Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

Palmetto Faith Operating LLC d/b/a Faith Healthcare Center, (PTAN: 425009),

Palmetto Hallmark Operating LLC d/b/a Hallmark Healthcare Center,
(PTAN: 425326),

Palmetto Jolley Acres Operating LLC d/b/a Jolley Acres Healthcare Center,
(PTAN: 425055),

Palmetto Lake City Operating LLC d/b/a Lake City Scranton Healthcare Center,
(PTAN: 425149),

Palmetto Oakbrook Operating LLC d/b/a Oakbrook Health & Rehabilitation Center,
(PTAN: 425156),

Palmetto Prince George Operating LLC d/b/a Prince George Healthcare Center,
(PTAN: 425295),

Palmetto Springdale Operating LLC d/b/a Springdale Healthcare Center,
(PTAN: 425169),

Palmetto St. George Operating LLC d/b/a St. George Healthcare Center,
(PTAN: 425143),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-162

(Consolidated Docket Nos. C-17-163, C-17-164, C-17-165,
C-17-166, C-17-167, C-17-168, C-17-169)

Decision No. CR4781

Date: January 31, 2017

DECISION

There is a basis for the revocation of the Medicare enrollment and billing privileges of Petitioners pursuant to 42 C.F.R. § 424.535(a)(3),[1] effective August 24, 2015.

I. Background

Petitioners are a group of skilled nursing facilities (SNFs) located in South Carolina and all wholly owned by Palmetto Health and operated by Petitioners. Petitioners' (P.) Exhibits (Exs.) 17 ¶ 2; 19 ¶ 2; 32 ¶ 3; 33 ¶ 3. Wisconsin Physicians Service Insurance (WPS), a Centers for Medicare & Medicaid Services (CMS) Medicare administrative contractor, notified each of the Petitioners of the initial determination to revoke their Medicare enrollment and billing privileges as follows:

FACILITY NAME	DATE OF NOTICE	REGULATORY AUTHORITY FOR REVOCATION CITED	EXHIBIT
Faith	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 1 at 12-13
Hallmark	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 2 at 12-13
Jolley Acres	Aug. 30, 2016, Dec. 28, 2016	42 C.F.R. § 424.535(a)(2), (3), (9)	CMS Ex. 3 at 11-12; P. Ex. 15
Lake City	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 4 at 12-13
Oakbrook	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 5 at 12-13
Prince George	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 6 at 12-15
Springdale	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 7 at 12-13
St. George	Aug. 15, 2016	42 C.F.R. § 424.535(a)(3), (9)	CMS Ex. 8 at 12-13

[1] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

WPS advised each Petitioner that revocation was effective August 24, 2015, and that their provider agreements were terminated under 42 C.F.R. § 424.535(b). WPS also advised each Petitioner that it was subject to a three-year bar to re-enrollment pursuant to 42 C.F.R. § 424.535(c).

Petitioners requested reconsideration through counsel on September 13, 2016. CMS Exs. 1 at 8-11; 2 at 8-11; 3 at 7-10; 4 at 8-11; 5 at 8-11; 6 at 8-11; 7 at 8-11; 8 at 8-11. CMS issued a reconsidered determination in each case. CMS notified each Petitioner by letter dated November 17, 2016, that revocation was upheld on reconsideration under 42 C.F.R. § 424.535(a)(3). CMS Exs. 1 at 1-7; 2 at 1-7; 3 at 1-6; 4 at 1-7; 5 at 1-7; 6 at 1-7; 7 at 1-7; 8 at 1-7.

Petitioners filed separate requests for a hearing before an administrative law judge (ALJ) on December 5, 2016, in which they requested consolidation of all cases for hearing and decision and expedited review and decision. Each case was separately docketed; assigned to me; and an Acknowledgement and Prehearing Order (Prehearing Order) was issued in each on December 8, 2016. CMS subsequently moved to consolidate and the cases were consolidated on December 14, 2016, under docket number C-17-162.

A prehearing conference was convened on December 20, 2016, to discuss Petitioners' request for an expedited hearing and decision. Petitioners did not waive an oral hearing, but the parties agreed that it may be possible to resolve the case by summary judgment. An expedited schedule was adopted to develop the case for consideration of possible full or partial summary judgment. On January 13, 2017, CMS filed a document styled as a prehearing brief (CMS Br.), which I treat as a motion for summary judgment based on the agreement of the parties during the prehearing conference. CMS also filed CMS Exs. 1 through 14 on January 13, 2017. On January 13, 2017, Petitioner filed its motion for summary judgment (P. Br.) with P. Exs. 15 through 33. Petitioners filed documents marked P. Exs. 1 through 14 with their requests for hearing. The 14 exhibits filed with the requests for hearing are not listed on the Amended Exhibit List Petitioners filed in "support of their Motion for Summary Judgment" on January 13, 2017. It is not clear that Petitioners are offering P. Exs. 1 through 14 for consideration on summary judgment. P. Br. at 3 n.3. However, out of an abundance of caution, I treat those exhibits as offered by Petitioners for my consideration on summary judgment. The parties filed reply briefs on January 20, 2017 (CMS Reply and P. Reply, respectively).

Petitioners did not object to my consideration of CMS Exs. 1 through 10 and 12 through 14 and they are admitted as evidence. Petitioner objects to the admission of CMS Ex. 11 on grounds that the documents included therein are hearsay. P. Reply at 7 n.8. CMS Ex. 11 is excluded because those documents have not been shown to be relevant to the issue to be resolved on summary judgment, that is, whether Avi Klein was an owner or manager of Petitioners' on the date of his conviction.

CMS did not object to P. Exs. 1 through 14 and they are admitted. CMS argues in its reply brief that Petitioners did not have good cause for failing to submit their documentary evidence at the reconsideration stage or earlier as required by 42 C.F.R. § 498.56(e). CMS Reply at 4-5. CMS does not specifically state that it objects to the admissibility or my consideration of the documents offered by Petitioner as P. Exs. 15 through 33. CMS also does not identify which of P. Exs. 15 through 33 required a showing of good cause by Petitioner. Accordingly, I conclude CMS has failed to preserve any objection to any of Petitioners' exhibits. CMS should not impose upon a judge the burden to intuit CMS's objection.

To the extent CMS may be determined to have preserved an objection to P. Ex. 15, the objection is overruled. P. Ex. 15 is a notice from WPS to Petitioner Jolley Acres dated December 28, 2016, that should be in the records of the government and which Petitioner should have no reason to submit on reconsideration. Similarly, P. Ex. 16 includes documents that should have been in government records and available to the hearing officer on reconsideration. Because these records were not included in the records considered by the hearing officer on reconsideration (CMS Exs. 1 through 8) there is good cause to accept them at this level to ensure the record is as complete as possible.

P. Ex. 31 is a copy of Petitioner Faith's request for hearing. The requests for hearing are already part of the record and there was no need to mark that document and offer it as substantive evidence. Accordingly, P. Ex. 31 is not admitted as evidence.

To the extent, CMS may have preserved an objection to P. Exs. 17, 19, 32, and 33, which are declarations, the objection is overruled. Declarations are written testimony. Civil Remedies Division Procedures § 19.b.; 28 U.S.C. § 1746. Oral testimony is not commonly heard in connection with resolving a motion for summary judgment. Written testimony in the form of declarations or affidavits is expected to be filed on summary judgment in support of the parties' positions on summary judgment. The CMS objection is based on 42 C.F.R. § 498.56(e) and that regulation is limited in its application to "new documentary evidence." Because P. Exs. 17, 19, 32, and 33 are written testimony, 42 C.F.R. § 498.56(e) has no application to those exhibits.

Whether or not CMS preserved an objection, under 42 C.F.R. § 498.56(e) I am obliged to consider for admissibility P. Exs. 18 and 20 through 30. These documents are clearly documentary evidence not produced by Petitioners at reconsideration and offered for the first time before me, and 42 C.F.R. § 498.56(e) does apply. If I conclude that Petitioners have good cause for submitting these documents for the first time before me, they must be included as evidence and considered in reaching the decision; if not, the documents must be excluded. The Secretary has not defined "good cause" in the regulations, and CMS offers no definition. CMS Reply at 4-5. Petitioners assert that there is good cause to admit these documents now. P. Br. at 3, 13-15. Petitioners assert in their briefing that numerous attempts were made to ensure that CMS had all the information it needed on

reconsideration, and Petitioners' counsel was assured that if CMS needed more information they would be in touch. P. Br. at 8. Petitioners clearly offered in their request for reconsideration to submit any additional information CMS needed. See, e.g., CMS Ex. 1 at 11. Mr. Tabler, Petitioners' President who submitted a declaration with Petitioners' requests for reconsideration, specifically refers in his declaration to the books and records of Petitioners as the source of his knowledge. See, e.g., CMS Ex. 1 at 21. Petitioners argue that the hearing officer never requested the documents to which Mr. Tabler referred in his declaration. The procedures established by 42 C.F.R. pt. 405, subpt. H apply to provider and supplier enrollment cases. 42 C.F.R. § 405.800. Pursuant to 42 C.F.R. § 405.803(c), providers and suppliers are to submit all evidence they want considered on reconsideration. However, if supporting evidence is not submitted the provider or supplier is to be contacted in an attempt to obtain the evidence. 42 C.F.R. § 405.803(d). The regulation provides that if the provider or supplier fails to submit evidence before the contractor issues a decision, the provider or supplier is precluded from introducing new evidence at higher levels of review. 42 C.F.R. § 405.803(e). Pursuant to 42 C.F.R. § 498.24, the hearing officer on reconsideration is to consider any written evidence and statements that are relevant and material and submitted within a reasonable time after the reconsideration request. Given this regulatory scheme, Petitioners took an unnecessary risk by failing to submit all available documents that were relevant and material to the issue on reconsideration, choosing to rely upon a declaration of a knowledgeable individual who had reviewed the books and records and provided the summary to the hearing officer in the form of a declaration – a reasonable tactical judgment. Hearing officers no doubt cringe at the thought of being required to examine large quantities of corporate books and records that providers and suppliers feel compelled to offer on reconsideration to protect themselves against adverse determinations based on less than the whole record. However, that is precisely what the regulations require. P. Exs. 18 and 20 through 30 are clearly relevant and material. But Petitioners have failed to show good cause for not submitting these documents at reconsideration with Mr. Tabler's declaration. Accordingly, P. Exs. 18 and 20 through 30 are not admitted as evidence. Mr. Tabler's original declaration, his further declaration, and other declarations are now before me on summary judgment and, as discussed hereafter, on summary judgment I do not judge credibility or weigh the evidence. Rather, I accept undisputed assertions of fact as true and draw all favorable inferences in favor of the nonmovant. Prehearing Order ¶ II.H. Because I resolve this case on summary judgment upon concluding that there are no genuine disputes of material fact; having drawn all favorable inferences for Petitioners; and having accepted as true facts asserted by Petitioners that are not disputed by CMS, the exclusion of P. Exs. 18 and 20 through 30 is not prejudicial to Petitioners as the same evidence is presented in summary fashion by the declarations admitted as evidence.

II. Discussion

A. Applicable Law

Sections 1811 through 1821 of the Social Security Act (the Act) (42 U.S.C. §§ 1395c-1395i-5) establish the hospital insurance benefits program for the aged and disabled known as Medicare Part A. Administration of the Part A program is through contractors, such as WPS. Act § 1816 (42 U.S.C. § 1395h). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1815 (42 U.S.C. § 1395g) and 1817 (42 U.S.C. § 1395i). Petitioners, which are skilled nursing facilities, are providers.

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. §§ 424.500 and 424.505, a provider 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 provider's Medicare enrollment and billing privileges and provider agreement for any of the reasons listed in 42 C.F.R. § 424.535. A provider 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 provider 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 provider, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to

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

meet, and the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the provider, the provider has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004).

The provider bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c). The Secretary has not provided for the allocation of the burden of persuasion or the quantum of evidence in 42 C.F.R. pt. 498 for ALJ and Board review when the right to such review is triggered. The Board has, however, provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. The Board has allocated to CMS the burden of establishing a prima facie case that a petitioner is not in substantial compliance with relevant statutory or regulatory provisions. Only when CMS has met the burden of making a prima facie case does the burden shift to the petitioner to show by a preponderance of the evidence that the revocation of its enrollment and billing privileges was incorrect. *See Medisource Corp.*, DAB No. 2011 at 2-3, (2006); *citing Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

CMS makes a prima facie showing of noncompliance if the evidence CMS relies on is sufficient to support a decision in its favor absent an effective rebuttal. *Hillman Rehab. Ctr.*, DAB No. 1611 at 8 (1997), *aff'd, Hillman Rehab. Ctr. v. U.S.*, No. 98-3789 (GEB) (D. N.J. May 13, 1999). A provider can overcome CMS's prima facie case either by rebutting the evidence upon which that case rests or by proving facts that affirmatively show statutory or regulatory compliance. *Tri-County Extended Care Ctr.*, DAB No. 1936 (2004). "An effective rebuttal of CMS's prima facie case would mean that at the close of the evidence, the provider had shown that the facts on which its case depended (that is, for which it had the burden of proof) were supported by a preponderance of the evidence." *Id.* at 4 (quoting *Western Care Mgmt. Corp.*, DAB No. 1921 (2004)).

B. Issues

Whether summary judgment is appropriate.

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

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

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

1. Summary judgment is appropriate.

The parties filed cross-motions for summary judgment. A provider whose enrollment has been revoked has a right to a hearing and judicial review, and a hearing on the record is required under the Act. Act §§ 205(b), 1866 (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, Petitioners have not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless summary judgment is appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedures to be followed in adjudicating Petitioners' cases 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 by my Prehearing Order, which is within my authority to regulate the course of proceedings.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 5-6 (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).

Viewing the evidence before me in a light most favorable to Petitioners and drawing all inferences in Petitioners' 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. The issues in this case raised by Petitioners related to revocation of their Medicare enrollment and billing privileges must be resolved against them as a matter of law. The undisputed evidence shows that there is a basis for revocation of Petitioners' Medicare enrollment and billing privileges and termination of their provider agreements. Accordingly, summary judgment is appropriate.

1. On August 24, 2015, Avi Klein was convicted of a felony offense of a type that the Secretary or CMS have determined to be detrimental to the program or program beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3).

2. Avi Klein's conviction occurred within ten years of enrollment or revalidation of Petitioners' enrollment in Medicare.

3. The controlling date for purposes of 42 C.F.R. § 424.535(a)(3) is the date of the conviction and the ownership or control of the convicted individual or entity on the date of the conviction is determinative.

4. There is a basis for revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) because Avi Klein was an owner of Petitioners' on the date of his conviction, even though he subsequently transferred his ownership interest effective on a date prior to his date of conviction.

5. The effective date of revocation in this case is August 24, 2015, the date of the felony conviction of one of Petitioners' owners. 42 C.F.R. § 424.535(g).

6. The Secretary and CMS have discretion to revoke when there is a basis for revocation, and the exercise of that discretion is not subject to ALJ review.

7. CMS has discretion whether or not to reverse revocation pursuant to 42 C.F.R. § 424.535(e), and the exercise of that discretion is not subject to ALJ review.

8. I have no authority to review the imposition or duration of a bar to re-enrollment. 42 C.F.R. §§ 424.545, 498.5(*l*)(1)-(2).

The material facts are not in dispute. The specific legal issues to be resolved relate to whether or not the undisputed facts show that Avi Klein was an owner or manager of Petitioners' on the day he was convicted of a felony offense determined by the Secretary or CMS to be detrimental to Medicare or its beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3). P. Reply at 3.

a. Undisputed Facts

The material facts are not disputed. Petitioner receives the benefit of all favorable inferences of fact.[3]

(1) Petitioners are a group of SNFs located in South Carolina and all are wholly owned by Palmetto Health Care LLC (Palmetto Health) and operated by Petitioners. P. Exs. 17 ¶ 2; 19 ¶ 2; 32 ¶ 3; 33 ¶ 3; P. Br. at 3, 4.

(2) Avi Klein, through his entity ASK Holdings, LLC, acquired a 25 percent ownership of Palmetto Health in 2006. P. Exs. 5; 6 ¶¶ 2-3; 17 ¶ 3; P. Br. at 4-5.

(3) On August 24, 2015, Avi Klein was convicted pursuant to his guilty plea of the felony offense of racketeering in violation of 18 U.S.C. §§ 1961 and 1962(d) related to a June 24, 2014 criminal indictment on charges of unlawful conduct in the operations of an unrelated skilled nursing facility in Virginia. P. Br. at 5; P. Ex. 10.

(4) Avi Klein's indirect ownership of 25 percent of Petitioners and his role as manager of Palmetto Health were divested and terminated effective August 15, 2015. But the final documentation reflecting the divestiture and termination effective August 15, 2015, took some time to finalize and was not signed until some months after the effective date. P. Ex. 17 ¶ 8; P. Exs. 7, 8, 9 at 1; 32 ¶¶ 5-6.

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[3] This section is taken mostly from Petitioners' Notice of Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof with supplemental citations to the evidence that supports the finding of undisputed fact.

(5) Avi Klein's resignation letter dated November 3, 2015, states that he resigned effective August 15, 2015. P. Ex. 9.

(6) Petitioners submitted applications (CMS-855A) to revalidate their enrollment in March 2015. See, e.g., CMS Ex. 1 at 26-122.

(7) On August 15, 2016, WPS notified all Petitioners, except Petitioner Jolly Acres, that their Medicare enrollment and billing privileges were revoked and their provider agreements terminated effective August 24, 2015, pursuant to 42 C.F.R. § 424.535(a)(3) and (9) based on the conviction of Avi Klein. The notice to Petitioner Jolly Acres was dated August 30, 2016, and an amended notice was dated December 28, 2016. CMS Exs. 1 at 12-13; 2 at 12-13; 3 at 11-12;; 4 at 12-13; 5 at 12-13; 6 at 12-15; 7 at 12-13; 8 at 12-13; P. Ex. 15.

(8) On September 12, 2016, fewer than 30 days after the date of the initial determinations, Petitioners submitted applications (CMS-855A) to report that Avi Klein was no longer an indirect owner and had no affiliation with Petitioners as of August 15, 2015. CMS Exs. 1 at 133-190; 2 at 23-84; 3 at 22-81; 4 at 23-89; 5 at 23-89; 6 at 25-82; 7 at 23-82; 8 at 23- 82.

(9) Reconsidered determinations were issued by CMS on November 17, 2016; the revocations were upheld pursuant to 42 C.F.R. § 424.535(a)(3); and CMS did not reverse the revocations pursuant to 42 C.F.R. § 424.535(e) based on termination of Petitioners' relationships with Avi Klein within 30 days of the notices of the initial determinations to revoke. CMS Exs. 1 at 1-7; 2 at 1-7; 3 at 1-6; 4 at 1-7; 5 at 1-7; 6 at 1-7;7 at 1-7; 8 at 1-7.

b. Analysis

In this case, CMS on reconsideration revoked Petitioners' Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), which provides in pertinent part:

> (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:
>
> * * * *
>
> (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.
>
> (ii) Offenses include, but are not limited in scope or severity to—
>
> (A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
>
> (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.
>
> (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.

42 C.F.R. § 424.535(a)(3); Act § 1866(b)(2)(D). Conviction as defined by 42 C.F.R. § 1001.2 includes:

> (a) A judgment of conviction has been entered against an individual or entity by a Federal, State or local court, regardless of whether:
>
> (1) There is a post-trial motion or an appeal pending, or
>
> (2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

> (b) A Federal, State or local court has made a finding of guilt against an individual or entity;
>
> (c) A Federal, State or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or
>
> (d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

Petitioners do not dispute that on August 24, 2015, Avi Klein was convicted within the meaning of 42 C.F.R. §§ 424.535(a)(3) and 1001.2, of the offense of racketeering related to the operations of an unrelated nursing home. Petitioners do not dispute that the offense of which Avi Klein was convicted was a felony within the meaning of 42 C.F.R. § 424.535(a)(3) or that the offense was an offense that the Secretary or CMS deems to be detrimental to Medicare or its beneficiaries under that same section. Petitioners concede that Avi Klein was excluded from Medicare pursuant to section 1128(a) of the Act based on his conviction which falls within the listing of detrimental offenses under 42 C.F.R. § 424.535(a)(3)(ii)(D). P. Br. at 5 n.7. Petitioners do not dispute that the conviction occurred within 10 years of Petitioners' enrollment or revalidation of their enrollment.

Petitioners argue that the revocation is improper and may not be upheld because Avi Klein divested his ownership interest and his managing role in Petitioners effective August 15, 2015, prior to his August 24, 2015 conviction. For purposes of summary judgment, I accept as true Petitioners' representations that Avi Klein was effectively removed from his management role prior to the date of his conviction. Petitioners do not dispute that the documents that accomplished the divesture of Avi Klein's indirect ownership of Petitioners were not executed until sometime after the date of his conviction. Therefore, the issue of law that must be resolved based on the undisputed facts is whether or not Avi Klein was an owner of Petitioners at the time of his conviction.

Congress defined an owner of an entity to be:

> [A] person who –
>
> (A)(i) has directly or indirectly (as determined by the Secretary in regulations) an ownership interest of 5 per centum or more in the entity; or
>
> (ii) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured

> (in whole or in part) by the entity or any of the property or assets thereof, which whole or part interest is equal to or exceeds 5 per centum of the total property and assets of the entity . . . .

Act § 1124(a)(3) (42 U.S.C. § 1320a-3(a)(3)).

The Secretary defines an "owner" to be "any individual or entity that has any partnership interest in, or that has 5 percent or more direct or indirect ownership of the provider or supplier as defined in sections 1124 and 1124A(A) of the Act." 42 C.F.R. § 424.502. According to its plain language 42 C.F.R. § 424.535(a)(3) is a basis for revocation only when an owner of the provider or supplier is convicted of a felony of the types listed in 42 C.F.R. § 424.535(a)(3) during the pertinent ten-year period.

There is no dispute that Avi Klein acquired an indirect ownership interest of 25 percent in Petitioners in 2006. Under 42 C.F.R. § 424.535(a)(3), if Avi Klein was an owner of Petitioners on August 24, 2015, the date of his conviction, then CMS has a basis to revoke Petitioners' Medicare enrollment and billing privileges and their provider agreements. If Avi Klein was not an owner on the date of his conviction, there is no basis for revocation and termination.

Petitioners argue that transactions after the date of the conviction retroactively divested Avi Klein of his ownership interest effective August 15, 2015. Petitioners argue that Avi Klein was therefore not an owner on the date of his conviction. I have no reason to doubt Petitioners' thorough legal analysis and conclusion that under contract law one can divest oneself of an ownership interest in an entity retroactively. But, I have no real reason to discuss Petitioners' contract analysis in any significant detail. Regulation of providers and suppliers enrolled in Medicare is far simpler than suggested by Petitioners' contract analysis.

The plain language of section 1124(a)(3) of the Act and the Secretary's regulations at 42 C.F.R. §§ 424.502 and 424.535(a)(3) support only one reasonable interpretation. It is the ownership status of the convicted individual or entity *on the date of the conviction* that is determinative. Subsequent contractual arrangements to divest retroactively may be effective as a matter of contract law, but the authority of CMS to revoke is based on the Act and regulations and not contract law. The simple question in this case is whether Avi Klein was an owner on the date of his conviction. The answer is as simple as the question – yes. When Avi Klein entered his plea of guilty on August 24, 2015, he indirectly owned 25 percent of Petitioners. When the judgment of conviction was entered on August 24, 2015, Avi Klein was a 25 percent owner of Petitioners. When Avi Klein left the courthouse on August 24, 2015, he owned 25 percent of Petitioners. If Avi Klein had died later that day, he would have died a 25 percent owner of Petitioners. Even though I accept as true for purposes of summary judgment Petitioners' representations

that Avi Klein, on some subsequent date, divested his ownership in Petitioners, on the day of his conviction he was an owner of Petitioners in fact and in law. Accordingly, I resolve the legal issue of ownership against Petitioners and conclude that CMS has a basis for revocation of Petitioners Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3).

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

Revocation for a felony conviction under 42 C.F.R. § 424.535(a)(3) is effective on the date of the conviction. 42 C.F.R. § 424.535(g). Avi Klein was convicted on August 24, 2015, and CMS has authority to revoke effective that date. When a provider's billing privileges are revoked the provider's provider agreement is also terminated effective the date of revocation. 42 C.F.R. § 424.535(b).

Petitioners acted promptly after the initial determinations to notify CMS and its contractor that steps were taken to remove Avi Klein from his management position and to divest his ownership of Petitioners. Pursuant to 42 C.F.R. § 424.535(e):

> (e) Reversal of revocation. If the revocation was due to adverse activity (sanction, exclusion, or felony) against an owner, managing employee, or an authorized or delegated official; or a medical director, supervising physician, or other personnel of the provider or supplier furnishing Medicare reimbursable services, 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.

(Emphasis added.) The authority to reverse a revocation is an action within the discretion of CMS, and I have no authority to review that exercise of discretion. In *Main Street Pharmacy, LLC*, the Board stated:

> 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.

DAB No. 2349 at 8 (2010). Finally, to the extent Petitioners' arguments may be construed as a request for equitable relief, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009).

III. Conclusion

For the foregoing reasons, the Medicare enrollment and billing privileges of Petitioners are revoked pursuant to 42 C.F.R. § 424.535(a)(3), effective August 24, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge