Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Vinod Patwardhan, M.D.,
(PTAN: 00A293180),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-502

Decision No. CR2909

Date: August 30, 2013

DECISION

There was a basis for the revocation of the Medicare enrollment and billing privileges of Petitioner, Vinod Patwardhan, M.D. effective May 8, 2009.

I. Procedural History and Jurisdiction

Palmetto GBA (Palmetto), the Medicare administrative contractor, notified Petitioner's counsel by letter dated February 1, 2013, that the November 16, 2012 initial determination to deny Petitioner enrollment in Medicare was upheld on reconsideration. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1. The Palmetto employee that prepared the reconsideration letter was clearly confused by the convoluted history of this case.[1] The reconsideration letter referred to a November 16, 2012 initial determination by Palmetto. However, as discussed in more detail hereafter, the November 16, 2012 Palmetto notice advised Petitioner that he was re-enrolled in Medicare and that his billing privileges were effective December 20, 2011. CMS Ex. 10. Petitioner's reconsideration request, which was dated July 12, 2012, was actually

[1] However, remand is not necessary in this case because I am providing de novo review.

triggered by a Palmetto letter dated May 14, 2012, in which Palmetto stated that it had learned that Petitioner may not have received a June 19, 2009 notice of an initial determination that Petitioner's enrollment and billing privileges were revoked effective May 8, 2009 due to his felony conviction. Palmetto stated in its May 14, 2012 letter that its purpose was to accord Petitioner appeal rights and the letter advised Petitioner of the right to request reconsideration. CMS Ex. 1 at 10-11. Petitioner timely requested reconsideration by letter dated July 12, 2012. CMS Ex. 1 at 4-9. Therefore, it is the June 19, 2009 initial determination to revoke Petitioner's Medicare enrollment effective May 8, 2009, followed by the new notice of the initial determination dated May 14, 2012, and the reconsideration decision of February 1, 2013, that are the subject of the case before me.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated March 6, 2013 (RFH), seeking review of the revocation of his billing privileges. The case was assigned to me for hearing and decision on March 15, 2013, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction. No issue has been raised as to the timeliness of Petitioner's request for hearing and neither party alleges that I lack jurisdiction to decide this matter.

On April 15, 2013, CMS filed a motion for summary judgment (CMS Br.). CMS also filed CMS Exs. 1 through 11. On May 14, 2013, Petitioner filed a response to the CMS motion for summary judgment (P. Br.) with Petitioner's exhibits (P. Exs.) 1 through 9, and two declarations (one by Petitioner and one by Petitioner's attorney) in support of his opposition to the CMS motion. CMS filed a reply brief (CMS Reply) on May 29, 2013 with CMS Ex. 12. On June 6, 2013, Petitioner filed an objection to the admissibility of CMS Ex. 12. On June 6, 2013, Petitioner also filed a motion for leave to file a sur-reply (P. Reply) with his sur-reply, which is accepted and considered. The parties were advised by the Prehearing Order § II.G that for purposes of summary judgment "a fact alleged and not specifically denied, may be accepted as true . . . . [and] evidence will be considered admissible and true unless specific objection is made to its admissibility and accuracy." The parties have not objected to my consideration of CMS Exs. 1 through 11 and P. Exs. 1 through 9, and all are admitted.

Petitioner objected to my consideration of CMS Ex. 12, the declaration of Timothy Wachtman, on grounds that the declaration is not based on personal knowledge, but rather upon speculation. Mr. Wachtman declares that his statements are based on "personal knowledge and upon information available to [him] in [his] official capacity." CMS Ex. 12 at 1. However, the declaration of Mr. Wachtman does not lay an adequate foundation for me to determine how he came to have the knowledge he shares in his declaration, e.g., Mr. Wachtman does not state when he began his employment with Palmetto; when he began the duties of his current position; why his duties require that he have the knowledge which he purports to have; or whether he personally reviewed current or historic records to learn the information he relates in his declaration.

Paragraph 4 of Mr. Wachtman's declaration strongly suggests that the information in that paragraph was obtained by communication with an unidentified person or persons at First Coast Service Options (Palmetto's subcontractor) and the information he relates is clearly second or third-party hearsay. The second sentence of paragraph 5 of the declaration is speculative and unsupported by evidence that shows a relationship between the presence of a document in Palmettos files and the delivery of such documents to the intended recipient. Relevant and authentic evidence is generally admissible even though the evidence may not be admissible in court. 5 U.S.C. § 556(c)(3) and (d); 42 C.F.R. § 498.62. CMS Ex. 12 is admitted as it is relevant and authentic and Petitioner's objection to the admissibility of CMS Ex. 12 is treated as an argument that the exhibit should be given little weight, a proposition with which I agree. Accordingly, all exhibits are admitted.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner is a physician and as such is a supplier under the Act. Administration of the Part B program is through contractors such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)).

Subject to some limitations, qualified physician services are covered by Medicare Part B for those physicians enrolled in Medicare. Act §§ 1832(a) (42 U.S.C. § 1395k(a)), 1861(s)(1) (42 U.S.C. § 1395x(s)(1)); 42 C.F.R. § 410.20.[3] "Physician's services" are

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[2] A "supplier" furnishes services under Medicare and the term supplier applies to 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) and 1835(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.

[3] Citations are to the annual revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the pertinent agency action, unless otherwise indicated.

professional services performed by physicians, including surgery, consultation, and home, office, and institutional calls also subject to some exceptions. Act § 1861(q) (42 U.S.C. § 1395x(q)); 42 C.F.R. § 410.20.

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier 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. Enrollment requirements are established by 42 C.F.R. § 424.510. The effective date of a physician's enrollment in Medicare is governed by regulations at 42 C.F.R. § 424.520(d). The date of filing of the enrollment application is the date when the complete enrollment application and supporting documentation is received by the designated Medicare contractor. 42 C.F.R. § 424.510(d)(1); 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008). An enrolled physician may bill Medicare for covered services provided to Medicare-eligible beneficiaries up to 30 days prior to the effective date of enrollment, if circumstances precluded enrollment before the services were provided. Retroactive billing for up to 90 days prior to the effective date of enrollment is permitted only in case of a Presidentially-declared disaster pursuant to 42 U.S.C. §§ 5121-5206. 42 C.F.R. § 424.521. Requirements for reporting changes, updating, and revalidating enrollment information are established by 42 C.F.R. §§ 424.515 and 424.516.

Section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)) gives the Secretary discretion to refuse to enter into an agreement or to terminate or refuse to renew an agreement with a physician or supplier who "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries."

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a), CMS is delegated authority to revoke enrollment and billing privileges for the following reasons, among others:

> (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:
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> * * * *

> (3) Felonies. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.
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> > (i) Offenses include—
> >
> > (A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
> > (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, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
> > (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.
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> > (ii) Denials based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

Revocation is effective 30 days after CMS or its Medicare contractor mails notice of the revocation except that when a felony conviction is the basis for the revocation, the effective date of the revocation is the date of the conviction. 42 C.F.R. § 424.535(g); 73 Fed. Reg. 69,725, 69,782, 69,865, 69,940 (Nov. 19, 2008).[4] Any claims for services provided before revocation, must be submitted within 60 days of the effective date of revocation. 42 C.F.R. § 424.535(h).

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[4] Section 424.535(g) of 42 C.F.R. was amended effective January 1, 2009, to provide that in the case of a felony conviction the effective date of the revocation was the date of the conviction. 73 Fed. Reg. at 69,726.

A supplier whose enrollment and billing privileges have been revoked or whose enrollment has been denied, may request reconsideration and review as provided by 42 C.F.R. pt. 498. A supplier 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 supplier, 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 supplier, the supplier has a right to request a hearing by an ALJ and further review by the Departmental Appeals Board (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, 748-751 (6th Cir. 2004).

B. Issue

Whether Petitioner's Medicare enrollment was properly revoked effective May 8, 2009.

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

My conclusions of law are numbered and set forth in bold text followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

CMS requested summary judgment. Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a)(1). The regulations do not establish or recognize a summary judgment procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g., Ill. Knights Templar Home*, DAB No. 2274, at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.) do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order dated March 15, 2013. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hospital Reg'l Med. Ctr.*, DAB No. 2459, at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452, at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (and cases cited therein); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc*, DAB No. 2291, at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the parties' evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347, at 5 (2010). 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. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Petitioner argues in his opposition to the CMS motion for summary judgment that summary judgment must be denied because there are two issues of fact in dispute. Petitioner argues "there is a question of fact as to whether CMS ever sent Petitioner notice of revocation of his billing privileges by certified mail as required by 42 C.F.R. § 405.800(b)." P. Br. at 1. Petitioner argues that there is also a question of fact as to when he was actually notified of the revocation. P. Br. at 1. Viewing the evidence in a light most favorable to Petitioner, there are no genuine disputes as to the facts to which Petitioner points, or any other material facts in this case. As discussed in more detail hereafter, the undisputed evidence shows that CMS and Palmetto accepted Petitioner's assertion that he did not receive the original notice of revocation. Therefore, Palmetto

sent Petitioner a second notice so that Petitioner could exercise his due process rights to request reconsideration and administrative review by an ALJ and the Board. The impact of a notice of initial decision delayed by three years is a legal question to be resolved by application of the law to the undisputed facts. Accordingly, I conclude that summary judgment is appropriate.

2. Petitioner's felony convictions are a basis for the revocation of Petitioner's enrollment in Medicare and his billing privilege.

3. Revocation effective May 8, 2009, the date of Petitioner's conviction, is permissible under the regulations in effect at the time.

4. The delayed notice of initial determination did not deprive Petitioner of due process.

5. No equitable relief is available in this forum.

a. Background

Set forth here is a summary of Petitioner's convoluted history with Medicare since May 2009, which is based on the evidence admitted to the record by the parties. This summary is helpful to explain and understand that the only issue before me is whether or not there was a proper basis for CMS to revoke Petitioner's enrollment effective May 8, 2009.

i. Petitioner's May 8, 2009 Conviction

Petitioner does not dispute that he was convicted of a felony offense, as alleged by CMS. On May 8, 2009, Petitioner was convicted in the United States District Court, Central District of California, of the following felony offenses: conspiracy; introducing misbranded drugs into interstate commerce; smuggling drugs purchased in India into the United States; and knowingly and intentionally aiding and abetting, counseling, commanding, inducing, procuring and causing the fraudulent and knowing importation into the United States of drugs purchased in Honduras. On September 21, 2009, Petitioner was sentenced to pay a fine of $10,000; to pay restitution of $1,313,634.10 to the United States Department of Health and Human Services and the California MediCal program; five years of probation; 1,000 hours of community service; and forfeiture in the amount of $1,313,634.10. CMS Ex. 3.

ii. June 19, 2009 Initial Revocation Determination and Three Year Bar to Re-enrollment

CMS introduced a May 14, 2009 internal CMS email, which directed that Palmetto be told to revoke Petitioner's enrollment and billing privileges based on his conviction as announced by a press release from the United State Attorney. CMS Ex. 2 at 2. A subsequent email states that Petitioner's enrollment and billing privileges were revoked on June 18, 2009, effective May 8, 2009, with a three-year enrollment bar and that Petitioner had no pending or finalized claims for services delivered after May 8, 2009. CMS Ex. 2 at 1.

CMS also introduced a letter dated June 19, 2009, from Palmetto to Petitioner notifying Petitioner that his enrollment in Medicare and his Medicare billing privileges were revoked effective May 8, 2009, pursuant to 42 C.F.R. § 424.535(a)(d) based on his May 8, 2009 conviction. The notice advised Petitioner that he was barred from re-enrolling for three years beginning on May 8, 2009. Thus, the re-enrollment bar continued through May 7, 2012. The notice advised Petitioner of the right to request reconsideration of the revocation within 60 days and that failure to make a timely request would be deemed a waiver of the right to administrative review. CMS Ex. 1 at 12-13.

Petitioner asserts that he never received the June 19, 2009 Palmetto letter.

iii. Petitioner's December 18, 2009 Application to Re-enroll

On December 18, 2009, roughly seven months after his conviction, Petitioner submitted an application to re-enroll in Medicare. The cover letter that accompanied the application admitted that Petitioner's attorneys were advised on November 12, 2009 that Petitioner's status in Medicare was listed as inactive. Thus, Petitioner was aware at least as early as November 12, 2009, that his enrollment and billing privileges were no longer active. Petitioner's counsel asserted in the December 18, 2009 cover letter that Petitioner had never been notified of a reason for a change in his status in Medicare. The letter states that Petitioner had unsuccessfully inquired as to the basis for the denial of his claims for reimbursement from Medicare. Petitioner's counsel asserted in the cover letter that there were no grounds for revocation of Petitioner's Medicare enrollment, but also disclosed that Petitioner was convicted in federal court related to the importation of foreign chemotherapy medicines. Petitioner's counsel asserted in the letter that the application to reenroll was submitted in an attempt to clarify Petitioner's status in the absence of meaningful information from Palmetto regarding his status. CMS Ex. 4 at 2-3. Petitioner's evidence shows that he was aware at least as early as November 9, 2009, that his reimbursement claims had been denied since June 2009 and Petitioner admits in his brief that he noticed the denial of his claims as early as October 2009. P. Exs. 1, 2, 3, 5, 6; P. Br. at 2.

Palmetto notified Petitioner by letter dated July 7, 2010, that Petitioner's enrollment application was denied based on his felony conviction which occurred within the ten years preceding the application. The notice does not refer to the June 19, 2009 notice of

revocation or the three-year bar to re-enrolling. The notice did advise Petitioner of the right to submit a corrective action plan within 30 days or to file a request for reconsideration within 60 days. CMS Ex. 5. Counsel for Petitioner filed a request for reconsideration on September 1, 2010. Petitioner admitted that he was convicted of six counts related to importing foreign chemotherapy medicines and that he was sentenced on about September 21, 2009. Petitioner advanced several arguments for why his conviction should not be a basis for denying him enrollment. CMS Ex. 6. Petitioner was notified by letter dated September 23, 2010, that it was determined on reconsideration that he did not meet the conditions for enrollment due to his felony conviction with the ten years preceding his application. The notice advised Petitioner of his right to request review by an ALJ within 60 days. CMS Ex. 7. Petitioner requested a hearing before an ALJ by letter dated November 23, 2010. CMS Ex. 9 at 11-13. However, by letter dated February 7, 2011, Petitioner requested that his case be dismissed. CMS Ex. 9 at 17. An ALJ dismissed the case on February 16, 2011. CMS Ex. 9 at 20. Therefore, Petitioner waived further review of whether or not his May 8, 2009 conviction was a proper basis for denying him enrollment. Administrative review related to this December 18, 2009 application was final 60 days after the ALJ dismissal and this application is not subject to my review. 42 C.F.R. § 498.72-.74(b) (2010).

iv. Petitioner's December 29, 2010 Application to Re-enroll

On December 29, 2010, while the denial of his December 2009 application was still pending review by an ALJ, Petitioner filed another application to enroll using the on-line, web-based, Provider Enrollment, Chain and Ownership System (PECOS). Petitioner listed a business address in Upland, California. Palmetto advised Petitioner by letter dated January 27, 2011 that the application was rejected as it was incomplete because it did not have a certification page. Palmetto requested additional tax documents by letter dated March 21, 2011. Petitioner submitted additional documentation on March 31, 2011. CMS Ex. 8. I note that Petitioner incorrectly marked on this application that he had no adverse legal history, but this issue and this application are not before me. CMS Ex. 8 at 21. Palmetto notified Petitioner by letter dated May 2, 2011, that he was re-enrolled in Medicare with billing privileges effective April 27, 2011. CMS Ex. 1 at 21.

Palmetto's action on this application is not before me for review.

v. July 20, 2011 Exclusion from Medicare, Medicaid, and All Federal Health Care Programs for 23 Years

The Inspector General of the United States Department of Health and Human Services (I.G.) notified Petitioner by letter dated June 30, 2011, that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for 23 years pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act, effective July 20, 2011. The exclusion notice states that the exclusion was based on Petitioner's felony conviction in

the United States District Court, Central District of California. However, the I.G. waived the exclusion for oncology items and services that Petitioner provided in Upland, California. CMS Ex. 1 at 14-16. Subsequently on December 20, 2011, the I.G. expanded the wavier to include oncology items and services that Petitioner provided in all of San Bernardino County, California. CMS Ex. 1 at 19-20. An ALJ reduced the period of exclusion to 12 years, but otherwise concluded that Petitioner's conviction was a basis for his exclusion, subject to the waiver granted by the I.G. *Vinod Chandrashekhar Patwardhan, M.D.*, DAB CR2471 (2011). On April 10, 2012, the Board affirmed Petitioner's exclusion from all federal health care programs for 12 years, subject to the waiver granted by the I.G. *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 (2012).

The Board decision completed administrative review of the I.G. exclusion action and was final and binding subject any review in the federal district court. 42 C.F.R. § 498.90. The I.G. exclusion is not subject to my review.

vi. May 14, 2012 Palmetto Notice of the May 8, 2009 Revocation

Palmetto and CMS were apparently convinced by Petitioner that he did not receive the June 19, 2009 notice from Palmetto that his enrollment and billing privileges were revoked effective May 8, 2009. As a result, Palmetto notified Petitioner by letter dated May 14, 2012, that Palmetto learned that Petitioner may not have received the June 19, 2009 notice of initial decision that his enrollment and billing privileges were revoked effective May 8, 2009, based on his conviction and that he was subject to a three-year bar to re-enrollment. Palmetto states in the May 14 letter that its purpose is to explain the basis for the revocation and provide Petitioner appeal rights. The letter advises Petitioner of the right to request reconsideration. CMS Ex. 1 at 10-11; P. Ex. 7. The May 14, 2012 Palmetto letter does not purport to change the May 8, 2009 effective date of Petitioner's revocation. Petitioner timely requested reconsideration by letter dated July 12, 2012. CMS Ex. 1 at 4-9. Petitioner's July 12, 2012 request for reconsideration led to the February 1, 2013 reconsideration decision, which triggered Petitioner's March 6, 2013 request for hearing. This is the case that is presently subject to my review.

vii. November 16, 2012 Enrollment Effective December 20, 2011

Palmetto notified Petitioner by letter dated November 16, 2012, that he was re-enrolled and his billing privileges were effective December 20, 2011. CMS Ex. 10. There is no evidence that Petitioner requested reconsideration of this decision. This action by Palmetto is not pending before me.

b. Analysis

Petitioner has never denied that he was convicted as alleged by CMS. The evidence shows that he was convicted on May 8, 2009, in the United States District Court, Central District of California, of the following felony offenses: conspiracy; introducing misbranded drugs into interstate commerce; smuggling drugs purchased in India into the United States; and knowingly and intentionally aiding and abetting, counseling, commanding, inducing, procuring and causing the fraudulent and knowing importation into the United States of drugs purchased in Honduras. On September 21, 2009, Petitioner was sentenced to pay a fine of $10,000; to pay restitution of $1,313,634.10 to the United States Department of Health and Human Services and the California MediCal program; five years of probation; 1,000 hours of community service; and forfeiture in the amount of $1,313,634.10. CMS Ex. 3.

Section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)) gives the Secretary discretion to terminate a Medicare participation agreement with a physician or supplier who "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries."

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(3), CMS is delegated authority to revoke enrollment and billing privileges based on the conviction of a supplier or provider for the following felonies:

> (3) Felonies. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.
>
> (i) Offenses include—
>
> (A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
> (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, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

Section 1842(h)(8) of the Act and related regulations do not mandate revocation but, rather, grant the Secretary and CMS discretion to revoke. Petitioner does not and cannot dispute that he was convicted by a state court of felonies that fit within the felonies described by 42 C.F.R. § 424.535(a)(3)(D). Petitioner does not dispute that his conviction occurred on May 8, 2009, and the requirement that the conviction occur within the 10 years preceding revalidation of enrollment is satisfied. The I.G. excluded Petitioner for his felony conviction pursuant to section 1128(a)(1) and (3) of the Act, the exclusion was upheld on ALJ and Board review, and is now binding upon Petitioner as a matter of law.[5] Pursuant to 42 C.F.R. § 424.535(a)(3)(i)(D) a felony conviction that would result in mandatory exclusion pursuant to section 1128(a) of the Act, is per se detrimental to the best interest of the program and its beneficiaries. *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008). Accordingly, there is a basis for revocation. The correct effective date of the revocation is established by regulation as the date on which Petitioner was convicted, not the date of sentencing, or any other date such as completion of appeals. 42 C.F.R. § 424.535(g); 73 Fed. Reg. 69,725, 69,782, 69,865, 69,940 (Nov. 19, 2008). I conclude that CMS has made a prima facie showing of an adequate basis for the revocation of Petitioner's enrollment effective May 8, 2009. Furthermore, when CMS has established that a legal basis for revocation existed, the revocation action was a reasonable and permissible exercise of the discretion granted to CMS by 42 C.F.R. § 424.535(a)(3). *Letantia Bussell, M.D.*, DAB No. 2196, at 10.

Petitioner advances three arguments in his request for hearing for why the revocation should not be upheld: (1) Palmetto and CMS failed to consider the extraordinary circumstances of Petitioner's conviction and Petitioner's exclusion is inconsistent with the primary purposes and policies underlying the Medicare program; (2) Petitioner did not receive the June 2009 notice that his participation was revoked and he acted reasonably in the absence of such notice rendering nearly $1 million of services to Medicare beneficiaries between May 8, 2009 and May 2012, when Petitioner finally received notice of the revocation; and (3) pursuant to 42 C.F.R. § 424.535 and section 19 of the CMS Program Integrity Manual the revocation was not effective until 30 days after the May 14, 2012 notice of revocation. RFH at 1-2. Petitioner advances two arguments

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[5] CMS argues that Petitioner's felony convictions also fit within 42 C.F.R. § 424.535(a)(3)(i)(C), but I need not analyze that argument Petitioner's convictions clearly fit within 42 C.F.R. § 424.535(a)(3)(i)(D).

in his opposition to the CMS motion for summary judgment for why the revocation should be set aside: (1) the notice of revocation was not mailed to him by certified mail as required by law; and (2) he was denied his right to have a hearing within a reasonable time of the revocation being imposed. P. Br. at 6-7. In his sur-reply, Petitioner argues that I have the authority to set aside the revocation based on the violation of Petitioner's due process rights established by section 205(b) of the Act (42 U.S.C. § 405(b)). P. Reply at 1. Petitioner's arguments merit no relief.

Petitioner's argument that Palmetto and CMS failed to consider the extraordinary circumstances of Petitioner's conviction and that the revocation of enrollment and billing privileges is inconsistent with the purposes and polices underlying Medicare is not persuasive. Petitioner was convicted of felonies that are per se detrimental to the program and its beneficiaries and are a legal basis for CMS to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). There is no statutory or regulatory requirement for CMS or its contractor to permit Petitioner to participate in the revocation decision. There is also no authority that requires CMS or its contractor to consider factors in addition to those specified by 42 C.F.R. § 424.535(a)(3) when the revocation decision is made. Furthermore, there is no authority for me to further review the exercise of discretion by CMS or its contractor to revoke enrollment and billing privileges when there is a legal basis for revocation. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 18 (2009), *aff'd, Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010). If it were within my authority to review the exercise of discretion by CMS, I would conclude that Petitioner's revocation is certainly not inconsistent with the purposes and policies underlying Medicare. Petitioner was convicted of serious felony offenses for which the district court imposed a significant sentence. The Congressional grant of authority to revoke enrollment and billing privileges is clearly intended to protect both the Medicare Trust Fund and Medicare beneficiaries. The revocation of Petitioner's enrollment and billing privileges was entirely consistent with the Congressional purpose, notwithstanding that the I.G. subsequently granted a limited waiver of Petitioner's exclusion from Medicare based on the request of a state official for a limited-waiver of the exclusion.

Petitioner's argument that he acted reasonably by continuing to deliver services to Medicare beneficiaries between May 2009 and May 2012 and the implication that CMS should be estopped from denying Petitioner's alleged $1 million in claims[6] for services he allegedly delivered during that period is also meritless.

> It is well-established that "the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in "affirmative misconduct." *Oaks of Mid City Nursing and Rehabilitation Center*, DAB No. 2375, at 31 (2011), *citing Office of Personnel Management v. Richmond*; *see also Rosewood Living Center*, DAB No. 2019, at 13 (2006), *citing Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) and *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984). Thus, even if the traditional requirements of estoppel were met here, estoppel would not be available because there is no allegation or evidence of any affirmative misconduct.

Southlake Emergency Care Center, DAB No. 2402, at 7 (2011). Just as in *Southlake*, there is no allegation or evidence of affirmative misconduct by government agents in this case. Petitioner alleges that he did not receive the June 19, 2009, from Palmetto notifying him that his enrollment in Medicare and his Medicare billing privileges were revoked effective May 8, 2009. Petitioner does not allege affirmative misconduct by Palmetto to prevent him from learning of the revocation or that Palmetto affirmatively misrepresented his status in Medicare. The evidence also shows that Petitioner was not acting reasonably if, after his conviction, he continued delivering services to Medicare beneficiaries expecting that he might be reimbursed by Medicare. Petitioner was certainly aware of his felony conviction on May 8, 2009. Petitioner was participating in Medicare prior to his conviction and as a condition of participation he agreed to comply with the law governing Medicare participation. Act § 1866(a) and (b)(2); 42 C.F.R. §§ 424.500, 424.510(d)(3),

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[6] I have no jurisdiction to adjudicate Medicare claims by beneficiaries or suppliers and Petitioner has no right to have such claims adjudicated by me. The only evidence of the existence of such claims is Petitioner's declaration. As I understand Petitioner's argument, he does not seek my approval of the alleged claims, rather he advocates for me to find the revocation invalid so that his claims may be processed through the appropriate channels.

424.516 . It is not unreasonable to expect that Petitioner have some understanding of the Act and regulations and that he knew or should have known that his felony convictions could cause revocation of his enrollment and billing privileges. *Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010) (Board noted with approval the ALJ's observation that a provider of Medicare services "should be expected to possess at least a rudimentary understanding of program rules and terminology"), *citing Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 63, 64 (1984) (participant in the Medicare program had "duty to familiarize itself with the legal requirements" for cost reimbursement); *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). Therefore in October 2009, when Petitioner admits he became aware that his claims were being denied, he should have recognized that the denials were likely related to his felony conviction. Although Petitioner was apparently frustrated by Palmetto's lack of responsiveness to his inquiries, there is no evidence that he elevated his inquiry to CMS which has responsibility over Palmetto for program administration. However, given the facts known to Petitioner in October 2009, i.e. that he had been convicted of felonies and that his claims were being denied, it was not reasonable for him to continue to bill Medicare without first clarifying his status. As of November 12, 2009, Petitioner admits that he and his attorneys knew that he was no longer considered to be in active status and the continued delivery of services to Medicare beneficiaries with the expectation of filing claims for reimbursement after November 12, 2009 was clearly unreasonable.

To the extent that Petitioner's arguments may be construed to be a request for equitable relief, such relief is clearly beyond my authority. *US Ultrasound*, DAB No. 2302, at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."); *Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395, at 9-10 (2011) (the Board and the ALJs are bound by the applicable statute and regulations) *citing 1866ICPayday*, DAB No. 2289, at 14 (2009) ("an ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground"); and *Sentinel Medical Laboratories, Inc.*, DAB No. 1762, at 9 (2001), *aff'd, Teitelbaum v. Health Care Financing Admin.*, 32 F. App'x 865 (9th Cir. 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002).

Petitioner argues that pursuant to 42 C.F.R. § 424.535 and section 19 of the CMS Program Integrity Manual[7] the revocation was not effective until 30 days after the May 14, 2012 notice of revocation. Petitioner overlooked the fact that 42 C.F.R. § 424.535(g)

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[7] The CMS Medicare Program Integrity Manual was not promulgated as a regulation and is not enforceable as law. Rather, the regulation in effect controls.

was amended effective January 1, 2009, to provide that in the case of a felony conviction the effective date of the revocation was the date of the conviction. 73 Fed. Reg. at 69,726. Petitioner was convicted May 8, 2009, after the effective date of the change, and the initial revocation determination also occurred after the effective date. Therefore, revocation of Petitioner's Medicare enrollment and billing privileges effective May 8, 2009, the date of his conviction, was authorized.

Petitioner argues that he was denied due process because the June 19, 2009 notice of revocation was not sent to him by certified mail. P. Br. at 6. For purposes of summary judgment, I do not weigh the evidence related to this allegation of fact but accept it as true. Petitioner cites 42 C.F.R. § 405.800(b) as the source of the requirement to use certified mail. However, Petitioner's citation to that authority is likely a clerical error as there is no such subsection. Furthermore, 42 C.F.R. pt. 405, subpt. H, which includes §§ 405.801-.877, establishes the procedures and requirements for appeals under Medicare Part B rather than for provider and supplier enrollment cases such as this case. The requirements and procedures for provider and supplier enrollment cases, including revocations of enrollment and billing privileges are found in 42 C.F.R. pts. 424, 489, and 498. The requirements for notice of an initial determination established by 42 C.F.R. § 498.20, do not include a requirement that notice be sent by certified mail. While sending official notices that trigger citizen rights by certified or registered mail with a return receipt requested may be an advisable practice, it is not required by the Act or the applicable regulations.

Petitioner argues that he was denied his right to have a hearing within a reasonable time of the revocation and that I should set aside the revocation based on the violation of his right to due process as provided by section 205(b) of the Act (42 U.S.C. § 405(b)). P. Br. at 7; P. Reply at 1. Petitioner cites *Ram v. Heckler*, 792 F.2d 444, 447 (4th Cir. 1986) as authority for the requirement for a prompt post-revocation hearing. P. Br. at 7. The court in *Ram* found that a physician convicted of Medicare fraud was not entitled to an administrative hearing before the suspension of his status as a Medicare provider. However, the court concluded that a prompt post-suspension hearing was required to satisfy due process due to the physician's property interest in participating in Medicare. The court in *Ram* did not define "prompt." Furthermore, the argument that providers and suppliers have a protected property interest in continued Medicare participation has been consistently rejected since *Ram*. *See, e.g., Gregory J. Salko, M.D.*, DAB No. 2437, at 6 (2012) and *Robert T. Tzeng, M.D.*, DAB 2169 (2008) and cases cited therein. There is no question that the Act and regulations grant Petitioner a right to a post-revocation hearing. The Act and regulations do not specify how promptly such a hearing must be accomplished. Certainly, it is desirable that such hearings occur as promptly as possible, if for no other reasons than to ensure that the evidence is fresh and citizens feel that their rights are being observed. However, when a hearing does not occur promptly, neither the Act nor the regulations authorize a remedy such as setting aside a lawful revocation as Petitioner advocates. Even if some remedy were authorized, Petitioner was not

prejudiced by the delay in this case. *C.f. Fady Fayad, M.D.*, DAB No 2266, at 9 (2009) (Board will not find due process violation related to notice absent a showing of prejudice). The revocation was effective May 8, 2009, the date of Petitioner's conviction, as authorized by 42 C.F.R. § 424.535(g). I accept, for purposes of summary judgment that Petitioner did not receive a copy of the June 19, 2009 Palmetto revocation notice until it was provided to him by the United States Attorney on May 7, 2012. Thus, there clearly has been a delay between the revocation and Petitioner's receipt of the notice of the revocation and a further delay between Petitioner's receipt of notice and this decision. The question of whether some remedy should be fashioned to attenuate any prejudice due to the delay must be answered in the negative for two reasons: (1) no remedy is authorized by the Act or regulation; and (2) Petitioner suffered no more than minimal prejudice. The first reason is self-explanatory. Regarding the second reason, Petitioner has argued that between roughly May 2009 and May 2012 he delivered approximately $1 million in services to Medicare eligible beneficiaries for which desires reimbursement. If after providing Petitioner de novo review I concluded that there was no basis for revocation and there was no CMS appeal or the decision was upheld by the Board, 42 C.F.R. § 424.545(a)(2) provides that Petitioner could resubmit all unpaid claims for services delivered during the period, thus minimizing any prejudice. However, because after de novo review I concluded that Petitioner was convicted of felonies that are per se detrimental and are a basis for his exclusion effective May 8, 2009, Petitioner has suffered no prejudice due to the delayed delivery of a copy of the June 9, 2009 notice. *Fady Fayad, M.D.*, DAB No 2266, at 10 (even if notice was inadequate at the reconsideration stage, de novo review with adequate notice was sufficient due process). Accordingly, if I had authority to fashion a remedy, I would conclude that no remedy is warranted.

The Act and regulations accord Petitioner a right to notice and the opportunity to have the decision to revoke his enrollment and billing privileges reconsidered and then administratively reviewed by an ALJ and the Board, and then judicial review. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5, 498.22(a), and 498.25. Petitioner was notified of the revocation, albeit after a significant delay; he exercised his right to reconsideration; he has received de novo review by an ALJ; and there is no real dispute that there is a factual and legal basis for revocation of his enrollment effective May 8, 2009, the date of his convictions. Petitioner has received the process due him under the Act and the Secretary's regulations.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner's enrollment and billing privileges were properly revoked effective May 8, 2009.

/s/
Keith W. Sickendick
Administrative Law Judge