and services furnished before the effective date of the change, unless the Secretary determines that –
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> > (i) such retroactive application is necessary to comply with statutory requirements; or
> > (ii) failure to apply the change retroactively would be contrary to the public interest.

Section 1871(e)(1)(A) of the Act applies in this case as this case involves a determination under section 1866(b)(2), (h)(1), and (j) of the Act that Petitioner was no longer eligible to participate in Medicare and his enrollment and billing privileges were revoked.

The Secretary though her agent CMS promulgated a new version of 42 C.F.R. § 424.545(a)(3) that was effective February 3, 2015. 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The regulatory history includes no findings by the Secretary or CMS that would permit retroactive application under section 1871(e)(1)(A) of the Act. However, there was no retroactive application in this case. The new 42 C.F.R. § 424.545(a)(3) was effective February 3, 2015. Petitioner's conviction was April 21, 2015. The effective date of the revocation of Petitioner's enrollment and billing privileges was the date of his conviction, April 21, 2015. Petitioner's enrollment and ability to bill for items and services furnished to Medicare-eligible beneficiaries prior to April 21, 2015 were not affected. There is no evidence of any effect upon Petitioner's enrollment and billing privileges prior to February 3, 2015, the effective date of the version of 42 C.F.R. § 424.535(a)(3) applied by CMS and NGS in this case. Accordingly, I conclude that there was no retroactive application of the February 3, 2015 version of 42 C.F.R. § 424.535(a)(3), and no violation of the prohibition against retroactive application found in section 1871(e)(1)(A) of the Act.

I also conclude that Petitioner has made no persuasive argument of an impermissible retroactive application of the regulation on any other legal theory. Petitioner was convicted on April 21, 2015. Petitioner's conviction is the basis for termination of his Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), not his

criminal conduct years earlier. The relevant statutory provision, section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)),[6] provides:

> 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 agreement, in the event that such 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.

The Act does not limit the Secretary to a list of felony offenses that are detrimental but grants the Secretary the discretion to make that determination. The Secretary has delegated that authority to CMS and its contractors by regulation. The regulation issued effective February 3, 2015 provides:

> § 424.535 Revocation of enrollment and billing privileges in the Medicare program.
>
> (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 CFR 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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> (A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the convicted, including guilty pleas and adjudicated pretrial diversions.
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> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

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[6] This statutory provision was added to the Medicare Act by Congress as part of the Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (Aug. 5, 1997), almost twenty years ago.

> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.
>
> (iii) Revocations based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

79 Fed. Reg. 72,500, 72,532. The regulation clearly requires a felony conviction and revocation is not permitted under this provision based only upon the commission of a crime. In this case the event that triggers the application of 42 C.F.R. § 424.535(a)(3), Petitioner's conviction, occurred approximately two months after the February 3, 2015 effective date of 42 C.F.R. § 424.535(a)(3). Therefore, as a matter of undisputed fact, there was no retroactive application of the new regulatory provision.[7]

Having decided that 42 C.F.R. § 424.535(a)(3) effective February 3, 2015 does apply in this case, I conclude that CMS has made a prima facie case of a basis for revocation of Petitioner's Medicare enrollment and billing privileges based on the undisputed material facts. There is no dispute that Petitioner was convicted of a felony and that the conviction was within the ten years preceding the revocation action as required by 42 C.F.R. § 424.535(a)(3)(i). The regulation grants CMS discretion to determine whether the felony conviction is "detrimental to the best interests of the Medicare program and its beneficiaries." *Id.* The regulation includes a list of felonies that are presumptively detrimental, but the regulation is clear that that list is not exhaustive and revocation is not limited to being based only upon those felonies. 42 C.F.R. § 424.535(a)(3)(ii). The undisputed evidence shows that either CMS or its contractor NGS made the determination that Petitioner's felony offense was detrimental even though Petitioner's felony is not listed among those felonies that are presumptively detrimental.

Accordingly, I conclude that CMS has established that there was a basis for revocation under 42 C.F.R. § 424.535(a)(3). I have no authority to review the exercise of discretion by CMS to revoke where there is a basis for revocation. *Abdul Razzaque Ahmed, M.D.*,

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[7] I express no opinion as to whether there would be a different outcome in this case if the version of 42 C.F.R. § 424.535(a)(3) in effect at the time of Petitioner's criminal conduct, i.e. July 2011, was applied.

DAB No. 2261 at 19 (2009), *aff'd, Ahmed v. Sebelius,* 710 F.Supp.2d 167 (D. Mass. 2010). Similarly, I find no authority to review the exercise of discretion granted to CMS under 42 C.F.R. § 424.535(a)(3)(i) to determine whether or not an offense is detrimental.

When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c) (2015). In this case, CMS determined that a three-year bar was appropriate. There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545; 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 10-11 (2016).

Petitioner argues that it was improper for NGS to issue the revocation on behalf of CMS. P. Br. at 26-29. Petitioner overlooks the fact that the Act specifically authorizes the Secretary to operate Medicare Part B through contractors such as NGS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Although 42 C.F.R. § 424.535(a)(3)(i) states that CMS determines whether or not a felony conviction is detrimental, Petitioner cites to no authority and I am aware of none that suggests that the Secretary and CMS cannot delegate that determination to a contractor pursuant to section 1842(a) of the Act.

Petitioner implies that he should have been give notice and an opportunity to address the revocation before it occurred. Memorandum filed with Request for Hearing at 8-9, 14, 31-37. However, the regulations establish no such procedural process due Petitioner when revocation is based on a felony conviction. The regulations do not require CMS or its contractor to notify a supplier that revocation is contemplated or to contest the revocation at the initial determination stage. There is no suggestion in the regulation or its regulatory history that there is any right to a pre-revocation hearing. Only post revocation administrative review is required under the regulations. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16. Section 1866(b)(2), (h)(1), and (j)(8) are also clear that due process rights attach only after the Secretary or her delegate make a determination. Section 1866 does not require pre-revocation notice or a hearing and such rights are triggered only by the determination to revoke.

Petitioner argues that the determination to revoke Petitioner's enrollment and billing privileges was arbitrary and capricious. P. Br. at 29-32. Petitioner's theory is that the determination that Petitioner's offense is detrimental is arbitrary and capricious if the determination not subject to ALJ review. Petitioner argues that review of that determination is part of the due process granted Petitioner. P. Br. at 29. Petitioner points to no statutory or regulatory provision as the source for the purported due process right and wanders off into Constitutional grounds. I am required to follow the Act and regulations and have no authority to declare statutes or regulations invalid.

1866ICPayday.com, L.L.C., DAB No. 2289, at 14 (2009) ("[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground."). I conclude that Petitioner's argument is without merit under the Act and regulations. However, Petitioner's constitutional challenges to the Act and regulation, including those asserted in the memorandum filed with the request for hearing, are beyond my authority to review.

Petitioner argues that CMS is obliged to consider all the facts and circumstances of Petitioner's offense in determining whether or not his felony offense is detrimental. P. Br. at 33-34. I have concluded that CMS and its contractors have the discretion under the regulation to make the determination and that determination is not subject to my review. I also conclude that I have no authority to review whether CMS or NGS considered all the facts. I simply do not have authority to conduct such a review and substitute my judgment for CMS or NGS as to whether or not an offense is detrimental.

Petitioner argues that the facts surrounding the NGS decision to revoke show that it was arbitrary and capricious. P. Br. at 34-35. One could characterize the actions of NGS typical government bumbling. One could also view NGS' actions as clear evidence of an effort to get the revocation done correctly. How one characterizes the actions of NGS and CMS does not affect the outcome. The determination that Petitioner's offense is detrimental is not subject to review. There is no question Petitioner was convicted of a felony that CMS and its contractor have determined to be detrimental. Accordingly, there is a basis for revocation and it is not for me to review whether it was a proper exercise of discretion for CMS and NGS to effectuate the revocation.

Petitioner argues it was arbitrary and capricious for CMS and NGS to decide that Petitioner's offense was detrimental. P. Br. at 35-39. I have concluded that I have no authority to review the exercise of discretion by NGS and CMS to declare that the offense of which Petitioner was convicted was detrimental. However, if I were to conduct such a review, I would have no trouble reaching the same conclusion. For example, pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(B), financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud are all presumptively detrimental. Petitioner's crime of making false statements or representations to the FBI is easily analogized to the financial crimes that are presumptively detrimental on the basis that Petitioner's crime also evinces a lack of trustworthiness, reliability, and honesty that is necessary to entrust one with access to the public fisc, in this case the Medicare Trust Fund. *See, Fady Fayad, M.D.*, DAB No, 2266 (2009), *aff'd, Fayad v. Sebelius*, 803 F.Supp.2d 699 (E.D. Mich., March 25, 2011), (physician falsified immigration forms, the Board found that while the crime was not specifically listed in the regulations, petitioner's crime was detrimental to the Medicare program "because it evidenced a lack of trustworthiness in his dealings with the federal government.")

III. Conclusion

For the foregoing reasons, I conclude that there is a basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. 424.535(a)(3) effective April 21, 2015, because he was convicted of a felony that CMS determined is detrimental to the best interests of the Medicare program and its beneficiaries.

/s/
Keith W. Sickendick
Administrative Law Judge