**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Francis T. Kangethe, M.D.
(NPI: 1740361328 / PTANs: 534410531, 632570012),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-457

Decision No. CR4714

Date: September 28, 2016

# DECISION

The Medicare enrollment and billing privileges of Petitioner, Francis T. Kangethe, M.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(3)(i) and (ii)(A) (2015).[1] Pursuant to 42 C.F.R. § 424.535(f) (2007), which was in effect at the time of Petitioner's conviction, the effective date of revocation is January 13, 2016, 30 days after the notice of revocation.

## I. Background

Petitioner was enrolled as a supplier in the Medicare program with billing privileges. National Government Services, Inc. (NGS), a Medicare Administrative Contractor (MAC) for the Centers for Medicare & Medicaid Services (CMS), notified Petitioner by letter dated December 14, 2015, that his Medicare enrollment and billing privileges were revoked effective February 27, 2008. NGS cited 42 C.F.R. § 424.535(a)(3) as a basis for

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[1] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R), unless otherwise stated. Both the 2007 revision and the 2015 revision of the C.F.R. must be applied in this case, for reasons discussed hereafter. The language of the 2007 and 2015 revisions of 42 C.F.R. § 424.535(a)(3) are substantially the same.

revocation based on Petitioner's felony conviction within the previous ten years for aggravated driving while under the influence of alcohol. NGS also cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation based on Petitioner's failure to report his conviction within 30 days of that adverse legal action. NGS imposed a three-year bar to re-enrollment effective January 13, 2016. CMS Exhibit (Ex.) 1 at 6-7.

On January 4, 2015, Petitioner requested reconsideration of the initial determination to revoke his Medicare enrollment and billing privileges. Petitioner asserted that he notified his employer and he believed it was his employer's responsibility to report to CMS or the MAC. CMS Ex. 1 at 5. On February 1, 2016, NGS upheld the revocation on reconsideration, also citing 42 C.F.R. § 424.535(a)(3) and (9) as the bases for revoking Petitioner's Medicare enrollment and billing privileges. CMS Ex. 1 at 1.

Petitioner requested a hearing before an administrative law judge (ALJ) on March 30, 2016 (RFH). On April 8, 2016, the case was assigned to me for hearing and decision, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction.

On May 9, 2016, CMS filed a combined prehearing brief and motion for summary judgment with CMS Ex. 1. On May 25, 2016, Petitioner filed a prehearing brief (P. Br.). Petitioner did not file any exhibits. CMS waived filing a reply brief. Petitioner has not objected to my consideration of CMS Ex. 1 and it is admitted as evidence. Petitioner submitted documents with his request for hearing that he did not mark as evidence and file with his brief on the merits.[2] Some of the documents Petitioner filed with his request for hearing are admitted as evidence as part of CMS Ex. 1 and it is not necessary to mark and re-admit those documents. Petitioner also filed with his request for hearing a character reference from the Chair of Pediatric Emergency Medicine at John Stroger Hospital, Cook County, Illinois. The character reference is not considered and admitted as evidence because it is not relevant to any issue that I may decide. Petitioner also included a letter from NGS dated January 29, 2016, acknowledging receipt of Petitioner's request for reconsideration. The NGS letter is not admitted as evidence as there is no dispute that Petitioner's request for reconsideration was timely received by NGS.

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[2] The hearing request and submitted documents are filed together as received from Petitioner in the Departmental Appeals Board Electronic Filing System (DAB E-File), Item # 3b.

## II. Discussion

### A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as NGS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[3] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioner, a physician, is a supplier.

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for enrolling providers and suppliers in Medicare, including the requirement to provide 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. § 424.505, suppliers 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 supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The effective date of the revocation is presently controlled by 42 C.F.R. § 424.535(g).

A supplier 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 supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R.

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[3] A "supplier" furnishes 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.

§ 498.22(a). CMS or its contractor must give notice of: its reconsidered determination to the supplier; the reasons for its determination; 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 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 unless waived. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

### B. Issues

Whether summary judgment is appropriate;

Whether there was a basis for the revocation of Petitioner's billing privileges and enrollment in Medicare; and

Whether the effective date of revocation in this case may be determined by the retroactive application of a regulation.

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

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

#### 1. Summary judgment is appropriate.

CMS requested summary judgment or, in the alternative, a decision on the written record. A supplier whose enrollment has been revoked has a right to a hearing and judicial review. A hearing on the record is required under the Act. Act §§ 205(b), 1866 (h)(1), (j); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to a decision based only upon the written record, *i.e.*, the documentary evidence and pleadings. Accordingly, disposition on the written record alone is not permissible, unless summary judgment is appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedures to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a 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 do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. P. 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, para. II.D and G. The parties were given notice of my Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. P. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/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 and/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 Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 5-6 (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 differ from that used in 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 party's 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 in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. 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).

Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) or (9) that requires a hearing in this case. The issues in this case raised by Petitioner related to revocation of his Medicare enrollment and billing privileges must be resolved against him as a matter of law. The undisputed evidence shows that there was a basis for revocation of Petitioner's Medicare enrollment and billing privileges. The issue of the correct effective date must also be resolved as a matter of law and there are no factual disputes related to that issue that require a hearing. Accordingly, summary judgment is appropriate.

**2. Petitioner was convicted of a felony offense.**

**3. The Secretary has determined and provided by regulation that a felony crime against a person, such as murder, rape, assault, or similar crimes, is detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii)(A).**

**4. Petitioner was convicted in state court of aggravated driving under the influence of alcohol resulting in great bodily harm to a person, which is a felony crime against persons within the meaning of 42 C.F.R. § 424.535(a)(3)(ii)(A).**

**5. There is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(A).**

**6. CMS has failed to establish a legal basis for revocation based on Petitioner's failure to report his conviction in 2008, as there was no statutory or regulatory requirement to report prior to January 1, 2009. 42 C.F.R. § 424.535(a)(9) (2009); 73 Fed. Reg. 69,725, 69,939-40 (Nov. 19, 2008).**

**7. The issue for hearing and decision is whether there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges and, if there is a basis for revocation, my jurisdiction does not extend to review of whether CMS properly exercised its discretion to revoke Petitioner's Medicare enrollment and billing privileges.**

**8. CMS incorrectly determined the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges as the date of his conviction, by retroactively applying the 2009 revision of 42 C.F.R. § 424.535 to a felony conviction that occurred on February 27, 2008.**

**9. Petitioner's Medicare enrollment and billing privileges are revoked effective January 13, 2016, 30 days from the notice of the initial determination to revoke. 42 C.F.R. § 424.535(g) (2007).**

**10. I have no authority to review CMS's determination to impose a three-year bar on Petitioner's Medicare re-enrollment.**

**11. Pursuant to 42 C.F.R. § 424.535(c), the three-year bar to re-enrollment runs from the effective date of revocation, but the Secretary and CMS have discretion not to enroll a supplier convicted of a felony determined detrimental to the best interests of Medicare or its beneficiaries for up to ten years from the date of conviction. Act § 1866(b)(2)(D) (42 U.S.C. § 1395cc(b)(2)(D)); 42 C.F.R. § 424.530(a)(3).**

**a. Facts**

The following material facts are not disputed. On February 27, 2008, Petitioner entered a plea of guilty in the Circuit Court of Cook County, Illinois, to one felony count of aggravated driving under the influence of alcohol that involved a motor vehicle accident that was the proximate cause of great bodily harm to another in violation of 625 Ill. Comp. Stat. 5/11-501(a)(1) and (d)(1)(C) (1995). Petitioner's plea was accepted by the court and he was convicted of that count. CMS Ex. 1 at 9-12; RFH at 1-2. At the time of Petitioner's felony conviction, he was enrolled as a Medicare supplier but Petitioner did not report his conviction to CMS or its contractor. CMS Ex. 1 at 5; RFH at 1-2.

**b. Analysis**

(i.) There is a basis for the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(A).

The Act grants the Secretary authority not to enroll or to revoke the enrollment of a provider or supplier convicted under federal or state law of a felony offense that the Secretary determines is detrimental to the program or its beneficiaries. Act § 1866(b)(2)(D).

The requirements for establishing and maintaining Medicare billing privileges are found in 42 C.F.R. pt. 424, subpt. P. As a supplier, Petitioner was responsible to meet and maintain enrollment requirements in order to "bill either the Medicare program or its beneficiaries for Medicare covered services or supplies." 42 C.F.R. § 424.500. Under the regulation in effect at the time of his conviction and currently, CMS has authority to revoke a supplier's billing privileges if CMS determines that the 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 [Medicare] program and its beneficiaries." 42 C.F.R. § 424.535(a)(3) (2007). Among the types of felony offenses that CMS considers to be detrimental to the best interests of the program and its beneficiaries are "felony crimes against persons." 42 C.F.R. § 424.535(a)(3)(ii)(A) (2007) and (2015).

On December 14, 2015, NGS revoked Petitioner's Medicare enrollment and billing privileges citing 42 C.F.R. § 424.535(a)(3). The revocation was based on Petitioner's February 27, 2008 conviction in Illinois of one felony count of aggravated driving under the influence of alcohol in violation of 625 Ill. Comp. Stat. 5/11-501(a)(1) and (d)(1)(C) (1995). Petitioner's offense was a felony and characterized as aggravated driving under the influence of alcohol under the Illinois statutes because the offense involved a motor vehicle accident that was the proximate cause of great bodily harm to another. I conclude that the felony offense of "aggravated driving under the influence of alcohol," an offense that resulted in a car wreck that caused great bodily harm to another, satisfies the requirement of 42 C.F.R. § 424.535(a)(3)(ii)(A) that the felony conviction be for a crime against a person, such as an assault or similar crime, because Petitioner's felony offense caused injury to another.

It is undisputed that Petitioner's February 27, 2008 conviction occurred within the 10 years preceding the date of the December 14, 2015 revocation notice from the Medicare contractor NGS.

Petitioner's arguments before me are of no merit. He argues that: he was overcharged as the charge did not correlate with the facts; he had "incompetent counsel" at the time who "encouraged him to plead" to the facts; and he had an "unblemished traffic record." Petitioner also attempts to minimize the extent of his victim's injuries. RFH 2-4; P. Br. at 2. Petitioner's arguments regarding whether or not he was actually guilty of the offense for which he was convicted carry no weight in this proceeding. Petitioner's arguments amount to a collateral attack on his conviction and I have no authority to review his conviction. Here, Petitioner is bound by the undisputed fact that he was convicted of the charge of record. Petitioner cites no legal authority to the contrary. Whether or not the offense of which he was convicted was a felony crime against a person within the meaning of 42 C.F.R. § 424.535(a)(3)(ii)(A) is, given the undisputed facts, an issue of law that must be resolved against him. The Secretary has specifically provided that if a supplier was, within the preceding 10 years of filing an enrollment or revalidation application, convicted of an offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries, then the supplier's enrollment and billing privileges can be revoked on that basis by CMS or its contractor.

42 C.F.R. § 424.535(a)(3)(ii)(A). The offense of which Petitioner was convicted is a felony crime against persons, one of the categories of offenses the Secretary has determined to be detrimental to Medicare and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii)(A).

Petitioner complains about the sufficiency of the notice he received in the state court, an issue not within my authority to address. His arguments may also be considered an attack upon the sufficiency of the notices he received from NGS and CMS, which is a matter within my jurisdiction. RFH. I conclude based on my review that the notices of initial and reconsidered determinations satisfied regulatory requirements. Any error in the notices regarding citation of the state statute Petitioner violated was not prejudicial as Petitioner was well aware of the offense of which he was convicted. Furthermore, Petitioner has effectively exercised the rights of review available to him under the Act and regulations. 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 reviewed by an ALJ, the Board, and the courts. 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; 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 pursuant to 42 C.F.R. § 424.535(a)(3). Petitioner received adequate notice and there was no prejudice due to a violation of the process due him under the Act and the Secretary's regulations.

Accordingly, I conclude that CMS had a basis to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(A), based on his February 27, 2008 conviction.

> (ii.) There was no legal requirement for Petitioner to report his conviction when he was convicted, and CMS cannot retroactively apply 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9) to revoke Petitioner's Medicare enrollment and billing privileges.

NGS also cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation based on Petitioner's failure to notify CMS of his conviction within 30 days as required by 42 C.F.R. § 424.516(d)(1)(ii). CMS Ex. 1 at 1, 6. The current version of 42 C.F.R. § 424.516(d)(1)(ii) (2015) requires that a physician report to the MAC any "adverse legal action" within 30 days of the event. Petitioner does not dispute that he failed to report his February 2008 felony conviction to CMS or its contractor NGS. RFH at 2; CMS Ex. 1 at 5. However, the 2007 revision of the C.F.R., which was in effect at the time of Petitioner's conviction, did not include sections 424.516 or 424.535(a)(9), or a requirement to report adverse legal actions. The requirement to report an adverse legal

action was added to the regulations effective January 1, 2009, with the addition of 42 C.F.R. §§ 424.516 and 424.535(a)(9). 73 Fed. Reg. 69,939-40. Specifically, 42 C.F.R. § 424.535(a)(9) was added effective January 1, 2009, and provides:

> (9) *Failure to report*. The provider or supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart.

42 C.F.R. § 424.535(a)(9) (2009). Prior to January 1, 2009, Medicare enrollees were required to report any changes to the information in their enrollment application within 90 days:

> (b) *Reporting requirements*. Following enrollment, a provider or supplier must report to CMS any changes to the information furnished on the enrollment application and furnish supporting documentation within 90 calendar days of the change, with the exception of DMEPOS suppliers which are required to report changes of information within 30 days as specified in § 424.57(c)(2), or a change of ownership or control of the provider or supplier that must also be reported within 30 calendar days. Failure to do so may result in the deactivation or revocation of the provider or supplier's Medicare billing privileges.

42 C.F.R. § 424.520(b) (2007). There was no requirement to report an adverse legal action. Section 424.520(b) (2007) was replaced by 42 C.F.R. § 424.516(d)(1)(ii), effective January 1, 2009, and requires that "final adverse actions" be reported to CMS or a contractor within 30 days. In the preamble to the regulation, the drafters explained:

> we are adopting a new § 424.516(d) which would establish more stringent reporting requirements for physician NPP organizations and individual practitioners. (We proposed to redesignate § 424.520 as § 424.516 and amend the provisions in new § 424.516.) In addition to a change of ownership (as currently specified in redesignated § 424.516(d)(1)(i)), we proposed to add § 424.516(d)(1)(ii) requiring all physician and NPP organizations and individual practitioners to notify our designated contractor of any final adverse action within 30 days. We stated that final adverse actions include, but are not limited to, felonies, license suspensions, and the HHS Office of the Inspector General (OIG) exclusion or debarment.

73 Fed. Reg. 69,777. The drafters specified that "a final adverse action has occurred when the sanction is imposed and not when a supplier has exhausted all appeal rights associated with the action itself." *Id.* The requirement for a supplier such as Petitioner to report a "final adverse action" such as a felony conviction became effective after Petitioner's February 27, 2008 conviction. The MAC cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation alleging that Petitioner failed to report his conviction within 30 days as required by 42 C.F.R. § 424.516. However, there was no 42 C.F.R. § 424.516 at the time of Petitioner's conviction and no requirement to report within 30 days. CMS has failed to show that there was another legal basis for revocation based upon Petitioner's failure to report his conviction. For the reasons discussed hereafter, CMS could not apply 42 C.F.R. §§ 424.516(d) and 424.535(a)(9) retroactively. It is not necessary for me to examine the issue further as I have concluded that Petitioner's conviction is a basis for revocation under 42 C.F.R. § 424.535(a)(3).

(iii.) NGS and CMS incorrectly determined the effective date of revocation.

In the initial determination, NGS stated that the effective date of revocation was February 27, 2008, which was the date of Petitioner's conviction. CMS Ex. 1 at 6. The effective date of revocation is not specifically addressed in the reconsidered determination. CMS Ex. 1 at 1-3. I infer that NGS applied 42 C.F.R. § 424.535(g) (2015) to determine the date of revocation. The regulation provides that revocation is effective 30 days after CMS or its contractor mails the notice of the revocation determination to the provider or supplier. An exception exists in certain cases, such as when the revocation is based on a felony conviction, in which case the revocation is effective the date of the felony conviction. 42 C.F.R. § 424.535(g).

In February 2008, when Petitioner was convicted, the regulation in effect provided that "[r]evocation becomes effective within 30 days of the initial revocation notification." 42 C.F.R. § 424.535(f) (2007). There was no provision at the time of Petitioner's conviction that provided that the revocation was effective the date of the felony conviction.

I conclude that the effective date of the revocation of Petitioner's enrollment and billing privileges should be determined under the regulatory provisions in effect on the date of Petitioner's February 27, 2008 conviction. It was not until January 1, 2009, that CMS revised its regulation, providing that when revocation is based on a felony conviction, the effective date of revocation is the date of the conviction. 42 C.F.R. § 424.535(g); 73 Fed. Reg. 69,940. In this case, NGS retroactively applied 42 C.F.R. § 424.535(g) to determine that the date of Petitioner's felony conviction was the effective date of Petitioner's revocation. Pursuant to 42 U.S.C. § 1871(e)(1)(A) of the Act (42 U.S.C. § 1395hh(e)(1)(A)), the regulations of the Secretary are not applied retroactively, unless the Secretary determines that:

> (i) such retroactive application is necessary to comply with statutory requirements; or
>
> (ii) failure to apply the change retroactively would be contrary to the public interest.

Act § 1871(e)(1)(A). CMS has not shown that the retroactive application of 42 C.F.R. § 424.535(g) is necessary for the Secretary to comply with any statutory requirement or that the failure to apply the regulation retroactively would be contrary to the public interest. I conclude that it would be contrary to law to apply the 2009 revision of 42 C.F.R. § 424.535(g) to a conviction that occurred on February 27, 2008.

Accordingly, applying 42 C.F.R. § 424.535(f) (2007), I conclude that the effective date of Petitioner's revocation is January 13, 2016, 30 days from the notice of the initial determination.

When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c) (2015). In this case, CMS determined that a three-year bar was appropriate. There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545; 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 10-11 (2016).

Petitioner advances constitutional and equitable arguments to support his position that the revocation action should be rescinded or that his revocation should be waived because he is the sole source of essential specialized services in a community. P. Br. at 1-3, RFH at 4, 7. I have no authority to address the constitutional argument raised by Petitioner, to grant equitable relief, or to grant Petitioner a waiver from the revocation action. *US Ultrasound*, DAB No. 2302 at 8 (2010) ("Neither 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."). Furthermore, I am bound to follow the Act and regulations, and I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (noting that "[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.").

Petitioner argues that the determination to revoke in this case fails to make a distinction between permissive and mandatory exclusion. RFH at 3. Petitioner has confused the authority of the Secretary to exclude persons from participating in Medicare under section 1128 of the Act (42 U.S.C.§ 1320a-7), with the Secretary's authority to revoke

billing privileges and Medicare enrollment. The Secretary delegated the authority to impose a mandatory exclusion under section 1128 of the Act to the Inspector General of the U.S. Department of Health and Human Services, who administers that program pursuant to 42 C.F.R. pts. 1001 and 1005. The Secretary delegated the authority for revoking a provider or supplier's Medicare enrollment and billing privileges to CMS in 42 C.F.R. pt. 424. Revocation and exclusion are two separate and distinct administrative actions enforced by two different agencies within HHS. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 13 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010). In the case before me CMS has revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). In the case of revocation, I have no authority to review the exercise of discretion by CMS or its contractor to revoke when I find that there is a basis for revocation. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19. The scope of my authority is limited to determining whether there is a legal basis for revocation of Petitioner's Medicare enrollment and billing privileges. *Id*. I have concluded that there is a basis for CMS to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

## III. Conclusion

For the foregoing reasons, I conclude that Petitioner's Medicare enrollment and billing privileges are revoked pursuant to 42 C.F.R. § 424.535(a)(3)(i) and (ii)(A)(2015), effective January 13, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge