

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

Cornelius M. Donohue, DPM
Docket No. A-18-33
Decision No. 2888
August 14, 2018

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

In June 2016, the Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Cornelius M. Donohue, DPM (Petitioner) based on his October 2006 felony conviction for obstruction of a federal audit. Petitioner requested a hearing to challenge the revocation, and CMS moved for summary judgment. The administrative law judge (ALJ) granted CMS's motion, sustaining the revocation. *Cornelius M. Donohue, DPM, DAB CR4986 (2017) (ALJ Decision)*. Petitioner now appeals the ALJ's decision on various grounds. Finding no error by the ALJ, we affirm her grant of summary judgment to CMS.

Background

A medical practitioner or other health care "supplier" must be enrolled in Medicare in order to bill the program for services furnished to program beneficiaries.¹ Supplier enrollment is governed by regulations in 42 C.F.R. § 424.500-.575. Those regulations authorize CMS to revoke a supplier's Medicare billing privileges for any of the "reasons" specified in paragraphs (1) through (14) of section 424.535(a).

At issue here is paragraph (3) of section 424.535(a), which authorizes revocation of suppliers who have been convicted of criminal offenses that meet certain criteria. These criteria are (in relevant part):

¹ The term "supplier" is defined in Medicare's regulations to mean "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202 (defining terms as used in the Medicare program).

(3) *Felonies*. (i) The . . . supplier . . . was, within the preceding 10 years, convicted . . . of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

(ii) Offenses include, but are not limited in scope or severity to —

* * *

(A) Felony crimes against persons

(B) **Financial crimes**, such as extortion, embezzlement, income tax evasion, insurance fraud **and other similar crimes** for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(C) Any felony that placed the Medicare program or its beneficiaries at immediate risk

(D) Any felonies that would result in mandatory exclusion

42 C.F.R. § 424.535(a)(3) (emphasis added).

A supplier may appeal a revocation determination in accordance with the procedures in 42 C.F.R. Part 498. *Id.* § 424.545(a). The supplier must first request “reconsideration” of the initial revocation determination. *Id.* §§ 498.5(1), 498.22. If dissatisfied with CMS’s “reconsidered determination,” the supplier may request a hearing before an ALJ. *Id.* § 498.40.

Case Background

On October 26, 2006, Petitioner pled guilty to, and was convicted by a federal court of, one count of obstructing a federal audit, a violation of 18 U.S.C. § 1516. CMS Ex. 9, at 28, 36. The charge to which Petitioner pled states that, in response to an audit of his Medicare billing practices, Petitioner “created and back-dated approximately 35 false, fictitious and fraudulent patient treatment records and physicians’ orders” and then submitted those materials to Medicare’s auditors “as genuine patient treatment files” *Id.* at 26-27, 36. Concurrently with the entry of his guilty plea, Petitioner executed an agreement to settle a civil damages suit filed by the United States based on the same or related misconduct. *Id.* at 41-43, 52-53. Under that settlement, Petitioner agreed to pay the federal government \$136,275.92. *Id.* at 43.

Petitioner's conviction and civil settlement did not immediately affect his Medicare enrollment. In 2011, CMS approved Petitioner's application to revalidate his Medicare enrollment, an application on which he disclosed his 2006 felony conviction. *See* CMS Ex. 9, at 2-3, 9, 19; CMS Response to Pet.'s Request for Review (Response Br.) at 3.² However, on June 30, 2016, CMS, through Novitas Solutions, a Medicare contractor, notified him that his Medicare billing privileges were being revoked, effective October 26, 2006, pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 3. CMS upheld the revocation on reconsideration, stating:

Dr. Donohue's felony conviction under 18 U.S. Code § 1516, for Obstruction of Federal Audit, was due to his creation of fraudulent and false medical records, which he submitted as true and complete to HGSAdministrators, a private insurance carrier contracted by the Health Care Financial Administration, during a federal audit. Under 42 C.F.R. § 424.535(a)(3)(ii)(C), CMS may revoke a provider's Medicare billing privileges when, within the preceding 10 years, the provider is convicted of any felony offense that is detrimental to the best interests of the Medicare program and its beneficiaries. There is no dispute that Dr. Donohue was convicted of a felony offense related to the provision of healthcare, in violation of 18 U.S. Code § 1516, on October 6, 2006. The facts underlying [Petitioner's] felony conviction, the creation of false and fraudulent medical records during the context of a federal audit, call into question [Petitioner]'s trustworthiness and veracity. Payment under the Medicare program is made for claims submitted in a manner that relies upon the trustworthiness of our Medicare partners. Therefore, Dr. Donohue's continued enrollment in the Medicare program may place Trust Funds at risk. It necessarily follows that placing Trust Funds at risk is a detriment to beneficiaries.

CMS Ex. 1, at 4.

Petitioner then requested a hearing before the ALJ. CMS responded with a motion for summary judgment, which the ALJ granted. The ALJ held that there were no genuine disputes of material fact in the case, noting that Petitioner had not disputed the fact, date, or nature of his felony conviction and had raised only "purely legal issues" that are "properly addressed on summary judgment." ALJ Decision at 3. She concluded that

² Petitioner also disclosed the conviction in a January 31, 2014 application to change or update his "identifying information," practice location, and other enrollment information, an application which was approved. CMS Exs. 4 and 7.

Petitioner was subject to revocation under section 424.535(a)(3) because his conviction for obstructing a federal audit occurred within 10 years prior to revocation, and because his criminal offense was one that CMS had determined was “detrimental” to the Medicare program and its beneficiaries. *Id.* at 5-7.

In support of that conclusion, the ALJ found that the illegal conduct for which Petitioner was convicted is “similar to insurance fraud [a financial crime named in section 424.535(a)(3)(ii)(B)] and, as such, is detrimental per se to Medicare and its beneficiaries.” *Id.* at 6. Citing the just-quoted statements from the reconsidered determination, the ALJ further found that CMS had “exercised its discretion” to revoke based on a case-specific determination that Petitioner’s offense was detrimental to Medicare. *Id.* at 7. Finally, the ALJ rejected other contentions that Petitioner reiterates (and that we address) in this appeal. *Id.* at 9-11.

Analysis

We review the ALJ’s grant of summary judgment de novo. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 6 (2016). We conclude, for reasons stated below, that CMS is entitled to summary judgment.

In reviewing the revocation of a supplier’s Medicare billing privileges, the Board and its ALJs decide only whether CMS has established a lawful basis for the revocation. *Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 18 (2018). In this case, the asserted basis for the challenged revocation was Petitioner’s 2006 felony conviction. Section 424.535(a)(3) authorizes revocation based on a felony conviction if two conditions are met: (1) the supplier was convicted within 10 years prior to the revocation; and (2) the conviction was for an offense that CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries. The record shows without dispute that Petitioner’s conviction occurred within 10 years prior to the notice of revocation. Consequently, the revocation stands or falls on whether his offense of conviction is one that CMS has determined to be detrimental to Medicare and its beneficiaries.

The Board has held that the categories of offenses specified in section 424.535(a)(3), such as “financial crimes,” are those that CMS has determined by rulemaking to be detrimental to Medicare as a matter of law. *See Letantia Bussell, M.D.*, DAB No. 2196, 9-10 (2008) (holding that the offenses listed in section 424.535(a)(3) are “detrimental per se” to Medicare); *Robert F. Tzeng, M.D.*, DAB No. 2169, at 8 n.11 (2008) (holding that, by promulgating section 424.535(a)(3), CMS determined that “income tax evasion,” an offense named in the regulation, is detrimental to Medicare “as a matter of law”); *Francis J. Cinelli, Sr., D.O.*, DAB No. 2834, at 8 (2017) (citing cases); *John Hartman, D.O.*, DAB No. 2564, at 4-5 (2014) (citing cases and rulemaking preambles). The Board has

further held that, in promulgating section 424.535(a)(3)(ii)(B), CMS has “deem[ed] all financial crimes” to be detrimental to Medicare. *Stanley Beekman, D.P.M.*, DAB No. 2650, at 7 (2015).³ “Financial crimes” include the four examples named in section 424.535(a)(3)(ii)(B) – such as income tax evasion and insurance fraud – plus crimes “similar to” the named examples. *Id.* Hence, if the felony offense on which the revocation is based is similar to one of the financial crimes named in section 424.535(a)(3)(ii)(B), then that offense is necessarily one that CMS has determined to be detrimental to Medicare, and the revocation must be upheld (assuming that all other regulatory conditions for revocation are met). Applying that reasoning, the Board in *Abdul Razzaque Ahmed, M.D.* sustained a revocation based on the physician’s conviction for obstructing an investigation of a federal health care offense – a crime that the ALJ found, and the Board agreed, was similar to insurance fraud because it involved the physician knowingly submitting materially false patient information to federal authorities in an effort to bolster the validity of Medicare coverage claims that he had submitted on his patients’ behalf. DAB No. 2261, at 6-10, 14 (2009), *aff’d*, *Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010).

The ALJ here likewise found an analogy to insurance fraud in upholding the revocation:

According to the [criminal] information, in response to the overpayment determination, [Petitioner], “[k]nowing that he did not possess accurate, complete and truthful patient records to confirm his claimed . . . Medicare billings . . . created and back-dated approximately 35 false, fictitious and fraudulent patient treatment records and physicians’ orders to support the thousands of dollars of Medicare billings which [he] previously submitted on behalf of these patients.” [Petitioner] pled guilty to the conduct charged in the information. I therefore find it undisputed that [Petitioner] fabricated documents which he submitted to a CMS contractor to justify his claims for reimbursement from Medicare. That is, [Petitioner] knew that his claims would not qualify for Medicare reimbursement absent proper documentation; therefore, he fabricated documents in an attempt to avoid liability for the Medicare overpayment assessed against him. In so doing, [Petitioner] used fraudulent means in an attempt to retain insurance reimbursements to which he was not entitled. Such conduct is sufficiently

³ *Beekman* was decided under an earlier (pre-February 2015) version of section 424.535(a)(3) in which the enumerated felonies were found in subparagraph (i) of that section, rather than in subparagraph (ii), where they are currently found. DAB No. 2650, at 2-3; *see also Saeed A. Bajwa, M.D.*, DAB No. 2799, at 4-5 (2017). The ALJ held (ALJ Decision at 6 n.2), and we agree, that *Beekman* and other cases decided under the earlier version of section 424.535(a)(3) remain applicable because the former and current versions of that section describe the presumptively detrimental offenses or offense categories in identical terms.

similar to insurance fraud to be regarded as a financial crime described in 42 C.F.R. § 424.535(a)(3)(ii)(B). This conclusion is reinforced by the *Ahmed* decision, in which an appellate panel of the DAB endorsed the view that a conviction for obstructing a federal investigation by creating and submitting backdated documents that misstated patients' medical conditions was similar to insurance fraud. DAB No. 2261 at 8-10.

ALJ Decision at 7 (record citations omitted). Petitioner takes no issue with any part of this analysis, and we find it to be persuasive and legally sound and hereby adopt it. Although Petitioner states that there are disputes of material fact in the case, *see* Pet.'s Request for Review (RR) at 2-4, we see no factual dispute the resolution of which could affect our determination about whether Petitioner's felony offense is a financial crime that CMS has determined to be detrimental to Medicare and its beneficiaries. In sum, we conclude that section 424.535(a)(3)'s criteria are satisfied in this case, and that CMS therefore lawfully revoked Petitioner's Medicare billing privileges on that basis.

Although undisputed facts show that the regulatory conditions for revocation were met, Petitioner contends for various reasons that CMS "improperly revoked" his billing privileges. RR at 1. He chiefly asserts that CMS failed to make a case-specific determination about whether his particular offense was detrimental to the best interests of Medicare. *Id.* at 1, 9 (asserting that CMS did not "engage[] in any determinative process that would allow the conclusion . . . that his offense was detrimental to the best interests of the Medicare program"). However, no such determination is required if, as is the case here, the supplier's offense falls within one of the categories of crimes that CMS has, by rulemaking (in section 424.535(a)(3)), determined to be detrimental to Medicare. Furthermore, CMS did in fact make a case-specific finding of program detriment in the reconsidered determination, as the ALJ found. *See* CMS Ex. 1, at 2-3; ALJ Decision at 7.

Petitioner asserts that that finding was not "meaningful" and merely pro forma. RR at 1, 4. We disagree. The reconsidered determination shows that CMS reviewed the specific circumstances of Petitioner's offense. CMS noted that Petitioner had created "fraudulent and false medical records" and submitted them "as true and complete" to the Medicare contractor which was "a private insurance carrier," doing so "during a federal audit." Having demonstrated its grasp of the facts and circumstances underpinning Petitioner's felony, CMS then rationally concluded that his misconduct – in particular, his creation and submission of false medical records – was detrimental to Medicare because it eroded the trust that must, to some degree, be placed in the program's providers and suppliers. Petitioner has identified no authority suggesting that any further explanation was required. The regulations do not require CMS to explain the factors which inform its

finding that an offense is detrimental to Medicare or to otherwise explain that finding. *See, e.g., Brian K. Ellefsen, DO*, DAB No. 2626, at 9 (2016) (“no regulation provides that CMS must explain its reasons for exercising its discretion to deny an application [for enrollment] based on such a felony conviction rather than to accept it notwithstanding the conviction”). A reconsidered determination need only state “reasons” for the revocation and the “conditions or requirements of law or regulations that the affected party fails to meet.” 42 C.F.R. § 498.25(a)(2), (3). The reconsidered determination in this case met those content requirements.

Petitioner says that his situation “is nearly identical” to the physician’s in *Subramanya K. Prasad, M.D.*, DAB CR4522 (2016), a decision in which an ALJ reversed an enrollment denial based on the physician’s conviction for making false statements to a federal agent. RR at 5. The ALJ’s decision in *Prasad*, which was not appealed to the Board, is not precedential and does not bind other ALJs or the Board. *Bailey* at 14 n.11. In any event, the two cases are materially dissimilar in multiple ways (even apart from the fact that one involves a revocation under section 424.535(a)(3) while the other involves a denial of enrollment under section 424.530(a)(3)). For one thing, the offense of conviction in *Prasad*, unlike Petitioner’s felony offense, did not fall into any of the categories of offenses specified in section 424.530(a)(3), whose provisions mirror those in section 424.535(a)(3). DAB CR4522, at 7-8. In addition, the reconsidered determination in *Prasad*, unlike the reconsidered determination in this case, contained *no finding or statement* that the physician’s criminal offense was detrimental to Medicare and its beneficiaries, a circumstance that caused the ALJ to reverse the enrollment denial. *Id.* at 9-13.

Petitioner’s other contentions are factually unfounded or legally immaterial. Petitioner contends that his agreement to settle the federal government’s civil damages claims precludes a later revocation of his Medicare billing privileges. RR at 9-10. The ALJ rejected that contention based on the following analysis:

By its terms, the settlement agreement releases [Petitioner] from liability for “any civil or administrative monetary claim the United States has or may have under the common law theories of payment by mistake, unjust enrichment, and fraud” arising from the conduct for which [he] was convicted. CMS Ex. 9 at 45 (underscore added). The settlement agreement

explicitly excludes “any administrative liability” of [Petitioner]. CMS Ex. 9 at 45-46. The language of the settlement agreement makes plain that the agreement addresses only the claims of the United States for money damages and leaves CMS and other agencies free to pursue administrative action against [Petitioner]. The settlement agreement specifically cites, as an example, the Department of Health and Human Services’ (HHS’) authority to exclude [Petitioner] from participation in Medicare and state health care programs. CMS Ex. 9 at 46. Revocation of [Petitioner]’s Medicare billing privileges is analogous to exclusion from the program, since both administrative remedies prevent [him] from receiving Medicare reimbursement because he engaged in conduct that demonstrates he poses a risk to the Medicare trust fund or to Medicare beneficiaries. If the settlement agreement permits HHS to exclude [Petitioner], there is no reason to assume it does not likewise permit CMS to revoke [his] billing privileges.

ALJ Decision at 9 (emphasis in original). Petitioner’s request for review does not mention or allude to this analysis, much less find fault with it, and we find that the ALJ correctly construed the settlement agreement’s terms.⁴

Petitioner next implies that revocation of his billing privileges violates the constitutional prohibition against “excessive fines” (U.S. Const. amend. VIII). RR at 10. In a related vein, he contends that revocation is “punitive,” amounting to an “improper expansion” of the criminal penalties, fines, and restitution imposed for his 2006 conviction. *Id.* at 10-11. These contentions provide no basis to reverse the revocation. In settling the civil damage claims against him, Petitioner waived any right to invoke the Excessive Fines Clause as a defense to a revocation. CMS Ex. 9, at 47-48 (stating that Petitioner “waives and shall not assert any defenses he may have to any . . . administrative action relating to the conduct” for which the civil claims and criminal prosecution were brought). Regardless of any waiver, we lack the authority to overturn, on constitutional grounds, a revocation that was imposed in accordance with the applicable law and regulations; if the

⁴ Without referring to its terms, Petitioner asserts that the settlement agreement “brought full and complete closure to the Civil Action” and that CMS, in violation of “the well-established doctrine of accord and satisfaction,” is “seek[ing] to change the [agreement’s] terms by imposing additional post-hoc penalties that were not part of the bargained-for exchange.” These points overlook the fact that the settlement agreement *expressly excludes* “administrative” actions by federal agencies – actions such as Medicare enrollment revocation – from its scope and terms. CMS Ex. 9, at 46. Consequently, CMS’s revocation did not violate that agreement under any contract-law theory.

regulatory prerequisites for revocation (both procedural and substantive) are satisfied, as they were here, we must apply the regulations and sustain the revocation. *Zahid Imran, M.D.*, DAB No. 2680, at 9 (2016) (stating that the Board may not “[f]ind invalid or refuse to follow Federal statutes and regulations on constitutional grounds” (internal quotation marks omitted)). Furthermore, we disagree that revocation is “punishment”; “revocation is a remedial measure whose purpose is not to punish the program participant for past misconduct but to protect the program and its beneficiaries from fraud, abuse, and other harm that might arise in the future.”⁵ *Robert F. Tzeng, M.D.* at 14.

Petitioner further suggests that CMS waited too long to revoke his billing privileges after learning of his conviction. He states that he is “asserting all available defenses to the Medicare revocation based upon any relevant statutes of limitations, and the doctrine of laches and any other law providing for the timely imposition of such action.” RR at 11 n.1. However, “the Medicare statute and regulations do not require CMS to take action within a specified time frame after discovering information about a Medicare enrollee’s conviction.” *Horace Bledsoe, M.D., et al.*, DAB No. 2753, at 9 (2016). “CMS may revoke at any time based on a conviction if the regulatory elements in section 424.535(a)(3) are satisfied.” *Id.* “The only legally mandated time limit is the requirement in section 424.535(a)(3) that the conviction occur within 10 years preceding enrollment or revalidation of enrollment.” *Id.* CMS issued its revocation determination within that ten-year period. Laches is an equitable defense that applies when there is (1) lack of diligence by the party against whom the defense is asserted and (2) resulting injury to the party asserting the defense. *Mo. Dept. of Social Servs.*, DAB No. 193, at 9-10 (1981). However, ALJs and the Board have no authority to grant relief based on that defense or on other equitable doctrines; they must decide cases in accordance with applicable statutes and regulations. *Donna Maneice, M.D.*, DAB No. 2826, at 7-8 (2017).

Petitioner submits that revocation “has dramatically and unfairly impacted [his] ability to earn a living and provide for his family” because “more than sixty percent of his practice is Medicare based[.]” RR at 10, 12. He asserts that he has fully paid all civil and criminal fines; paid a substantial portion of the civil judgment against him; and continues to pay the outstanding judgment debt at a rate of \$500 per month. *Id.* at 10-12. In

⁵ The remedial purpose of a revocation undermines any claim that the revocation violated the Excessive Fines Clause. A revocation would violate the clause only if it could be considered a “fine” that was imposed as “punishment” for some offense. See *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998).

addition, Petitioner submits that revoking his Medicare billing privileges under these circumstances, almost ten years after the criminal and civil cases were closed, is unfair. *Id.* at 11 (asserting that CMS is “arbitrarily and capriciously exercising the ultimate punitive sanction”).

Like the ALJ, we construe these statements to be an argument that CMS should have exercised its discretion under section 424.535(a)(3) not to revoke Petitioner’s billing privileges as a matter of fairness. However, regardless of whether such an exercise of discretion might have been appropriate in Petitioner’s circumstances, we could not set aside the revocation on that ground. As we said earlier, when reviewing a Medicare enrollment revocation, the Board and its ALJs are limited to deciding whether the regulatory prerequisites for revocation have been satisfied. If the “regulatory elements [in section 424.535] necessary for CMS to exercise its revocation authority [are] satisfied,” as they are in this case, then “we must sustain the revocation” and “may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances.” *John Hartman, D.O.*, DAB No. 2564, at 6 (2014) (internal quotation marks omitted); *see also Saeed A. Bajwa, M.D.* at 15; *Norman Johnson, M.D.*, DAB No. 2799, at 11, 18 (2017). In other words, we must sustain a revocation that is lawful under the applicable regulations “regardless of other factors,” such as the financial impact of the revocation on the supplier, “that CMS might reasonably have weighed in exercising its discretion” about whether or not to revoke. *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff’d*, *Fayad v. Sebelius*, 803 F.Supp.2d 699 (E.D. Mich. 2011); *see also Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577, at 7 (2014) (sustaining a revocation despite the supplier’s claim that it would cause the business to downsize and release employees).

Finally, Petitioner asserts that, as a result of his revocation, he has unpaid Medicare claims, totaling more than \$313,000, “for services [he] rendered to Medicare beneficiaries after [his] billing privileges were terminated but before he was notified.” RR at 11-12. This is another argument in equity that the Board may not entertain. Moreover, if Petitioner is contending that CMS improperly denied or refused to process claims for Medicare payment, this is not the proper forum in which to present that claim. *See Vijendra Dave, M.D.*, DAB No. 2672, at 12 (2016) (describing the separate process for appealing Medicare claim denials); *Bledsoe* at 11 n.13, 14.

Conclusion

For the reasons stated above, we affirm the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare billing privileges effective October 26, 2006.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan
Presiding Board Member