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

Meadowmere Emergency Physicians, PLLC
Docket No. A-18-26
Decision No. 2881
July 13, 2018

# FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Meadowmere Emergency Physicians, PLLC (Meadowmere or Petitioner) appeals the November 20, 2017 decision by an administrative law judge, *Meadowmere Emergency Physicians, PLLC*, DAB CR4971 (ALJ Decision). The ALJ concluded that the Centers for Medicare & Medicaid Services (CMS) had legal bases to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.535(a)(3) and 424.535(a)(9) on the grounds that a Meadowmere managing employee was convicted of a felony offense relating to health care fraud within 10 years of the revocation and Meadowmere did not timely report the conviction to CMS or its Medicare contractor. The ALJ did not disturb the June 14, 2016 effective date (the date Meadowmere's managing employee entered a plea of guilty to the felony offense) assigned by CMS.

For the reasons discussed below, we affirm the ALJ's determination that CMS had legal bases to revoke Meadowmere's Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.535(a)(3) and 424.535(a)(9). However, pursuant to 42 C.F.R. § 424.535(g), we modify the ALJ Decision by changing the effective date of the revocation to July 14, 2016, the date on which a United States district court judge accepted the managing employee's plea and adjudged him guilty.

## Legal Background

1. Requirements for physicians and physician groups to enroll and maintain enrollment in Medicare

Section 1866(j) of the Social Security Act (Act), 42 U.S.C. § 1395cc(j), authorizes the Secretary of Health and Human Services (HHS) to "establish by regulation a process for

the enrollment of providers of services and suppliers" in Medicare.[1] Medicare is administered by CMS, which delegates certain program functions to private contractors that function as CMS's agents in administering the program – in this case, Novitas Solutions, Inc. (Novitas). *See* Act §§ 1816, 1842, 1866, 1874A; 42 C.F.R. § 421.5(b). [2]

Meadowmere is a supplier for purposes of the Medicare enrollment requirements. Act § 1861(d); 42 C.F.R. § 400.202. Suppliers have "billing privileges," the right to claim and receive Medicare payment for items or services provided to Medicare beneficiaries, only when enrolled. 42 C.F.R. § 424.505.

In order to enroll and maintain enrollment in Medicare, a supplier must comply with program requirements, including the "enrollment requirements" in 42 C.F.R. Part 424, subpart P (sections 424.500-.570). *See* 42 C.F.R. § 424.516(a). The enrollment requirements obligate physicians and physician organizations to submit, and keep current, a CMS-approved "enrollment application" that "must include … [c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the … supplier type" and a "certification statement . . . signed by an individual who has the authority to bind the … supplier, both legally and financially" that attests to the accuracy of the information submitted. *Id*. §§ 424.502, 424.510(d)(2)(i), (ii), (d)(3), 424.515(a), 424.515(a)(2), 424.516(d).

"CMS may revoke a currently enrolled … supplier's Medicare billing privileges" for any of the "reasons" listed under 42 C.F.R. § 424.535(a). CMS may revoke a supplier's billing privileges under section 424.535(a)(3)(i) if the "supplier, or any 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." Section 1001.2 defines "convicted" to mean, among other things, a federal "court has accepted a plea of guilty" by the individual. Section 424.535(a)(3)(ii) lists offenses that CMS has determined to be *per se* detrimental to the best interests of the Medicare program and its beneficiaries. These offenses include any felony "that would result in mandatory exclusion under section 1128(a) of the Act." 42 C.F.R. § 424.535(a)(3)(ii)(D). A "felony conviction relating to health care fraud" results in mandatory exclusion under section 1128(a)(3) of the Act.

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[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home /ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[2] We cite to the regulations in effect on October 13, 2016, the date of the initial revocation determination (CMS Ex. 3). *See John P. McDonough III, Ph.D.*, DAB No. 2728, at 2 n.1 (2016) and *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016) (the version of the regulations in effect on the date of the initial determination to revoke controls).

CMS may revoke a supplier's Medicare enrollment pursuant to section 424.535(a)(9) if the "supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) …." Section 424.516(d)(1)(ii) requires physicians and physician organizations to report to their Medicare contractor within 30 days "[a]ny adverse legal action." Section 424.502 defines "final adverse action" to include "[a] conviction of a Federal … felony offense … within the last 10 years preceding enrollment, revalidation, or re-enrollment[.]"

When a revocation of Medicare enrollment and billing privileges is based on a felony conviction "the revocation is effective with the date of … felony conviction[.]" 42 C.F.R. § 424.535(g). Once revocation occurs, the supplier is "barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar" established by CMS, a minimum of one year up to a maximum of three years. *Id.* § 424.535(c).

2. Appeals procedures

A supplier whose Medicare enrollment has been revoked may appeal CMS's decision under the procedures in 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). The supplier must be able to show that it meets the enrollment requirements and must make available supporting documents and records. 42 C.F.R. § 424.545(c). The supplier must first ask CMS for "reconsideration" of the "initial determination." *Id.* §§ 498.3(b)(17), 498.5(*l*), 498.22. A supplier dissatisfied with the "reconsidered determination" may request a hearing before an ALJ. *Id.* §§ 498.24, 498.40. Either party may ask for Departmental Appeals Board (Board) review of the ALJ decision. *Id.* § 498.80.

The ALJ will examine any evidence submitted for the first time at the ALJ level. *Id.* § 498.56(e). If the ALJ concludes that good cause does not exist for submitting the documentary evidence for the first time at the ALJ level, "the ALJ must exclude the evidence from the proceeding and may not consider it in reaching a decision." *Id.* § 498.56(e)(2)(ii).

ALJs and the Board are bound by all applicable statutes and regulations and have no authority to make exceptions to their applicability or grant equitable relief. *E.g*. *Fady Fayad, M.D.*, DAB No. 2266, at 14-16 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 15 (2016).

**Case Background**[3]

Meadowmere is a clinic/group practice that was enrolled in Medicare. CMS Ex. 3; CMS Ex. 4, at 2. On May 27, 2015, Meadowmere submitted a Form CMS-855B through the electronic Provider Enrollment, Chain and Ownership System (PECOS) to revalidate its Medicare enrollment. CMS Ex. 4. On that form, Meadowmere listed "Byron Conner" as a managing employee and Medical Director, effective May 1, 2015. CMS Ex. 4, at 6. On September 15, 2015, Meadowmere submitted another Form CMS-855B through PECOS to update its enrollment. CMS Ex. 5. Meadowmere reported on that form that "Byron F. Conner" was a managing employee, effective May 1, 2015. CMS Ex. 5, at 4.

In May 2016, a grand jury in the United States District Court for the Northern District of Texas charged Byron Felton Conner with felony conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349, and health care fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1347 and 2. CMS Ex. 6, at 1-16. On June 14, 2016, Conner entered a guilty plea, before a United States magistrate judge, to conspiracy to commit health care fraud, "in violation of 18 U.S.C. § 371[18 U.S.C. § 1347]," and the magistrate judge issued a report recommending that the district court accept the plea. *Id.* at 17-18. On July 14, 2016, a judge in the district court "accept[ed] the plea of guilty" and "adjudged [Conner] guilty of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 371[18 U.S.C. § 1347]." *Id.* at 19.

By letter dated October 13, 2016, Novitas notified Meadowmere that its Medicare billing privileges were revoked effective June 14, 2016 pursuant to: (1) 42 C.F.R. § 424.535(a)(3), because Byron Conner, listed as a managing employee on Meadowmere's Medicare enrollment record, had a felony conviction for conspiracy to commit healthcare fraud within the preceding ten years; and (2) 42 C.F.R. § 424.535(a)(9), because Meadowmere did not notify CMS of this adverse action as required under 42 C.F.R. § 424.516. CMS Ex. 3, at 1. Novitas established a re-enrollment bar of three years for Meadowmere based on 42 C.F.R. § 424.535(c). *Id.* at 2.

Meadowmere requested reconsideration of Novitas's decision, stating that Byron Conner had "not worked a shift on behalf of Meadowmere … since September 26, 2015," and Meadowmere had not submitted any claims for services performed by Dr. Conner in 2016. CMS Ex. 2. Meadowmere also stated that it was not aware of Dr. Conner's conviction because he was "not listed as an excluded person" on the websites of the HHS Inspector General or the Texas Inspector General, and the Texas Medical Board website

[3] The facts stated in this section are from the ALJ Decision and the record and are stated only to provide background, not to replace the ALJ's findings. Unless otherwise noted, the facts stated herein are undisputed.

showed Dr. Conner's license as active and in good standing. *Id.* "Due to an administrative error in our enrollment process," Meadowmere said, "Dr. Conner's enrollment with Meadowmere … was not timely deactivated." *Id.*

On reconsideration, CMS upheld the revocation, effective June 14, 2016. CMS Ex. 1. CMS stated that "the reason for Meadowmere's revocation is [that] Meadowmere listed Dr. Conner as a managing employee on its Medicare enrollment record" and it was Meadowmere's "responsibility … to be aware of the criminal misconduct of its managing employees." CMS Ex. 1, at 4-5. CMS further explained that Meadowmere did not dispute Dr. Conner's felony conviction for conspiracy to commit healthcare fraud, a felony crime under 42 C.F.R. § 424.535(a)(3)(ii)(D) and section 1128(a)(3) of the Act, which CMS has found to be *per se* detrimental to the best interests of the Medicare program and its beneficiaries. *Id.* at 5. CMS also determined that the revocation was proper under section 424.535(a)(9) because Meadowmere had not reported the conviction to CMS or Novitas within 30 days. *Id.*

Meadowmere appealed the reconsidered determination.

**The ALJ Proceeding**

The ALJ issued an Acknowledgment and Pre-Hearing Order that directed the parties to file briefs and exhibits according to specific instructions. The Order stated that a "party must exchange as a proposed exhibit the complete, written direct testimony of any proposed witness." Order ¶ 8. The Order also explained that an in-person hearing would be held only if a party filed admissible, written direct testimony of one or more witnesses and the opposing party asked to cross-examine any witness.[4] Order ¶¶ 8, 9 and 10.

CMS filed a "Motion for Summary Judgment and Brief in Support Thereof or Pre-Hearing Brief" with 10 proposed exhibits, which the ALJ admitted into the record absent objection by Meadowmere. Meadowmere filed a "Response to Centers for Medicare & Medicaid Services' Motion for Summary Judgment and Brief in Support Thereof or Pre-Hearing Brief" and six proposed exhibits (Petitioner Exs. 1-6). CMS objected to Petitioner exhibits 1, 2, 3, 4, and 6 as inadmissible new evidence. The ALJ excluded those five exhibits pursuant to 42 C.F.R. § 498.56(e) because Meadowmere did not show good cause for submitting them for the first time at the ALJ level.

[4] The Board has held that requiring a party to submit the direct testimony of its witnesses in writing is not inconsistent with the regulations in 42 C.F.R. Part 498, "so long as the opportunity to cross-examine and hence observe demeanor where credibility is at issue is preserved. Written direct testimony is widely used both in administrative proceedings and federal court." *Vandalia Park*, DAB No. 1940, at 28-29 (2004), *aff'd, Vandalia Park v. Leavitt*, 157 F. App'x 858 (6th Cir. 2005).

The ALJ decided the case based on the written record because neither party submitted written direct testimony; nor did they "limit their arguments to the question of summary judgment[.]" ALJ Decision at 7 n.10.

The ALJ determined that CMS had a legal basis to revoke Meadowmere's Medicare enrollment under 424.535(a)(3) because the evidence admitted into the record showed: A Meadowmere managing employee, Dr. Byron Conner, entered a plea of guilty to the offense of conspiracy to commit heath care fraud, in violation of 18 U.S.C. §§ 371 and 1347; a United States district court judge accepted that plea and adjudicated Byron Conner guilty on July 14, 2016; and the type of offense to which Byron Conner was adjudicated guilty is listed in section 424.535(a)(3)(ii)(D) and has been determined by CMS to be *per se* detrimental to the best interests of the Medicare program and its beneficiaries. ALJ Decision at 8, Findings of Fact and Conclusions of Law (FFCL) 2, 3, and 4. The ALJ rejected Meadowmere's arguments that Dr. Conner resigned from his position effective September 1, 2015 and that Meadowmere inadvertently listed Dr. Conner's name on its September 2015 enrollment application because Meadowmere had not submitted admissible evidence to substantiate these arguments and the arguments were inconsistent with assertions made in Meadowmere's request for reconsideration. ALJ Decision at 9-11.

The ALJ further held that even if Meadowmere had mistakenly listed Dr. Conner as a managing employee, a "mistake in completing the application" did not "absolve" Petitioner from its responsibility to update its enrollment information. ALJ Decision at 11. "The simple fact is," the ALJ stated, Meadowmere "listed Dr. Conner as a managing employee" when it submitted an updated enrollment application on September 15, 2015, and "Dr. Conner continued to be listed on Petitioner's enrollment record at the time he was convicted[.]" *Id.* at 9, 11 (citing CMS Exs. 5, at 4). The ALJ also noted that, "as compared to the previous application," Meadowmere "added a middle initial for Dr. Conner," indicating that it intentionally listed Dr. Conner on the September 2015 enrollment application. ALJ Decision at 11 (citing CMS Exs. 4, at 6; 5, at 4).

The ALJ concluded that CMS had an additional legal basis to revoke Meadowmere's Medicare enrollment under section 424.535(a)(9) because Meadowmere did not notify Novitas or CMS within 30 days of Dr. Conner's conviction, which was an "adverse legal action" that Meadowmere was required to report under section 424.516(d)(1)(ii). ALJ Decision at 11-12, FFCL 5. While Meadowmere argued that it was not, and could not reasonably have been, aware of Dr. Conner's conviction, the ALJ held that "such ignorance does not negate the fact that it continued to list Dr. Conner on its enrollment [record] through the time of his conviction." ALJ Decision at 12.

The ALJ sustained the June 14, 2016 effective date of revocation identified by Novitas and CMS. ALJ Decision at 12, FFCL 6. Though the ALJ noted that the United States district court judge accepted Dr. Conner's plea on July 14, 2016, the ALJ decided "not [to] disturb the June 14, 2016 effective date" because Meadowmere did not dispute it. ALJ Decision at 12. Finally, the ALJ determined that the three-year re-enrollment bar imposed by CMS was not reviewable. ALJ Decision at 12-13, FFCL 7.[5]

## Standard of Review

The Board's standard of review for a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (Guidelines) available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html.

## Discussion

1. The ALJ's determination that CMS had a legal basis to revoke Meadowmere's Medicare enrollment under 42 C.F.R. § 424.535(a)(3) is supported by substantial evidence and free from legal error.

Meadowmere argues that the ALJ "improperly deemed 42 C.F.R. § 424.535(a)(3) to be a strict liability offense" and failed to address the "mitigating circumstances" that "it had severed all business ties with Dr. Conner" months before he was convicted and that it had listed Dr. Conner on its September 2015 enrollment application due to "an unintentional oversight." Meadowmere Memorandum of Law in Support of Request for Review (RR) at 9-10. Meadowmere also contends that the ALJ erred in finding that the statements in its request for reconsideration were inconsistent with its arguments before the ALJ. *Id.* at 10. Meadowmere asks the Board to reverse the ALJ decision or to remand the case to the ALJ for a new hearing, "where testimony can be introduced to complete the factual record." RR at 2; Meadowmere Reply Memorandum of Law (Reply) at 1.

[5] Meadowmere does not contest the ALJ's finding that the re-enrollment bar is not reviewable, and the Board has held "that CMS's determination of the length of the reenrollment bar [under section 424.535(c)] is not subject to review." *Mohammad Nawaz, M.D.*, DAB No. 2687, at 15 (2016) (citing *Vijendra Dave, M.D.,* DAB No. 2672, at 10-11 (2016)), *aff'd, Nawaz v. Price*, 2017 WL 2798230 (E.D. Tex. June 28, 2017). Accordingly, we sustain this finding without further discussion.

To support its argument that the ALJ erroneously determined that section 424.535(a)(3) is a "strict liability offense," Meadowmere relies on the following CMS statement in the preamble to the 2006 final rule:

> In cases where the provider or supplier is not a convicted individual but, rather, has an ownership or management relationship with a convicted or excluded individual, that provider or supplier may also be subject to civil monetary penalties as stated in section 1128A(a)(6) of the Act. In addition, **we may deny or revoke billing privileges** if such a relationship exists. However, the denial may be reversed if, within 30 days of the denial notification, the provider or supplier terminates its ownership or management relationship with the convicted or excluded individual or organization.

RR at 9 (quoting 71 Fed. Reg. 20,754, 20,760 (Apr. 21, 2006) (emphasis by Meadowmere)). Meadowmere says that this statement "makes it plain that the Secretary did not intend to create a strict liability offense" in section 424.535(a)(3). RR at 9. Yet, Meadowmere asserts, the ALJ "deemed that a revocation was mandatory here," elevating form over substance to Meadowmere's detriment and without advancing "the intent of the regulation to prevent Medicare program fraud." *Id.* at 10-11.

Meadowmere's arguments mischaracterize the ALJ Decision. The ALJ did not "deem[] that a revocation was mandatory" under all of the circumstances presented in this case, as Meadowmere alleges. *See* RR at 10 (citing ALJ Decision at 11 n.14 ("I recognize that Dr. Conner's felony conviction in the preceding 10 years, **alone**, is a sufficient basis for CMS to have revoked Petitioner's Medicare enrollment and billing privileges.")) (emphasis added by Respondent). The ALJ's statement in footnote 14 merely reflects the ALJ's understanding, which is correct, that she need not find noncompliance with more than one of the bases for revocation in section 424.535(a) in order to uphold the revocation. ALJ Decision at 11 n.14; *Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 15 (2018).

Meadowmere's argument also reflects a fundamental misunderstanding of the scope of an ALJ's (and the Board's) review of a CMS decision to revoke a supplier's Medicare enrollment under section 424.535(a). The "Board has consistently held that ALJ and Board review is confined to deciding whether CMS has established the existence of one or more of the specified permissible grounds for revocation…." *Norman Johnson, M.D.*, DAB No. 2779, at 11 (2017) (citing *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008); *Lorrie Laurel, P.T.*, DAB No. 2524, at 7-8 (2013); *Dinesh Patel, M.D.*, DAB No. 2551, at 11 (2013)). The Board has explained that while "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." *Care Pro Home Health, Inc.*, DAB No. 2723, at 9 n.8 (2016); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Here, as reflected in the language of the ALJ Decision, the ALJ properly limited her review to the issue of whether CMS had shown a legal basis for the revocation and concluded that, indeed, CMS had shown two legal bases, including, as we discuss in this section of our decision, its authority under section 424.535(a)(3)(i), (ii).

On review of the administrative record and the ALJ Decision, we conclude that substantial evidence supports the ALJ's determination that each of the criteria for revoking Meadowmere's enrollment and billing privileges under section 424.535(a)(3) was met. As Meadowmere acknowledged and its Medicare enrollment records show, Meadowmere's May 27, 2015 Medicare enrollment application listed "Byron Conner" as "Medical Director" and "Managing Employee" effective May 1, 2015. CMS Ex. 4, at 6. Meadowmere's September 15, 2015 Medicare enrollment application listed "Byron F. Conner" as a "Managing Employee" effective May 1, 2015. CMS Ex. 5, at 4. In addition, there is no evidence showing, nor does Meadowmere allege, that the September 15, 2015 application was superseded or amended as of October 13, 2016, when Novitas notified Meadowmere that its billing privileges were being revoked. Thus, the evidence supports the finding that Byron Conner was a Meadowmere managing employee effective May 1, 2015 through the date Novitas issued the initial revocation decision.

Next, the documentation of the criminal proceedings involving Byron Conner evidence that on July 14, 2016, within 10 years of the initial determination to revoke, he was "convicted" of a felony offense that CMS has determined to be *per se* detrimental to the best interests of the Medicare program and its beneficiaries within the meaning of 42 C.F.R. §§ 424.535(a)(3)(i), 424.535(a)(3)(ii)(D) and 1001.2. Specifically, the court records show that on June 14, 2016, Byron Conner entered a plea of guilty to felony conspiracy to commit health care fraud, in violation of 18 U.S.C. § 371 [18 U.S.C. § 1347, and on July 14, 2016, a judge in the district court accepted the plea and adjudged Byron Conner guilty of that offense. CMS Ex. 6, at 15-17, 19. Because "a felony conviction for conspiracy to commit health care fraud would subject him to a mandatory exclusion under section 1128(a)(3) of the Act," the ALJ properly found, Byron Conner's "conviction warrants revocation of enrollment and billing privileges," ALJ Decision at 9 (citing 42 C.F.R. § 424.535(a)(3)(ii)(D) (a conviction for an offense that would result in mandatory exclusion under section 1128(a) is *per se* detrimental to the best interests of the Medicare program and its beneficiaries)).

Furthermore, the ALJ addressed and explained why she rejected Meadowmere's allegations that Byron Conner was not a managing employee on September 15, 2015 or thereafter. The ALJ noted that Meadowmere alleged that Dr. Conner resigned from his position as Site Medical Director effective September 1, 2015 and was terminated as an employee on August 31, 2015. ALJ Decision at 10; P. Br. at 2. The ALJ ruled, however, that the documentation submitted by Meadowmere to support the allegations (P. Exs. 1, 2, 3, 4 and 6) was inadmissible under 42 C.F.R. § 498.56(e) because Meadowmere submitted it for the first time with its ALJ hearing request and did not show good cause for failing to submit it earlier in the appeals process. ALJ Decision at 5-8, 10 n.13.

In ruling to exclude the evidence, the ALJ noted that Novitas "clearly explained" in the initial revocation notice that if Meadowmere had any additional information to show that the revocation was incorrect, it "must submit that information with [its] request for reconsideration" and this was Meadowmere's "only opportunity to submit information during the administrative appeals process." ALJ Decision at 7; CMS Ex. 3, at 1-2. The ALJ's Pre-Hearing Order, in turn, plainly instructed Meadowmere not to offer new documentary evidence absent a showing of good cause for failing to present it previously to CMS as required by 42 C.F.R. § 498.56(e). Order ¶ 6. Notwithstanding this clear instruction, Meadowmere submitted to the ALJ new documentary evidence, which was in existence at the time that it requested reconsideration, but "declined to address the issue of good cause in its pre-hearing brief." ALJ Decision at 7.[6] Accordingly, the ALJ properly ruled that Meadowmere had "not demonstrated, through the submission of admissible evidence, that it erroneously listed Dr. Conner as a managing employee."[7] ALJ Decision at 9-10.

[6] The ALJ noted that Meadowmere asserted in a footnote of its brief that the "good cause" requirement in section 498.56(e) applied only to hearings and not in the context of summary judgment and that it "reserves its right to submit briefing on the good cause requirement…." ALJ Decision at 6-7. The ALJ explained that the wording of section 498.56(e) does not limit the good cause requirement to hearings, *id.* at 7, and in any event, the parties' briefing was not limited to the question of summary judgment. *Id.* n.10. Since the ALJ decided this case on the written record, not on summary judgment, the issue is moot in any event.

[7] The ALJ also noted that Meadowmere's "only allegation that it committed administrative error with respect to listing Dr. Conner as a managing employee [was] in its brief[]" and that Meadowmere did not submit written direct testimony of any witness to address the alleged administrative error (or any other issue), even though the ALJ's Pre-Hearing Order expressly provided that the parties may submit such testimony. ALJ Decision at 10 n.11, referencing Order § 8.

Before the Board, Meadowmere does not point to any record evidence to show that it terminated Dr. Conner as an employee on August 31, 2015 or that Dr. Conner resigned from his management position effective September 1, 2015.[8] Meadowmere also does not identify any error or abuse of discretion (nor do we see any) in the ALJ's evidentiary ruling. Furthermore, while Meadowmere contends that we should remand this case to permit it to introduce witness testimony "that as of September 2015, Dr. Conner had no relationship of any kind with Meadowmere," RR at 15-16, Meadowmere does not deny that the ALJ previously provided it such an opportunity, but Meadowmere failed to avail itself of it.

We also agree with the ALJ that even if Meadowmere mistakenly listed Dr. Conner as a managing employee on its September 2015 enrollment application, no provision of the statute or regulations "absolves it of responsibility for [this] uncorrected error …." ALJ Decision at 11. As the regulations make clear, to maintain Medicare billing privileges, a supplier is obligated to ensure that its "enrollment application" contains "[c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the … supplier type." 42 C.F.R. §§ 424.502 (Definition of "Enroll /Enrollment"), 424.510(a)(1) and (d), 424.515. Moreover, when a supplier submits a Medicare enrollment application, a person who has authority to bind the supplier legally and financially must sign a certification statement attesting that the information submitted is accurate and that the "supplier is aware of, and abides by, all applicable statutes, regulations, and program instructions." *Id.* § 424.510(d)(3). These requirements ensure, among other things, that CMS may rely on the accuracy of the information in administering the Medicare program.

"As courts and the Board have recognized," moreover, "Medicare providers and suppliers, as participants in the program, have a duty to familiarize themselves with Medicare requirements." *Francis J. Cinelli, Sr., D.O.*, DAB No. 2834, at 10 (2017) (citing *Gulf South Medical*, DAB No. 2400, at 9 (2011); *John Hartman, D.O.*, DAB No. 2564, at 3 (2014) (quoting *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984) ("those who deal with the government are expected to know the

[8] Meadowmere says in its Reply that it "presented evidence and written representations that Dr. Conner was neither employed by Meadowmere nor had any business relationship to Meadowmere when he was convicted." Reply at 6. However, Meadowmere's citation to support the statement refers to CMS's Brief and Meadowmere's request for reconsideration (CMS Ex. 2), not to any Meadowmere evidence that was admitted into the record. As the ALJ noted, one of Petitioner's proposed exhibits, an August 14, 2015 email from Dr. Conner with the subject "Resignation," states that he intended to resign as Site Medical Director effective September 1, 2015, but that he planned to "stay on in [an as-needed] status to help when my schedule permits …." ALJ Decision at 10 n.13 (quoting P. Ex. 1, at 2 (excluded)). We agree with the ALJ that it is not clear from this email that Dr. Conner would have no role as a "managing employee" after September 1, 2015. We note in this regard (as did the ALJ) that Meadowmere continued to list Dr. Conner as a "Managing Employee" on its September 15, 2015 enrollment application even though it omitted the title "Medical Director." CMS Ex. 5, at 4; ALJ Decision at 2 and n.1.

law[.]")); *see also Thomas M. Horras and Christine Richards*, DAB No. 2015, at 34 (2006) (officer and principal of provider had responsibility to be aware of and adhere to applicable law and regulations), *aff'd, Horras v. Leavitt*, 495 F.3d 894 (8th Cir. 2007)).

Thus, regardless of whether Meadowmere listed Dr. Conner as a managing employee intentionally or by mistake, Novitas and CMS properly relied on the information that Meadowmere provided about Dr. Conner's employment status on its enrollment applications in determining that a Meadowmere managing employee was convicted of a federal felony offense relating to health care fraud.

Accordingly, we affirm the ALJ's conclusion that CMS lawfully revoked Meadowmere's Medicare enrollment pursuant to section 424.535(a)(3).

2. The ALJ's additional determination that CMS lawfully revoked Meadowmere's enrollment based on 42 C.F.R. § 424.535(a)(9) is supported by substantial evidence and free from legal error.

As explained above, CMS may revoke a supplier's Medicare enrollment and billing privileges for any one of the "reasons" listed under 42 C.F.R. § 424.535(a). Because CMS lawfully revoked Meadowmere's Medicare enrollment pursuant to section 424.535(a)(3), the revocation would stand, regardless of whether CMS had an additional basis to revoke under section 424.535(a)(9). Nevertheless, as did the ALJ, we address the second basis for revocation cited by CMS, section 424.535(a)(9), failure to comply with the requirement in section 424.516(d)(1)(ii) to report to its Medicare contractor an adverse legal action within 30 days of the reportable event.

Meadowmere argues that the ALJ erred in upholding the revocation under section 424.535(a)(9) because it had no actual knowledge of Dr. Conner's conviction until it received the revocation notice in October 2016, that it "could not have queried state or HHS databases to learn of the conviction," and that it had no reason to ask Dr. Conner about any criminal activity. RR at 12-14. Meadowmere also says that the purpose of the reporting requirement, to prevent Medicare from paying unauthorized suppliers, is not implicated here because "any billing for services performed by Dr. Conner had ceased months before he was indicted …." *Id.* at 14.

ALJs and the Board are "bound by applicable statutes and regulations and [have] no authority to make exceptions to their applicability." *Vijendra Dave, M.D.*, at 8. Here, the ALJ recognized that the controlling language of section 424.516(d)(1)(ii), provides that "physician organizations *must* report '[a]ny adverse legal action' within 30 days of the reportable event[.]" ALJ Decision at 11 (quoting 42 C.F.R. § 424.516(d)(1)(ii) (emphasis in ALJ Decision)). The ALJ also noted accurately that section 424.502, in turn, "lists a conviction of a felony offense as defined in section 424.535(a)(3)(i) within the last 10 years preceding enrollment, revalidation, or re-enrollment as a final adverse action." ALJ

Decision at 11-12 (emphasis in ALJ Decision). The regulations do not exempt a physician organization from the reporting requirement if it had no actual knowledge of a managing employee's conviction, if the convicted individual was currently licensed and not listed in an office of inspector general exclusion list, or if the concerns underlying the reporting requirement are not present. Consequently, the ALJ properly applied the mandatory language of section 424.516(d)(1)(ii) to the record evidence, concluding that Meadowmere violated the reporting requirement and, therefore, CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under section 424.535(a)(9).

3. The effective date of the revocation of Meadowmere's enrollment is July 14, 2016.

When a revocation of a supplier's Medicare enrollment is based on a felony conviction pursuant to section 424.535(a)(3), "the revocation is effective with the date of … felony conviction." 42 C.F.R. § 424.535(g). As set out above, section 1001.2 of the regulations defines "convicted" to mean, among other things, a federal "court has accepted a plea of guilty" by the individual. Therefore, for "purposes of section 424.535(a)(3), a person is deemed to have been 'convicted' of a felony offense when the court in the person's criminal case has accepted his no-contest or guilty plea." *Norman Johnson, M.D.*, DAB No. 2779, at 20. The Board has additionally held that the effective date of a supplier's revocation is controlled by operation of 42 C.F.R. § 424.535(g), and "ALJs and the Board are not permitted to depart from, or ignore, that regulation's plain text." *Id.* at 18-20 (reversing an ALJ's failure to apply subsection 424.535(g) when determining the effective date of the petitioner's revocation based on a felony conviction).

In this case, CMS determined that the effective date of Meadowmere's revocation was June 14, 2016. That date, as the ALJ noted, was the date Dr. Connor entered his plea of guilty to conspiracy to commit health care fraud. ALJ Decision at 2. The ALJ also noted, however, that the court did not accept Dr. Connor's guilty plea and adjudge him guilty until July 14, 2016. *Id*. n.4 (citing CMS Ex. 6, at 19 (Order Accepting Report and Recommendation of the United States Magistrate Judge Concerning Plea of Guilty)). The ALJ further noted that "[p]ursuant to 42 C.F.R. § 424.535(g), the effective date of revocation of a supplier's billing privileges is the date of the conviction." ALJ Decision at 12. The ALJ nevertheless concluded that she "need not further address whether an effective date of revocation other than June 14, 2016 is appropriate" because Meadowmere did "not dispute the effective date of [its] revocation." *Id*. at 2 n.4. This was error. Regardless of whether Meadowmere disputed the effective date incorrectly stated in Novitas' and CMS's notice letters, the ALJ was legally required to change that effective date to the date of Dr. Conner's conviction because that is the date mandated by section 424.535(g). *Vijendra Dave, M.D.* at 8.

Accordingly, we conclude that the effective date of Meadowmere's revocation is July 14, 2016, the date of the district court's order that accepted Dr. Conner's guilty plea and adjudged him guilty. *See* 42 C.F.R. § 498.88(f)(1)(iii)(authorizing the Board to modify an ALJ decision).

4. We reject Meadowmere's argument that it is entitled to an additional opportunity to submit evidence and testimony.

In the proceedings below, Meadowmere proceeded without counsel in requesting reconsideration. Meadowmere argues that its President, Dr. Joseph Gatewood, made a "good faith effort" in the reconsideration request "to explain that [Meadowmere] had terminated its business relationship with Dr. Conner." RR at 15. Yet, Meadowmere asserts, the ALJ did not "take proper notice" of this effort or "make any further inquiries into" Meadowmere's efforts to comply with the Medicare enrollment obligations. *Id.* Instead, Meadowmere says, the ALJ improperly "held a non-attorney to the same standard as a seasoned health care attorney." *Id.* Meadowmere argues, "[a]t a minimum" it "should be allowed an opportunity to clarify Dr. Gatewood's explanation and allow testimony to address the precise requirements of 42 C.F.R. § 424.535(a)(3) and (a)(9)." *Id.*

Meadowmere's choice to seek reconsideration without counsel did not shift or lower its burden of proof, nor did it obligate the ALJ to ignore inconsistencies in Meadowmere's factual representations about Dr. Conner's employment status. As the Board previously has held, "the regulations do not contain any exception for the ALJ to consider evidence for the first time simply because a party chose not to be represented by counsel during the reconsideration process." *A to Z DME, LLC*, DAB No. 2303, at 11 (2010).

Moreover, Meadowmere's argument ignores the fact that although it *was* represented by counsel in its appeal to the ALJ, it did not avail itself of the opportunity to submit witness testimony or to argue that it had good cause for not submitting documentary evidence earlier in the appeals process. The ALJ's Pre-Hearing Order clearly instructed the parties that they were permitted to file written direct testimony to "offer evidence that is relevant, explain the contents of other exhibits, and render opinions." Order ¶ 8. The Order also plainly stated that if Petitioner offered new documentary evidence, Petitioner's brief must explain why there was good cause for failing to present that evidence previously to CMS. *Id.* ¶ 6. Nevertheless, Meadowmere failed to submit any witness testimony; nor did it address the good cause requirement when it submitted new documentary evidence with its prehearing submission. In sum, Meadowmere was afforded all of the hearing rights provided under the regulations in 42 C.F.R. Part 498. If Meadowmere is suggesting that the Board should review evidence not admitted below, the Board may not do so. *See* 42 C.F.R. § 498.86(a)("Except for provider or supplier enrollment appeals, the Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing . . . ." (Emphasis added)).

5. The notice of revocation was not defective.

Lastly, Meadowmere argues that it was denied due process because the notice of Novitas's initial determination to revoke Meadowmere's Medicare enrollment did not inform Meadowmere "of the simple remedy in [42 C.F.R. § 424.535(e)] that allows the affected entity to avoid the effects of a revocation." RR at 16. Section 424.535(e) provides that if a revocation was due to a managing employee's felony conviction, "the revocation may be reversed" if the supplier terminates its business relationship with that individual within 30 days of the revocation notice. Meadowmere says that the lack of any reference to this provision in the revocation notice was a material omission, "creat[ing] the improper inference that its only possible remedy was to take on the time, effort, cost and risk of pursuing an appeal." RR at 17.

Meadowmere did not make this argument in its briefs before the ALJ. A party appearing before the Board is not permitted to raise on appeal issues that could have been raised before the ALJ but were not. Guidelines, "Completion of the Review Process," ¶ (a) ("The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not."). Accordingly, these arguments are not properly before the Board. *See, e.g.*, Guidelines; *Mohammad Nawaz, M.D.*, at 10 n.12; *Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (applying the Board's Appellate Division Guidelines to exclude arguments not raised before ALJs).

Even if Meadowmere had raised this argument earlier, we would not find it persuasive. Contrary to Meadowmere's description, section 424.535(e) does not provide a "simple remedy" that would have allowed it "to avoid the effects of a revocation." RR at 16. Rather, the Board previously has explained, the use of the term "may" in section 424.535(e) "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." *Main St. Pharmacy, LLC*, DAB No. 2349, at 8 (2010) (citations omitted). Nothing in the language of section 424.535(e) conveys a right to reversal of a revocation. The regulation merely gives CMS discretion to reverse a revocation if the supplier submits proof within 30 days thereof that it has terminated its business relationship with the employee convicted of the felony.[9] Nor does the regulation require CMS to reverse a revocation or to document its reasons for choosing not to do so. *Id.*

Furthermore, the content requirements for a revocation notice are set out by regulation in 42 C.F.R. § 498.20(a)(1), which provides that the notice must set "forth the basis or reasons for the determination, the effect of the determination, and the party's right to reconsideration[.]" In sum, a revocation notice must contain the information necessary for a provider or supplier to understand why CMS has made a revocation decision and

[9] Since CMS made no exercise of its discretion under section 424.535(e), we need not address whether ALJs or the Board would have authority to review such an exercise.

how the provider or supplier may contest it. CMS is not obligated to inform the provider or supplier that CMS may exercise its discretion to reverse the revocation if the supplier severs its business relationship with the convicted individual within 30 days or for any other reason.

In this case, the notice of initial determination plainly satisfied the regulatory requirements. It clearly identified the legal bases for the determination, "42 CFR §424.535(a)(3) – Felonies" and "42 CFR §424.535(a)(9) – Failure to Report." CMS Ex. 3, at 1. It also detailed the factual findings on which the determination was based: "Byron Conner's felony conviction for Conspiracy to Commit Healthcare Fraud, in violation of 18 USC §1347, in the United States District Court for the Northern District of Texas, Dallas Division"; "Byron Conner is listed as a managing employee on your Medicare 855 enrollment record"; and "You did not notify CMS of this adverse legal action as required under 42 CFR §424.516." *Id.* The notice additionally identified the effect of the determination, stating: "Your Medicare privileges are being revoked effective June 14, 2016," and that Novitas "is establishing a re-enrollment bar for a period of three (3) years that shall begin 30 days after the postmark date of this letter." CMS Ex. 3, at 1, 2. The notice also gave detailed instructions for Meadowmere to request reconsideration.

Accordingly, we reject Meadowmere's argument that the notice of the initial determination to revoke Meadowmere's Medicare enrollment was defective.

## Conclusion

For the reasons stated above, we affirm the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare enrollment under 42 C.F.R. §§ 424.435(a)(3) and (9). We modify the ALJ decision to correct the effective date of the revocation of Meadowmere's enrollment, which is now July 14, 2016.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member