

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Derm One, PLLC,  
(PTAN: C09028),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-11-29

Decision No. CR2355

Date: April 12, 2011

**DECISION**

For the reasons set forth below, I find in favor of CMS upholding its determination to revoke Petitioner's enrollment and billing privileges in the Medicare program under 42 C.F.R § 424.535(a)(3). However, pursuant to the regulations in effect at the time of the 2008 conviction of Petitioner's sole owner, I find CMS improperly determined the effective date of Petitioner's revocation. I now find that date to be August 15, 2010, thirty days from the initial notification of the revocation.

**I. Background**

Petitioner, Derm One, PLLC (Derm One), appeals the revocation of its Medicare billing privileges. Trailblazer Health Enterprises, LLC (Trailblazer), the Medicare contractor, imposed the revocation because Derm One's sole owner, David L. Tolliver, D.O., was convicted on September 18, 2008 of the federal felony offense of filing a false tax return. Trailblazer initially imposed the revocation on July 16, 2010, effective retroactively to November 3, 2008. On August 10, 2010, Trailblazer revised the notice letter to reflect that the revocation became effective retroactive to September 18, 2008,

the date of Dr. Tolliver's conviction. Derm One requested reconsideration of this determination. On September 2, 2010, Trailblazer issued an unfavorable reconsideration decision, upholding the revocation, the revocation effective date, and a three-year bar on re-enrollment. P. Ex. 5.<sup>1</sup>

By letter dated October 12, 2010, Petitioner timely requested an Administrative Law Judge (ALJ) hearing, and this matter was assigned to me for hearing and decision.<sup>2</sup> Pursuant to my Acknowledgment and Pre-Hearing Order, CMS submitted a motion for summary judgment (CMS Br.) and its exhibits (CMS Exs. 1-6). Petitioner filed its response to CMS's motion together with its motion for summary judgment (P. Br.) and its exhibits (P. Exs. 1-9). CMS filed its reply (CMS Reply) to Petitioner's motion.

## II. Relevant Authority

At the time of Dr. Tolliver's conviction in 2008, the applicable regulation authorized CMS to "revoke a currently enrolled provider or supplier's Medicare billing privileges

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<sup>1</sup> Petitioner submitted exhibits (exhibits 1-9) with its hearing request as well as with its motion for summary judgment (exhibits 1-9). They are not numbered the same. I cite in this decision only to Petitioner's exhibits (P. Exs. 1-9) attached to its motion for summary judgment.

<sup>2</sup> Prior to this proceeding, Trailblazer revoked the billing privileges of Dr. Tolliver due to his conviction, his medical license suspension, and his admitted failure to notify Trailblazer about these events. After Trailblazer discovered the conviction, it notified Dr. Tolliver on July 13, 2009 that his Medicare billing privileges were revoked effective September 18, 2008, based on his felony conviction. Dr. Tolliver timely requested an ALJ hearing but did not dispute the effective date of the revocation. On November 23, 2010, Board Member Sussan decided that matter, granting CMS's motion for summary judgment and finding that CMS had the authority to revoke Dr. Tolliver's enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.535(a)(3) and 424.535(a)(9) based on the revised 2009 regulations. *See David L. Tolliver*, DAB CR2281 (2010). Board Member Sussan also sustained CMS's revocation of Dr. Tolliver's enrollment effective September 18, 2008 and the associated three-year bar on re-enrollment. During the pendency of that matter, Petitioner asked to broaden the scope of review to include the revocation of Derm One but at the time of the request, Trailblazer had not issued its reconsideration determination for Derm One. Board Member Sussan later denied Petitioner's motion to consolidate this matter regarding the Derm One practice revocation with Dr. Tolliver's individual revocation appeal because the issues presented were significantly different, and she did not want to delay the resolution of Dr. Tolliver's appeal. Therefore, the revocation of Derm One is considered separately in all respects.

and any corresponding provider agreement or supplier agreement” for reasons including, as relevant here:

(3) *Felonies*. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries.

(i) Offenses include—

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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.

42 C.F.R. §424.535(a)(3) (2008). That regulation further provides at 424.535(f) that when a provider or supplier is revoked from the Medicare program, “CMS automatically reviews all other related Medicare enrollment files that the revoked provider or supplier has an association with to determine if the revocation warrants an adverse action of the associated Medicare provider.” Under the terms of the regulation, the revocation of a provider or supplier’s Medicare billing privileges becomes effective within 30 days “of the initial revocation notification.” 42 C.F.R. § 424.535(g)(2008).<sup>3</sup>

Providers or suppliers who have had their billing privileges revoked “are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar,” which is “a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation.” 42 C.F.R. § 424.535(c).

### III. Issues, Findings of Fact and Conclusions of Law

#### A. Issues

The issues in this case are:

1. Whether CMS had a legitimate basis to revoke Petitioner’s Medicare enrollment and billing privileges; and if so,

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<sup>3</sup> Effective January 1, 2009, this regulation was revised. It now provides that when a revocation is based on a “felony conviction, license suspension or revocation . . . the revocation is effective with the date of . . . felony conviction, license suspension or revocation. . . .” 42 C.F.R. § 424.535(g) (2009).

2. Whether CMS had a legitimate basis to determine Petitioner's effective date of revocation as September 18, 2008, the date of Petitioner's sole owner's conviction.

## **B. Discussion**

My findings and conclusions are in the italicized and bolded headings followed by discussions below.

### ***1. CMS had an undisputed and legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.***

Petitioner, in its request for hearing, contends that it was improper for CMS to revoke Petitioner's enrollment and billing privileges in Medicare about a year after it decided to revoke Dr. Tolliver's individual enrollment and billing privileges on the same underlying basis. Petitioner argues that 42 C.F.R. § 424.535(f) requires CMS to "automatically" review all other related Medicare enrollment files that a revoked supplier or provider has an association with to determine if the revocation warrants an adverse action of the associated Medicare supplier. Petitioner contends that although the regulations may authorize the revocation of Petitioner's enrollment as a result of an owner's conviction, the regulations did not intend a period as long as a one-year lapse between the decision to revoke the owner's enrollment and the decision to revoke the associated group's enrollment.

I do not agree that section 424.535(f) constrains CMS from taking action within a certain time period. The terms of the statute do not limit the Secretary from taking action at any time after it ascertains that a provider or its owner has been convicted of a felony. The Social Security Act (Act) § 1866(b)(2)(D). After all, it may take CMS some time to learn about a conviction in situations where CMS may not have been aware that a conviction occurred. Here, I do not find a one-year lapse between the revocation of the individual provider and the revocation of his practice unreasonable.

### ***2. CMS did not properly determine Petitioner's effective date of revocation.***

Under applicable legal precedent, the revocation of Petitioner's enrollment must be determined under the regulatory provisions in effect on the date of the conviction of Petitioner's owner. As of January 1, 2009, CMS revised its applicable regulations resulting in certain changes and new provisions. Nonetheless, CMS holds Petitioner to the new provisions of the regulations which would make Petitioner's revocation effective as of date of the conviction of its owner on September 18, 2008. The problem with CMS's position is that it results in making the revocation of Petitioner's enrollment

retroactive to a date prior to the enactment and the effective date of the new regulatory provisions. It also holds Petitioner to a reporting requirement that was not even in effect at the time of Dr. Tolliver's conviction.<sup>4</sup> CMS, in addressing Petitioner's arguments against retroactive application of the regulations under the circumstances here, cites to the new regulations as being applicable and, in support, cites a previous ALJ decision. However, the Board remanded that decision and recognized a potential issue regarding whether the Medicare contractor erroneously applied a change in the effective date provision retroactively rather than 30 days from its notice letter. *Daniel H. Kinzie, IV, M.D.*, DAB No. 2341, at 10 (2010).

A federal agency cannot create a new rule and apply it retroactively unless that power is conveyed expressly by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215 (1988). Here, while the Act authorizes the Secretary of the Department of Health and Human Services to promulgate rules and regulations as may be necessary to the efficient administration of the functions with which the Secretary is charged under this Act, Congress did not provide express authority for retroactive rulemaking. Act § 1102. Therefore, I cannot apply the 2009 revisions of 42 C.F.R. 424.535 to a conviction that occurred on September 18, 2008.

I therefore must look at the regulatory and statutory requirements in effect on the date of the conviction of Petitioner's owner to determine what obligations Petitioner was under as a result. Under those provisions, Petitioner's revocation becomes effective within 30 days of the initial revocation notification. Reading all the applicable subsections of the regulation together, this means that Petitioner's revocation will be effective on August 15, 2010, which is 30 days from the date of CMS's initial notification to Petitioner of its revocation.

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<sup>4</sup> Trailblazer determined that one of the grounds for Petitioner's revocation was that under 42 C.F.R. § 424.516(d)(ii) Petitioner was required to report any adverse legal action to Trailblazer within 30 days. This regulation became effective January 1, 2009. Prior to this, there was no requirement to report "an adverse legal action." The previous provision required enrollees to report any changes to the information in its enrollment application within 90 days. 42 C.F.R. § 424.520(b) (2008). CMS has not shown that Dr. Tolliver's conviction was a change in the information in the enrollment application for Derm One that was required to be reported within 90 days. In any event, the statute and applicable regulations provide that a felony conviction such as Dr. Tolliver's conviction for filing a false tax return is a basis for revocation if it occurred within 10 years of the date of enrollment of the Medicare program whether or not the provider reported that conviction. Social Security Act § 1866(b)(2)(D); 42 C.F.R. § 424.535(a)(3) (2008).

**IV. Conclusion**

As a matter of law, I conclude that CMS was authorized to revoke Petitioner's enrollment and billing privileges effective August 15, 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph Grow  
Administrative Law Judge