

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

Vital Care Medical Transportation, LLC
Docket No. A-18-126
Decision No. 2930
March 8, 2019

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

In 2017, the Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Vital Care Medical Transportation, LLC (Petitioner) based on the felony conviction of an individual whom CMS identified as Petitioner’s “managing employee.” Petitioner, which provides ambulance services, requested a hearing before the administrative law judge (ALJ) to challenge the revocation, and CMS moved for summary judgment. The ALJ granted CMS’s motion, sustaining the revocation. *Vital Care Med. Transp.*, DAB CR5138 (2018) (ALJ Decision). Petitioner now appeals the ALJ’s decision on various grounds. Based on our de novo review, we affirm the ALJ’s grant of summary judgment to CMS.

Legal Background

A supplier of health care services must be enrolled in Medicare in order to bill the program for services furnished to program beneficiaries. 42 C.F.R. § 424.500. Medicare enrollment is governed by regulations in 42 C.F.R. Part 424, subpart P (sections 424.500-.575). Those regulations authorize CMS to revoke an enrolled supplier’s Medicare billing privileges for any of the “reasons” specified in paragraphs (1) through (14) of section 424.535(a). (In this decision, we cite to, and apply, the version of section 424.535 that was in effect on October 5, 2017, the date of the initial revocation determination. *John P. McDonough III, Ph.D.*, DAB No. 2728, at 2 n.1 (2016).)

Under paragraph (3) of section 424.535(a), CMS may revoke a supplier’s billing privileges if its “owner or managing employee . . . 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.” 42 C.F.R. § 424.535(a)(3)(i). Paragraph (3) specifies general categories of offenses that CMS has determined by rulemaking to be detrimental *per se* to Medicare and its beneficiaries. *Id.* § 424.535(a)(3)(ii)(A-D); *Cornelius M. Donohue, DPM*, DAB No. 2888, at 4 (2018). One such offense category is “crimes against persons, such as murder, rape, assault, and other similar crimes.” 42 C.F.R. § 424.535(a)(3)(ii)(A).

Two other paragraphs of section 424.535(a) are relevant to our discussion but not material to our decision: paragraph (9) authorizes billing-privilege revocation if a supplier fails to comply with provisions in section 424.516(d) that require certain suppliers to report any “adverse legal action” or change in practice location within a specified timeframe; and paragraph (1) authorizes revocation when a supplier is found noncompliant with “enrollment requirements” (specified in either 42 C.F.R. Part 424, subpart P or a pertinent enrollment application) and “has not submitted a plan of corrective action” as outlined in 42 C.F.R. Part 488.

A supplier may contest a revocation in accordance with the procedures in 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). The supplier must first request “reconsideration” of the initial revocation determination. *Id.* §§ 498.5(1), 498.22. If dissatisfied with the “reconsidered determination,” the supplier may request a hearing before an ALJ. *Id.* § 498.40. A party dissatisfied with an ALJ’s decision may seek review by the Departmental Appeals Board (Board). *Id.* § 498.80.

Case Background

The facts in this section are undisputed, unless otherwise indicated. Petitioner enrolled in Medicare in 2008 as an “ambulance service supplier.” CMS Ex. 6, at 1, 4; Pet.’s Request for Review (RR) at 2. Its application for Medicare enrollment (filed in March 2008) identifies John E. Bond as its “owner” and Jeffrey K. Bond as its “managing employee.” *Id.* at 13, 15-16. (Jeffrey Bond is John Bond’s son. RR at 3.) On February 27, 2013, Jeffrey Bond pled guilty in a Tennessee state court to a felony count of “reckless aggravated assault.” CMS Ex. 3; RR at 1. Based on the plea, the court entered a judgment of conviction against Mr. Bond on September 29, 2014. *Id.*

On October 5, 2017, a CMS contractor notified Petitioner that its Medicare billing privileges had been revoked (effective September 29, 2014) under two provisions of section 424.535(a): paragraph (3), because of the September 29, 2014 felony assault conviction of its managing employee, Jeffrey Bond; and paragraph (9), because of Petitioner’s alleged failure to report Bond’s conviction to Medicare in accordance with 42 C.F.R. § 424.516(d)(1). CMS Ex. 9.

Petitioner requested reconsideration of the initial revocation determination, contending, among other things, that it was not subject to revocation under paragraph (9) because the reporting requirements referenced in that paragraph do not apply to ambulance suppliers, only to physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations. Req. for Hearing Supporting Docs., CRD Dkt. No. C-18-870, entry 1B, at 3, 4-5. Petitioner also asserted that it was under no obligation to report Mr. Bond’s conviction because it had relieved him of “supervisory duties” (and from his

duties as a paramedic) immediately after his conviction and reassigned him to other work. *Id.* at 4, 6. Petitioner provided CMS with corporate meeting minutes, purportedly prepared and signed by John Bond (Petitioner's owner), which mention these duty changes. *Id.* at 2, 12.

On March 2, 2018, CMS issued a reconsidered determination upholding the revocation. CMS Ex. 1. CMS agreed that section 424.516(d) did not require Petitioner to report Jeffrey Bond's conviction and thus withdrew section 424.535(a)(9) as a legal ground for the revocation. *Id.* at 5. However, CMS concluded that the revocation was proper under section 424.535(a)(3) based on Jeffrey Bond's September 2014 felony assault conviction. *Id.* at 4-5. In support of that conclusion, CMS noted that: (1) Jeffrey Bond was designated in Petitioner's initial (March 2008) enrollment application as a "managing employee" and that this designation remained "current" in Petitioner's enrollment record; (2) Mr. Bond's conviction had occurred within 10 years preceding revocation; (3) the offense of conviction – felony assault – was a crime against a person, as specified in section 424.535(a)(3)(ii)(A); and (4) Mr. Bond's felony offense was detrimental *per se* to the Medicare program. *Id.* CMS reviewed the corporate meeting minutes submitted by Petitioner but found that they did "not adequately demonstrate[]" that Jeffrey Bond had been removed from his managerial position on September 29, 2014, emphasizing the absence of any "indicat[ion] that Mr. Bond [had been] made aware of and agreed to" the duty changes mentioned in the minutes. *Id.* at 5. CMS also noted that section 424.516(e) required Petitioner to amend its enrollment record to reflect any change in Jeffrey Bond's status as managing employee but that Petitioner had not done so. *Id.*

Petitioner then filed a request for hearing that mostly raised issues about its obligation to report convictions (and other adverse actions) to Medicare. CMS responded to the hearing request with a motion for summary judgment, contending that Petitioner's billing privileges had been properly revoked under section 424.535(a)(3) based on Jeffrey Bond's conviction and that Petitioner's "reporting obligations are not at issue here." June 12, 2018 CMS Motion for Summary Judgment at 2, 3-4. Petitioner countered that *it* was entitled to summary judgment, asserting that the revocation "was not, and can not be, based on section . . . 424.535(a)(3) alone." Pet.'s Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment at 2-3, 5-6. More specifically, Petitioner asserted that a revocation based on a felony conviction that occurs after initial enrollment (as Jeffrey Bond's did) is improper unless the supplier was legally required to report it, and that it was under no such obligation when Jeffrey Bond was convicted. *Id.* at 3, 5 (stating that paragraph (3) of section 424.535(a) "cannot be the basis of revocation for future [post-enrollment] convictions unless there is an applicable section that mandates an ongoing reporting requirement"). Petitioner further suggested that any duty it had to report Jeffrey Bond's conviction arose under section 424.535(a)(1), entitling it to submit a corrective action plan that, if implemented, would enable it to avoid the revocation. *Id.* at 3-4.

While the case was pending before the ALJ, Petitioner neither questioned nor offered evidence rebutting CMS's finding that, when the initial revocation and reconsidered determinations were issued, Petitioner's Medicare enrollment record continued to identify Jeffrey Bond as a managing employee and that this official designation had not changed since 2008, when Petitioner first enrolled in Medicare.

CMS moved for summary judgment before the ALJ, and Petitioner responded to CMS's motion and cross-moved for summary judgment. The ALJ granted CMS's summary judgment motion, sustaining the revocation under section 424.535(a)(3) based on Jeffrey Bond's 2014 conviction and rejecting Petitioner's various legal arguments. ALJ Decision at 2-4.

Analysis

We review the ALJ's grant of summary judgment de novo, viewing the record in the light most favorable to Petitioner, who did not prevail on summary judgment. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 6 (2016). Summary judgment, here entered for CMS based on its motion, is appropriate if there are no genuine disputes of material fact, and the prevailing party is entitled to judgment as a matter of law. *Id.* In assessing the substantive merit of a revocation determination, administrative law judges and the Board are confined to deciding whether CMS "has established the existence of one or more of the . . . permissible grounds for revocation" specified in 42 C.F.R. § 424.535(a). *Norman Johnson, M.D.*, DAB No. 2779, at 11 (2017).

In this case the challenged revocation rests on section 424.535(a)(3), which authorizes revocation if the following conditions exist: (a) the supplier's owner or "managing employee" was "convicted" of a federal or state felony offense; (b) the conviction occurred "within the preceding 10 years" – that is, within 10 years prior to the initial revocation determination; and (c) the conviction was for an offense that has been determined by CMS to be detrimental to the best interests of Medicare and its beneficiaries. Under section 424.535(a)(3), the term "convicted" means, among other things, that "[a] judgment of conviction has been entered against an individual or entity by a Federal, State, or local court." 42 C.F.R. § 1001.2 (cross-referenced in 42 C.F.R. § 424.535(a)(3)(i)).

As our background narrative shows, there is no dispute that from 2008 through at least the date of the initial revocation determination, Petitioner's Medicare enrollment record identified Jeffrey Bond as its managing employee. There is also no dispute that on September 29, 2014, a Tennessee state court entered a judgment convicting Bond of reckless aggravated assault; that the offense of conviction was a felony; and that the judgment of conviction occurred within 10 years preceding the initial revocation determination. In addition, reckless aggravated assault unquestionably falls within the

category of “crimes against persons” that CMS has determined, by rulemaking (in section 424.535(a)(3)(ii)(A)), to be detrimental to the best interests of Medicare and its beneficiaries. In short, undisputed facts demonstrate that each of section 424.535(a)(3)’s conditions for revocation is met in this case.

We assume, for purposes of reviewing the grant of summary judgment, that Jeffrey Bond was relieved of his managerial duties immediately after his conviction.¹ However, that circumstance does not take the conviction outside the scope of section 424.535(a)(3).² To determine whether the conviction was a basis for revocation, CMS looked, in part, to Petitioner’s official Medicare enrollment record. As noted, that record continuously identified Jeffrey Bond as Petitioner’s managing employee from March 2008 through the date of the initial revocation determination (and beyond). In *Meadowmere Emergency Physicians, PLLC*, the Board held that CMS had “properly relied” on information in the supplier’s enrollment record about the identity of a managing employee in order to revoke the supplier’s billing privileges based on that employee’s felony conviction. DAB No. 2881, at 10-13 (2018). Such reliance was proper, said the Board, in part because suppliers are legally obligated to provide complete and truthful enrollment information to CMS to “ensure . . . that CMS may rely on the accuracy of the information in administering the Medicare program.” *Id.* at 11. CMS’s reliance on Petitioner’s enrollment record to identify its managing employee (Jeffrey Bond) is similarly proper, and Petitioner does not contend otherwise.

As it did before the ALJ, Petitioner contends that, if a felony conviction post-dates the supplier’s initial enrollment in Medicare, then CMS may not revoke “on the basis of [section 424.535](a)(3) alone” unless the supplier was also subject to revocation under another paragraph of section 424.535(a) for not reporting the conviction to the Medicare program. RR at 2, 3, 5 (¶ 1). This contention is baseless, as the ALJ recognized. Each paragraph of section 424.535(a) specifies a distinct, independent “reason” or circumstance – such as a qualifying felony conviction, as specified in paragraph (3) –

¹ Petitioner states that Jeffrey Bond “was convicted, and then immediately removed” from his supervisory position in the company, indicating that the change in duties followed his conviction. RR at 3. Petitioner cites “board meeting notes” it submitted with its reconsideration request to support this assertion. RR at 3; *see also* CMS Ex. 5, at 1, 4. Apparently, this is a reference to “Minutes of Meeting of the Members of Vital Care Medical Transportation, LLC,” discussing a meeting held at 7:00 p.m. on September 29, 2014, following Petitioner’s conviction on the same date. *See* CMS Ex. 5, at 11, 13. CMS found those notes to be inadequate proof that Jeffrey Bond was removed from his management position. Although we are accepting as true for purposes of summary judgment Petitioner’s assertion that it removed Jeffrey Bond from his management position immediately after his conviction, we make no finding as to whether the board meeting minutes would be adequate evidence to support that assertion in a hearing on the merits.

² Of course, even assuming, as we do, that Petitioner reassigned Jeffrey Bond to non-supervisory duties on September 29, 2014, that reveals nothing about the duties he undertook during the ensuing weeks and months, or about his current business relationship with Petitioner.

whose existence, if proven, is sufficient to warrant revocation. *Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 15 (2018) (noting that only one of the revocation reasons enumerated in section 424.535(a) is necessary to uphold a revocation); *Donna Maneice, M.D.*, DAB No. 2826, at 8 (2017) (upholding the physician's revocation under section 424.535(a)(3) while noting that the physician's timely "disclosure of her guilty plea and conviction" and CMS's decision to withdraw its reliance on section 424.535(a)(9) "could not change the outcome of her case"). Nothing in the applicable enrollment regulations suggests that the legality of a revocation based on the existence of a qualifying felony conviction depends on whether the affected supplier is also subject to revocation for not reporting the conviction.

Petitioner's contrary view seems to be motivated by a belief that section 424.535(a)(3) authorizes revocation only if the conviction occurred within 10 years preceding a supplier's initial enrollment. *See* RR at 2-3 (emphasizing that "[a]t the time of enrollment on March 27, 2008 . . . there was no conviction within the preceding 10 years"). However, since the regulation addresses felony convictions as a basis for deciding to revoke a provider or supplier that is already enrolled in the Medicare program, Petitioner's suggested reading makes no sense. Section 424.535(a)(3)'s statement that the conviction must have occurred "within the preceding 10 years" clearly means within 10 years of CMS's making the determination to revoke. *See Saeed A. Bajwa, M.D.*, DAB No. 2799, at 5 (2017) (noting with approval the ALJ's finding that a felony conviction had occurred within 10 years preceding the revocation determination, "as required by" section 424.535(a)(3)).

Next, Petitioner suggests that CMS unlawfully revoked its billing privileges based on Jeffrey Bond's conviction because the Medicare enrollment application it submitted in 2008 says that only the conviction of a supplier's "owner" may result in revocation. RR at 4. According to Petitioner, its CMS-approved enrollment application is a "contract between the parties, and as such is the governing requirement." *Id.*

Petitioner offers no analysis, and we know of none, that would support its apparent view that the enrollment application contractually limits CMS's revocation authority under the Medicare program's enrollment regulations. The outcome of this case is dictated by section 424.535(a)(3), a binding regulation, not by the Medicare enrollment application, whose instructions and guidance lack the force of law. *Cf. Health Connect at Home*, DAB No. 2419, at 9 (2011) (holding that the "legally binding regulation" was "controlling" over conflicting language in a Medicare program manual). Section 424.535(a)(3) expressly provides that CMS's basis for revocation due to a felony conviction extends to a "managing employee" as well as to an "owner." Furthermore, contrary to Petitioner's assertion, no language in the enrollment application purports to

define or limit CMS's authority to revoke based on a felony conviction. The only portion of the application cited by Petitioner (P. Ex. 3) merely advises a supplier about the types of convictions that are considered "final adverse legal actions" and which must therefore be reported to the Medicare program.

Based on the same unsupported "contract" theory, Petitioner asserts that it had no obligation to report Jeffrey Bond's conviction because Bond was not an "owner." *See, e.g.*, RR at 3-4 (relying in part on language in its Medicare enrollment application). This assertion presents an irrelevant issue. In an appeal contesting the revocation of Medicare billing privileges, the Board is limited to reviewing the basis (or bases) for revocation cited in the unfavorable reconsidered determination. *Vijendra Dave, M.D.*, DAB No. 2672, at 8 n.10 (2016). In this case, CMS stated in the reconsidered determination that its basis for revocation was the felony conviction of Petitioner's managing employee and not Petitioner's failure to report that conviction to the Medicare program. Because the reconsidered determination did not cite Petitioner's failure to report the conviction as a basis for revocation, there is no issue properly before us concerning Petitioner's reporting obligations under the Medicare enrollment regulations.

Petitioner asserts that CMS unlawfully revoked its billing privileges without first giving it an opportunity to submit a corrective action plan. RR at 4-5. Petitioner suggests that it was entitled to that opportunity under 42 C.F.R. §§ 424.535(a)(1) and 488.28(a), and that, regardless of these regulations, it would be "equitable" to allow corrective action because the "retroactive revocation of an entire company for the actions of one employee acting outside of the scope of his employment is not appropriate" and has led to potentially severe financial consequences (namely, being subjected to a \$1.2 million overpayment demand by CMS). *Id.*

Petitioner was not entitled to submit a corrective action plan in these circumstances. The applicable regulations permit that step only when CMS revokes under section 424.535(a)(1), which it did not do in this case. 42 C.F.R. § 405.809(a)(1) (stating that a supplier "[m]ay only submit a corrective action plan for a revocation for noncompliance under § 424.535(a)(1)"); *Meindert Niemeyer, M.D., LLC*, DAB No. 2865, at 2 n.3 (2018); *see also Main Street Pharmacy*, DAB No. 2349, at 6 (2010) (holding that "when a revocation is based on the felony conviction provision at section 424.535(a)(3), the supplier is not entitled to an opportunity for correction"). Section 488.28(a) does not help Petitioner, for it does not place conditions on CMS's authority to revoke a supplier's Medicare billing privileges under section 424.535(a). Instead, section 488.28(a) notifies a supplier or provider of its obligation to promptly submit an "acceptable" plan of correction after being found noncompliant with one or more of the conditions or requirements of Medicare participation, certification, or coverage specified in 42 C.F.R. § 488.3. None of those conditions or requirements is at issue in this case.

As for Petitioner’s plea for “equitable” relief, the Board has no authority to modify, rescind, or direct CMS to reconsider a revocation based on mitigating circumstances or claims that the revocation has caused financial or other hardship. *Patrick Brueggeman, D.P.M.* at 15 (stating that “neither [the Board] nor an ALJ has the authority to restore a supplier’s billing privileges on equitable grounds”). “[W]hile CMS may have discretion to consider unique or mitigating circumstances in deciding whether, or how, to exercise its revocation authority, ALJs and the Board may not substitute their discretion for that of CMS in determining whether revocation is appropriate under all the circumstances.” *Meadowmere Emergency Physicians* at 8-9 (internal quotation marks and brackets omitted).

Conclusion

Based on the foregoing analysis, we affirm the grant of summary judgment to CMS and conclude that CMS properly revoked Petitioner’s Medicare billing privileges effective September 29, 2014.³

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim

_____/s/
Sheila Ann Hegy
Presiding Board Member

³ When a revocation is based on a felony conviction, the revocation’s effective date is the date of conviction. 42 C.F.R. § 424.535(g). Petitioner’s appeal raised no issue concerning the revocation’s effective date.