

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Criskel Home Health, Inc.,
(PTAN: 67-9557; NPI: 1649360611),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1116

Decision No. CR3417

Date: October 20, 2014

DECISION

The Medicare enrollment and billing privileges of Petitioner, Criskel Home Health, Inc., are revoked pursuant to 42 C.F.R. § 424.535(a)(3),¹ effective May 24, 2012. Petitioner is also barred from re-enrolling in Medicare for three years beginning May 24, 2012.

I. Background

Palmetto GBA (Palmetto), a Medicare administrative contractor (MAC), notified Petitioner on April 9, 2013, that it was revoking Petitioner's Medicare billing privileges and provider agreement effective May 24, 2012. Palmetto cited 42 C.F.R. § 424.535(a)(3) as the basis for the revocation. Palmetto also notified Petitioner that it was barred for three years from re-enrolling in Medicare pursuant to 42 C.F.R.

¹ Citations are to the 2012 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

§ 424.535(c). Petitioner Exhibit (P. Ex.) 1; Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 3.

Petitioner requested reconsideration of the initial determination to revoke on May 7, 2013. P. Ex. 2; CMS Ex. 1 at 4-33. On June 4, 2013, CMS's Center for Program Integrity notified Petitioner that it upheld the revocation of Petitioner's Medicare enrollment and billing privileges on reconsideration, citing both 42 C.F.R. §§ 424.535(a)(3) and (4).² P. Ex. 3; CMS Ex. 1 at 1-3.

Petitioner requested review by an administrative law judge (ALJ) on August 1, 2013 (RFH). The case was assigned to me for hearing and decision on August 7, 2013, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction. On September 6, 2013, CMS filed a motion for summary judgment, a memorandum in support of the motion, and CMS Exs. 1 through 7. On October 4, 2013, Petitioner filed its opposition to the CMS motion for summary judgment, with P. Exs. 1 through 6. I denied the motion for summary judgment on November 20, 2013.

I held a hearing in this case on January 30, 2014. A 229-page transcript (Tr.) of the hearing was prepared. Margarita Badillo, a Palmetto Provider Enrollment Manager, testified for CMS. Tr. 66-113; CMS Ex. 7 (declaration). Testifying for Petitioner were: Christopher Ogbuehi (Tr. 115-58); Kelechi Ogbuehi (Tr. 163-212); and Theresa Ndukwe, Petitioner's Assistant Administrator (Tr. 214-19). CMS Exs. 1 through 7 and P. Exs. 1 through 5 were admitted as evidence. P. Ex. 6 was not admitted as evidence. Tr. 31-50. Both parties submitted post-hearing briefs and reply briefs (CMS Br. and P. Br. and CMS Reply and P. Reply).

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 Palmetto. Act § 1816 (42 U.S.C. § 1395h). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible

² CMS does not pursue this additional basis for revocation before me and the parties stipulated that only 42 C.F.R. § 424.535(a)(3) is at issue. Tr. 35-41.

providers of services and suppliers.³ Act §§ 1815 (42 U.S.C. § 1395g) and 1817 (42 U.S.C. § 1395i). Petitioner, a home health agency, is a provider.

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. In this case, CMS revoked Petitioner's 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.* The provider . . . or any owner of the provider . . . within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or

³ A "supplier" furnishes items and 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.

State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.

(i) Offenses include –

* * * *

(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.

* * * *

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.535(a)(3); Act § 1866(b)(2)(D). 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).

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 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. Issue

Whether there is a basis for the revocation of Petitioner's Medicare enrollment and billing privileges effective May 24, 2012.

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

My conclusions of law are set forth in bold text followed by my findings of fact and analysis. I have carefully considered all the evidence and the arguments of both parties, though not all may be specifically discussed in this decision. I discuss in this decision the credible evidence given the greatest weight in my decision-making.⁴ I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this

⁴ "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (8th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

- 1. On May 24, 2012, Christopher Ogbuehi was convicted of a felony offense of a type that the Secretary or CMS has determined to be detrimental to the program or program beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3).**
- 2. Christopher Ogbuehi's conviction occurred within 10 years of enrollment or revalidation of Petitioner's enrollment in Medicare.**
- 3. There is a basis for revocation of Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) because Christopher Ogbuehi was an owner of Petitioner on the date of his conviction.**

The parties agreed at hearing that the only issue in dispute is whether Mr. Ogbuehi was an owner of Petitioner on May 24, 2012, when he was convicted of a felony. Tr. 59-60. If Mr. Ogbuehi was an owner of Petitioner on the date of his conviction, there is clearly a basis for revocation. If not, there is no basis for revocation. According to Petitioner's request for hearing, before October 3, 2011, Christopher Ogbuehi and his wife, Kelechi Ogbuehi, each owned 50 percent of Petitioner, but on October 3, 2011, Mr. Ogbuehi allegedly terminated his interest in Petitioner and Mrs. Ogbuehi became the 100 percent owner of Petitioner. Petitioner asserts that Mr. Ogbuehi was not an owner of Petitioner on the date of his conviction, May 24, 2012. RFH at 1, 3; P. Br.; P. Reply.

a. Facts

Christopher and Kelechi Ogbuehi were married in 1990 and were never divorced. Tr. 116. They incorporated Petitioner in September 2006, with each owning a 50 percent interest in the corporation. Tr. 63, 118-19, 196; CMS Ex. 6 at 16, 18. They registered Petitioner with the Texas Secretary of State. CMS Ex. 4 at 47-50. They did not issue stock certificates or have a written agreement regarding the ownership of Petitioner; there was only a verbal agreement. Tr. 63, 118-19. CMS initially enrolled Petitioner as a Medicare provider effective September 18, 2006. CMS Ex. 5 at 1; CMS Ex. 7.

Petitioner submitted a revalidation application to Palmetto dated January 23, 2012 and April 2, 2012, that was received by Palmetto on about February 20 and April 9, 2012. CMS Ex. 6 at 3-26; CMS Ex. 7; Tr. 72-74, 80, 96-97. The revalidation application listed Mr. Ogbuehi and Mrs. Ogbuehi as each owning 50 percent of Petitioner. CMS Ex. 6 at 16, 18; Tr. 74-75. Christopher Ogbuehi is identified in the revalidation application as Petitioner's Chief Financial Officer (CFO) and Administrator since September 18, 2006. CMS Ex. 6 at 20, 26. Christopher and Kelechi Ogbuehi signed certification statements dated January 23, 2012, attesting that the information contained in the revalidation

application was “true, correct, and complete.” CMS Ex. 6 at 26. On April 2, 2012, Kelechi Ogbuehi signed a second certification statement. CMS Ex. 6 at 25; Tr. 76-77.

Christopher Ogbuehi admits that the alleged transfer of his ownership of 50 percent of Petitioner in October 2011 to Kelechi Ogbuehi was not evidenced by a transfer of a stock certificate, a “purchase transfer agreement,” or other written document. The transfer of ownership was allegedly done verbally and the only associated documents were those announcing Mr. Ogbuehi’s resignation and termination from his positions with Petitioner. Tr. 63-64, 123-25, 136-39; CMS Ex. 1 at 9 (October 3, 2011 letter from Kelechi Ogbuehi to Christopher Ogbuehi terminating him as CFO and Administrator); P. Ex. 2 at 9; CMS Ex. 1 at 10 (October 3, 2011 letter from Christopher Ogbuehi to all concerned resigning positions with Petitioner); P. Ex. 2 at 10; CMS Ex. 4 at 53.

Mr. Ogbuehi testified that he intended by his October 3, 2011 letter (CMS Ex. 1 at 10; P. Ex. 2 at 10) to state that he was giving up his ownership interest in Petitioner as well as his positions with Petitioner. He further testified that after October 2011 he was not an owner, officer, or employee of Petitioner. He admitted in response to questions from his counsel that he did complete the Medicare enrollment revalidation application dated January 23, 2012 and filed it with Palmetto. He testified that he completed the revalidation application because Mrs. Ogbuehi requested his assistance. He testified that he listed himself on the form as having a 50 percent ownership interest in September 2006 because that is the information he believed the form required. He testified that he did not understand when completing the form that it should have been completed to state that Mrs. Ogbuehi was the 100 percent owner. He did not explain why he signed the certification as CFO on January 23, 2012, if he believed that he divested his ownership and was removed from his positions with Petitioner on October 3, 2011. Tr. 125-30.

Mrs. Ogbuehi identified her October 3, 2011 letter to Christopher Ogbuehi admitted as CMS Ex. 1 at 9, which terminated Mr. Ogbuehi as CFO and Administrator. She testified that the October 3, 2011 letter from Mr. Ogbuehi admitted as CMS Ex. 1 at 10 was intended to show that he divested his ownership interest in Petitioner, as well as show that he was stepping down from being an officer and Administrator of Petitioner. Tr. 167-70, 203-04. She admitted that in January 2012, Mr. Ogbuehi completed Petitioner’s revalidation application that was filed with Palmetto. Tr. 171-73. Mrs. Ogbuehi testified that in April 2012, she realized that the revalidation application prepared by Mr. Ogbuehi and filed with Palmetto incorrectly showed that she was a 50 percent owner rather than a 100 percent owner so she called Palmetto. She testified that Tamara at Palmetto said it was no problem and Mrs. Ogbuehi should complete another application. She testified that she completed a corrected application and sent it by facsimile to Palmetto. Tr. 178-83. She admitted on cross-examination that Petitioner did not submit an application to Palmetto showing her as the 100 percent owner of Petitioner until June 2013. Tr. 211-12; CMS Ex. 4; CMS Ex. 7, at 2-3.

Mrs. Ogbuehi testified that she notified the Texas Department of Aging and Disability Services (the state agency) in January and February 2012 that Mr. Ogbuehi had been stripped of his positions with Petitioner and that he was no longer an owner. Tr. 173-77; CMS Ex. 1 at 13-16, 27-28. However, the evidence shows that the state agency did not acknowledge the change of ownership and issue a new license until June 20, 2013, with an effective date of February 14, 2013. P. Ex. 5.

Petitioner's evidence shows that on November 7, 2011, just over 30 days after she alleges she became the sole owner of Petitioner, Mrs. Ogbuehi signed a license application for filing with the state agency. In section I of the form, Mrs. Ogbuehi checked the block indicating the form was for a change of Administrator. Mrs. Ogbuehi wrote on the "Type of Update" line that the management changes were effective October 2011. Mrs. Ogbuehi did not check the block in section I to indicate that there was a change of ownership of Petitioner. P. Ex. 4 at 2.

On May 24, 2012, Christopher Ogbuehi pled guilty in the Dallas County, Texas, Criminal District Court, to a third degree felony offense of Medicaid theft under Tx. Pen. Code § 31.03. As part of his plea bargain, adjudication of guilt was deferred; Mr. Ogbuehi was sentenced to three years of community supervision; fined \$1,500; and ordered to pay court costs and restitution. CMS Ex. 2.

On June 8, 2012, Palmetto approved Petitioner's revalidation application. In the letter approving the application, Palmetto noted that Petitioner had not updated its information to reflect the addition or deletion of management personnel or authorized/delegated officials. Palmetto reminded Petitioner that it had to report any changes in ownership, authorized/delegated officials, or any final adverse legal actions, including felony convictions. CMS Ex. 6 at 1-2. Ms. Badillo testified that the Palmetto notice reflected no changes to Petitioner's revalidation information. Tr. 77; CMS Ex. 6 at 1. Ms. Badillo concluded, therefore, that as of June 8, 2012, Palmetto had received no documents showing that Mr. Ogbuehi was no longer an owner and officer of Petitioner. Tr. 78; CMS Ex. 7.

It was not until January 28, 2013, that Mrs. Ogbuehi signed a Certificate of Amendment that she filed with the Texas Secretary of State. This document removed Mr. Ogbuehi as the registered agent for Petitioner. The Certificate of Amendment was declared filed by the Secretary of State on January 31, 2013. CMS Ex. 4 at 42-50.

b. Analysis

The parties agreed at hearing that Mr. Ogbuehi was convicted on May 24, 2012, of a felony that fell within the category of offenses that the Secretary and CMS deem detrimental to the best interests of the program and its beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3). The parties also agreed that the felony conviction occurred

within ten years of Petitioner's revalidation application, which is also a required element for revocation pursuant to 42 C.F.R. § 424.535(a)(3). Tr. 57-60. Therefore, I agree with the parties that the only issue that needs to be resolved to determine whether 42 C.F.R. § 424.535(a)(3) applies in this case is whether Mr. Ogbuehi was an owner of Petitioner on May 24, 2012, when he was convicted of the felony. Tr. 59-60. If he was still an owner on May 24, 2012, then there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges effective on that date. 42 C.F.R. § 424.535(a)(3) and (g). If he was not an owner on May 24, 2012, 42 C.F.R. § 424.535(a)(3) is not a basis for revocation of Petitioner's Medicare enrollment and billing privileges.

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 type listed in 42 C.F.R. § 424.535(a)(3) during the preceding pertinent ten-year period.

The parties do not disagree that Mr. Ogbuehi was an owner of Petitioner prior to October 3, 2011. I have no reason to examine the facts further in that regard and accept that Mr. Ogbuehi was a 50 percent owner of Petitioner prior to October 3, 2011, and that his wife

owned the other 50 percent. There is no documentation in evidence of the Ogbuehis' ownership interests of the corporate entity that is Petitioner prior to October 3, 2011.⁵

A provider such as Petitioner has an affirmative legal obligation to notify CMS or its contractor of a change of ownership within 30 days. 42 C.F.R. § 424.516(e)(1). There is no dispute that Petitioner failed to send Palmetto or CMS the required notice within 30 days of October 3, 2011, when Mr. Ogbuehi allegedly gifted his ownership interest in Petitioner to his wife. The credible testimony of Ms. Badillo and the other CMS evidence also show that Palmetto and CMS did not receive any notice from Petitioner prior to Mr. Ogbuehi's conviction or prior to the initial determination to revoke that he had divested his ownership interest in Petitioner. Accordingly, I conclude that CMS has made a prima facie showing of a basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) – Mr. Ogbuehi was an owner; he was convicted within 10 years of revalidation; he was convicted of a felony; and the felony was of a type described by the regulation. The legal issue to resolve is whether Petitioner has rebutted the prima facie showing by establishing by a preponderance of the evidence that Mr. Ogbuehi had actually divested his ownership interest prior to his conviction so that 42 C.F.R. § 424.535(a)(3), which only applies to owners, does not apply in this case. I conclude that Petitioner has not met its burden.

Petitioner's position is that Mr. Ogbuehi divested himself of his ownership interest in Petitioner on October 3, 2011. As a practical matter, divestiture of his interest any time prior to his conviction would have been sufficient. The documentary evidence Petitioner relies upon does not actually show that Mr. Ogbuehi divested himself of his ownership

⁵ Texas is a community property state in which spouses may have separate property, and property that is not separate property is presumed to be community property. TX Const. art. 16, § 15; Tex. Stat. Fam. §§ 3.001-.410; 4.001-.206 (2013) (available at www.constitution.legis.state.tx.us). Pursuant to Texas law, any partition or exchange of community property or conversion of separate property to community property must be evidenced by a writing. Arguably, an exchange of separate property must also be evidenced by a writing. Tex. Stat. Fam. §§ 4.102-.104. It is also arguable that under Texas law the designation of the Ogbuehis' separate ownership interests in Petitioner had to be in writing and the transfer between the spouses had to be in writing. In this case however, I accept Petitioner's representation that the 50 percent ownership interests of Mr. Ogbuehi and Ms. Ogbuehi in Petitioner were their separate property and not community property. For purposes of this decision, I do not apply the Texas law to support a conclusion that Mr. Ogbuehi's failure to execute a writing showing a transfer of his separate property to Mrs. Ogbuehi amounts to a failure to effect a transfer of the separate property.

interest. The letters dated October 3, 2011, do not mention that Mr. Ogbuehi gave his ownership interest to Mrs. Ogbuehi. The letters only mention Mr. Ogbuehi's resignation and termination from his positions with Petitioner. Tr. 63-64, 123-25, 136-39; CMS Ex. 1 at 9 (October 3, 2011 letter from Kelechi Ogbuehi to Christopher Ogbuehi terminating him as CFO and Administrator); P. Ex. 2 at 9; CMS Ex. 1 at 10 (October 3, 2011 letter from Christopher Ogbuehi to all concerned resigning positions with Petitioner); P. Ex. 2 at 10; CMS Ex. 4 at 53. The Ogbuehis assert that the gift was made only verbally. They testify, however, that they intended for the letters to show that Mr. Ogbuehi was no longer involved with Petitioner in any capacity as owner, officer, or employee.

Based on the evidence, I conclude that the Ogbuehis' testimony and Petitioner's position that Mr. Ogbuehi divested himself of his ownership interest at any time prior to his conviction are not credible based on the following inconsistencies in the evidence:

- It is inconsistent with Petitioner's position that Petitioner failed to report the change of ownership to CMS or Palmetto within 30 days as required by 42 C.F.R. § 424.516(e)(1). The failure to satisfy the legal requirement to report a change of ownership within 30 days supports an inference that no transfer of ownership actually occurred.
- It is inconsistent with Petitioner's position that on November 7, 2011, Mrs. Ogbuehi signed a license application for filing with the state agency reporting a change of administrator but she failed to report in the same form a change in Petitioner's ownership. P. Ex. 4 at 2. The reporting of a change of administrator is consistent with Mr. Ogbuehi's removal as Petitioner's Administrator. However, the failure to report on the same form a change of ownership indicates that the ownership had not changed.
- It is inconsistent with Petitioner's position that in January 2012, Mr. Ogbuehi completed a revalidation application that was sent to Palmetto that listed Mr. Ogbuehi as a 50 percent owner and the CFO and Administrator for Petitioner. CMS Ex. 6 at 3-26; Tr. 72-75, 80, 96-97; CMS Ex. 7. Both Mr. and Mrs. Ogbuehi signed certification statements dated January 23, 2012, attesting that the information contained in the revalidation application was "true, correct, and complete." CMS Ex. 6 at 26. I find incredible Mr. Ogbuehi's testimony that he misunderstood the information required by the form. Mr. Ogbuehi's intelligence was clearly above average based on his testimony, education, and work experience. Although Mr. Ogbuehi made a point that English is his second language, there is no question given his testimony that he has excellent command of the language.

- It is inconsistent with Petitioner's position that Petitioner failed to report to the Texas Secretary of State Mr. Ogbuehi's removal as registered agent for Petitioner before January 28, 2013. CMS Ex. 4 at 42-50.

I conclude that Petitioner has failed to show by a preponderance of the evidence that Mr. Ogbuehi transferred his 50 percent ownership of Petitioner to Mrs. Ogbuehi at any time prior to his conviction on May 24, 2012. Accordingly, I conclude that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). I further conclude that a re-enrollment bar of three years is appropriate based on the severity of the basis for revocation, including consideration of Petitioner's conviction and my conclusion that representations that a transfer of ownership occurred were false. 42 C.F.R. § 424.535(c).⁶

III. Conclusion

For the foregoing reasons, the Medicare enrollment and billing privileges of Petitioner are revoked pursuant to 42 C.F.R. § 424.535(a)(3), effective May 24, 2012. Petitioner is also barred from re-enrolling in Medicare for three years from May 24, 2012.

/s/

Keith W. Sickendick
Administrative Law Judge

⁶ Denial of enrollment and revocation of enrollment are specifically reviewable under 42 C.F.R. § 424.545(a). The duration of the re-enrollment bar, which is authorized by 42 C.F.R. § 424.535(c) to run from one to three years, is not specified in 42 C.F.R. § 424.545(a) to be reviewable. The duration of the re-enrollment bar is also not listed as one of the initial determinations of CMS subject to ALJ and Board review. 42 C.F.R. § 498.3(b); *John Hartman, D.O.*, DAB No. 2564 at 6 (2014).