**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Meadowmere Emergency Physicians, PLLC
(NPI: 1669683645),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-495

Decision No. CR4971

Date: November 20, 2017

# DECISION

Novitas Solutions (Novitas or "the contractor"), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Meadowmere Emergency Physicians PLLC, effective June 14, 2016. Novitas revoked Petitioner's billing privileges because a managing employee listed by Petitioner on its enrollment record was convicted of a felony offense of health care fraud within 10 years prior to the revocation date, and Petitioner failed to timely report the felony conviction to CMS or its contractor.

## I. Background and Procedural History

Petitioner, a clinic/group practice, was enrolled as a supplier in the Medicare program. *See* CMS Exhibits (Exs.) 3, 4. On May 27, 2015, Petitioner filed a Form CMS-855B enrollment application through the Provider Enrollment, Chain and Ownership System (PECOS) in response to a revalidation request. CMS Ex. 4. Petitioner reported on its enrollment application that Dr. Byron Conner served as a managing employee and Medical Director, effective May 1, 2015. CMS Ex. 4 at 6. On September 15, 2015, Petitioner filed another Form CMS-855B application through PECOS to update its

enrollment information. CMS Ex. 5. While Petitioner reported numerous enrollment changes at that time, it continued to report that Dr. Conner was a managing employee.[1] CMS Ex. 5 at 4.

On May 3, 2016, a grand jury returned a true bill of indictment charging, in a second superseding indictment,[2] that Dr. Conner committed conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349, and health care fraud and aiding and abetting health care fraud, in violation of 18 U.S.C. §§ 1347 and 2.[3] CMS Ex. 6 at 1-16. On or about June 14, 2016, Dr. Conner entered a plea of guilty before a U.S. Magistrate Judge to the charge of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 371 [18 U.S.C. § 1347]. CMS Ex. 6 at 17. On July 14, 2016, a U.S. District Court Judge for the Northern District of Texas accepted Dr. Conner's guilty plea and adjudged him guilty.[4] CMS Ex. 6 at 19.

By letter dated October 13, 2016, Novitas notified Petitioner that its Medicare enrollment and billing privileges would be revoked for the following reasons:

> 42 CFR [§ ]424.535(a)(3) - Felonies
>
> The Centers for Medicare & Medicaid Services (CMS) has been made aware of Byron Conner's felony conviction for Conspiracy to Commit Healthcare Fraud, in violation of 18 USC §1347, in the United States District Court for the Northern District of Texas, Dallas Division. Bryon

[1] The latter application contains slightly different information regarding Dr. Conner, in that it omits the title of Medical Director and includes Dr. Conner's middle initial.

[2] The second superseding indictment superseded a superseding indictment returned on September 1, 2015. CMS Ex. 6 at 1.

[3] Petitioner was charged in counts one, six, and nine of the nine-count second superseding indictment. The remaining charges involved his co-conspirators.

[4] Neither party submitted a copy of the judgment of conviction. It appears, based on the previous discussion, that Petitioner was not adjudged guilty until July 14, 2016, based on the U.S. District Court Judge's acceptance of the plea of guilty. *See* CMS Ex. 6 at 19 (Order, dated July 14, 2016, stating: "Accordingly, the Court accepts the plea of guilty, and BYRON FELTON CONNER is hereby adjudged guilty of **Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 371[18 U.S.C. § 1347]**.") (emphasis in original). As Petitioner does not dispute the effective date of his revocation, I need not further address whether an effective date of revocation other than June 14, 2016 is appropriate.

> Conner is listed as a managing employee on your Medicare 855 enrollment record.
>
> 42 CFR [§ ]424.535(a)(9) - Failure to Report
>
> The Centers for Medicare & Medicaid Services (CMS) has been made aware of Byron Conner's felony conviction for Conspiracy to Commit Healthcare Fraud, in violation of 18 USC §1347, in the United States District Court for the Northern District of Texas, Dallas Division. Bryon Conner is listed as a managing employee on your Medicare 855 enrollment record. You did not notify CMS of this adverse legal action as required under 42 CFR [§ ]424.516.

CMS Ex. 3 at 1 (emphasis omitted). Novitas also informed Petitioner that if it believed the revocation was incorrect, it could request reconsideration of the determination. CMS Ex. 3 at 1. Novitas explained that Petitioner must submit any additional information with its request for reconsideration and would not have another opportunity to do so, stating:

> You must request the reconsideration in writing to this office within 60 calendar days of the postmark date of this letter. The reconsideration must state the issues or findings of fact with which you disagree and the reasons for disagreement. You may submit additional information with the reconsideration that you believe may have a bearing on the decision. However, if you have additional information that you would like a hearing officer to consider during the reconsideration or, if necessary, an administrative law judge to consider during a hearing, you must submit that information with your request for reconsideration. This is your only opportunity to submit information during the administrative appeals process; you will not have another opportunity to do so unless an administrative law judge specifically allows you to do so under 42 CFR [§ ]489.56(e).

CMS Ex. 3 at 1-2. Novitas informed Petitioner that the effective date of the revocation would be June 14, 2016, and that Petitioner would be barred from re-enrolling in the Medicare program for a period of three years, effective 30 days from the postmark date of the letter. CMS Ex. 3 at 1-2.

In a letter dated October 31, 2016, Petitioner requested reconsideration of the initial determination revoking its enrollment and billing privileges. CMS Ex. 2 at 1. Petitioner stated that Dr. Conner had not worked a shift for Petitioner since September 26, 2015. CMS Ex. 2 at 1. Petitioner also explained that Dr. Conner had not been scheduled for

any shifts during 2016, and it had not submitted any claims for services performed by Dr. Conner in 2016. CMS Ex. 2 at 1. Petitioner contended that "[d]ue to an administrative error in our enrollment process, Dr. Conner's enrollment with Meadowmere Emergency Physicians was not timely deactivated." CMS Ex. 2 at 1. Petitioner claimed it was unaware of the criminal proceedings against Dr. Conner, and it was "submitting deactivation for Dr. Conner's enrollment in Meadowmere Emergency Physicians." CMS Ex. 2 at 1. Petitioner did not address Dr. Conner's role as a managing employee, nor did Petitioner state that Dr. Conner was no longer a managing employee. CMS Ex. 2 at 1. To the contrary, Petitioner contended that it was "unaware of the criminal proceedings as Dr. Conner is still a current licensed and non-excluded provider, and he did not notify us of any actions." CMS Ex. 2 at 1.

CMS issued a reconsidered determination on February 1, 2017, at which time it explained that Petitioner's Medicare enrollment had been revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9) because "Dr. Conner was listed as a managing employee on Meadowmere's Medicare enrollment record with a start date of May 1, 2015." CMS Ex. 1 at 6. CMS explained that Dr. Conner's conviction was for an offense that "CMS has found to be *per se* detrimental to the Medicare program and its beneficiaries" and that Petitioner failed to report Dr. Conner's conviction within 30 days of his conviction. CMS Ex. 1 at 5. The letter notified Petitioner that it may request further review by an administrative law judge (ALJ). CMS Ex. 1 at 6.

Petitioner filed a request for hearing on March 17, 2017, which the Civil Remedies Division received on March 20, 2017. On April 7, 2017, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) directing the parties to file pre-hearing exchanges, consisting of a brief by CMS and a response brief by Petitioner, along with supporting evidence, in accordance with specific requirements and deadlines.

CMS filed a pre-hearing brief and motion for summary judgment, along with 10 exhibits (CMS Exs. 1-10). In the absence of any objections, I admit CMS Exs. 1-10 into the record. Petitioner submitted a pre-hearing brief and opposition to CMS's motion for summary judgment (P. Br.), along with six exhibits (Petitioner (P.) Exs. 1-6). CMS submitted a filing in which it objected to Petitioner's proposed exhibits 1, 2, 3, 4, and 6 (CMS Objections) as inadmissible new evidence submitted without a showing of good

cause.[5] I exclude P. Exs. 1, 2, 3, 4, and 6, which I will discuss below. Further, P. Ex. 5 is entirely duplicative of CMS Ex. 2 and will therefore not be admitted into evidence.[6] Neither party listed any witnesses or provided any written direct testimony. Consequently, there are no witnesses for the parties to cross-examine at a live hearing. Order, §§ 9-10. The record is closed, and the case is ready for a decision on the merits.[7]

## II. Issues

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (9) based on Dr. Conner's June 14, 2016 felony conviction and failure to comply with reporting requirements.

## III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

## IV. Findings of Fact, Conclusions of Law, and Analysis[8]

Petitioner is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to

[5] On November 3, 2017, I issued an order that, *inter alia*, required the parties to separately re-file exhibits that were not compliant with the Pre-Hearing Order and Civil Remedies Division Procedures. Shortly thereafter, the parties re-submitted their exhibits. As such, I have re-designated the exhibits formerly identified as P. Ex. A, B, C, D, E, and F as P. Exs. 1, 2, 3, 4, 5, and 6, respectively.

[6] Petitioner failed to comply with two orders directing it to file an exhibit list. I first directed Petitioner to file an exhibit list when I issued the Pre-Hearing Order on April 7, 2017. I again directed Petitioner to file an exhibit list when I issued the November 3, 2017 order, at which time I explained that submission of an exhibit list is not only required pursuant to my Pre-Hearing Order, but also by Section 14 of the Civil Remedies Division Procedures (CRDP). Petitioner disregarded both of my orders, along with the CRDP (which were furnished to Petitioner on April 7, 2017). I caution that noncompliance with orders can result in sanctions. *See* Civil Remedies Division Procedures, Section 23 (stating that an ALJ "may sanction a person, including any party or attorney, for failing to comply with an order or procedure . . . .").

[7] As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

[8] My numbered findings of fact and conclusions of law are set forth in italics and bold font.

participate in the Medicare program, a supplier must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke a supplier's enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535(a).

### *1. Petitioner has not shown good cause for submitting new documentary evidence, and there is no basis to admit this evidence into the record.*

Petitioner submitted five proposed documentary exhibits (P. Exs. 1, 2, 3, 4, and 6) that it did not submit prior to filing its request for an ALJ hearing. These five proposed exhibits will not be admitted into the record.

CMS argues in a July 3, 2017 filing (CMS Objections) that Petitioner did not previously submit these documents and that Petitioner has not shown good cause for failing to submit them earlier, as required by 42 C.F.R. § 498.56(e). CMS Objections, at 1-2. I agree with CMS that these five proposed exhibits existed at the time of the request for reconsideration. *See* P. Ex. 1 (email from Dr. Conner dated August 14, 2015); P. Ex. 2 (employment agreement, effective March 1, 2015); P. Ex. 3 (employment agreement, effective March 1, 2016); P. Ex. 4 (employment agreement, effective August 1, 2012); P. Ex. 6 (undated computer screen shot, reflecting reporting period of August 31, 2015 through November 14, 2015).

I must examine new documentary evidence that is offered by a provider or supplier and determine whether good cause exists for submitting that evidence for the first time at the ALJ level. 42 C.F.R. § 498.56(e)(1). I must exclude any new documentary evidence at the ALJ level of appeal if I do not find good cause for a petitioner's failure to previously submit that evidence. 42 C.F.R. § 498.56(e)(2)(ii) (stating that "if the ALJ determines that there was not good cause for submitting the evidence for the first time at the ALJ level, the ALJ must exclude the evidence from the proceeding and may not consider it in reaching a decision"); *Care Pro Home Health, Inc.*, DAB No. 2723 at 11 (2016) ("In enrollment revocation cases, an ALJ must exclude "new documentary evidence" – that is, documentary evidence that a provider did not previously submit to CMS at the reconsideration stage (or earlier) – unless the ALJ determines that "the provider or supplier has good cause for submitting the evidence for the first time at the ALJ level." 42 C.F.R. § 498.56(e)(1)."). While "good cause" is not defined in the regulations, the Departmental Appeals Board (DAB) has explained that, in showing good cause in such a situation, a party must explain its "failure to submit [evidence] at the reconsideration stage (or earlier)." *Care Pro,* DAB No. 2723 at 14.

Petitioner, who is represented by counsel, stated in an unsupported argument in a footnote on page 2 of its brief that the good cause requirement applicable to providers and suppliers pursuant to section 498.56(e) is only applicable to hearings, and not motions for summary judgment. In that same footnote, Petitioner stated that it "reserves

its right to submit briefing on the good cause requirement . . . ." and it expressly declined to address the issue of good cause in its pre-hearing brief.[9]

Petitioner is mistaken. Section 498.56(e) does not limit the good cause requirement to hearings. Rather, section 498.56(e)(1) explicitly states that an ALJ will determine whether good cause exists for the submission of new documentary evidence "[a]fter a hearing is requested but before it is held . . . ." Section 498.56(e) further states, unambiguously, that "the ALJ will examine any new documentary evidence submitted to the ALJ by a provider or supplier to determine whether the provider or supplier has good cause for submitting the evidence *for the first time at the ALJ level*." 42 C.F.R. § 498.56(e) (emphasis added).

Novitas clearly explained, at the time it first notified Petitioner of its revocation, that if Petitioner had any additional information, it "must submit that information with your request for reconsideration" and that "[t]his is your only opportunity to submit information during the administrative appeals process; you will not have another opportunity to do so unless an administrative law judge specifically allows you to do so under 42 [C.F.R. §] 498.56(e)."). CMS Ex. 3 at 1-2. Petitioner should not have been surprised when I instructed, in my Pre-Hearing Order, that it "may not offer new documentary evidence in this case absent a showing of good cause for failing to present that evidence previously to CMS." Order, § 6, citing 42 C.F.R. § 498.56(e). Petitioner opted to ignore section 498.56(e) and disregarded my clear directive that "[i]f Petitioner offers such [new] evidence, the evidence must be specifically identified as new, and Petitioner's brief must explain why good cause exists for me to receive it."[10] Order, § 6. Petitioner's documentary evidence was in existence at the time of the request for reconsideration and it did not submit the evidence at that time, and further, it rejected the requirement to offer a showing of good cause to present the evidence at this level.

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[9] I point out that I authorized the parties to each file a 25-page brief (and would consider accepting a brief in excess of 25 pages if a party filed a motion seeking leave to exceed the page limit). Petitioner filed a six-page brief, and it is perplexing that Petitioner explicitly refused to address the critical issue of good cause to submit the very evidence that it submitted in support of its current arguments.

[10] Despite Petitioner's assertions, the parties' briefing was not limited to the question of summary judgment. CMS filed a "Motion for Summary Judgment and Brief in Support Or Pre-Hearing Brief," and Petitioner filed a "Response to Centers for Medicare & Medicaid Services' Motion for Summary Judgment and Brief in Support Thereof or Pre-Hearing Brief." Thus, the parties did not limit their arguments to the question of summary judgment, but also briefed the case on the merits. *See* Pre-Hearing Order, § 4(c)(i)(directing that the parties each file "[a] brief, addressing all issues of law and fact, including any Motion to Dismiss or Motion for Summary Judgment . . . .").

As Petitioner has not asserted good cause for the submission of P. Exs. 1, 2, 3, 4, and 6, I do not admit this evidence. *See* 42 C.F.R. § 498.56(e)(2)(ii) (stating an ALJ "must" exclude new documentary evidence if no good cause is shown for its submission "for the first time at the ALJ level.").

2. ***A managing employee of Petitioner, Dr. Byron Conner, entered a plea of guilty to the offense of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 371 (conspiracy to commit offense or to defraud United States) and § 1347, on June 14, 2016 and a U.S. District Court Judge accepted that plea and adjudged guilt on July 14, 2016.***

3. ***An offense listed in 42 C.F.R. § 424.535(a)(3)(ii)(D) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.***

4. ***Novitas had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.***

CMS may revoke a supplier's enrollment based on the existence of a felony conviction, as set forth in 42 C.F.R. § 424.535(a)(3), which currently provides:

> (3) *Felonies.* (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 C.F.R. [§] 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.
>
> (ii) Offenses include, but are not limited in scope or severity to—
>
> * * *
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.535(a)(3)(ii)(D). The Social Security Act (Act), as referenced above, requires the exclusion of any individual or entity from participation in Medicare, Medicaid, and all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In particular, section 1128(a)(3) of the Act provides:

> (a) Mandatory exclusion

> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b(f) of this title):
>
> * * *
>
> (3) Felony conviction relating to health care fraud
>
> Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

42 U.S.C. § 1320a-7(a)(3). Petitioner's conviction is related to health care fraud, in that he was convicted of conspiracy to commit health care fraud. CMS Ex. 6 at 19. As a felony conviction for conspiracy to commit health care fraud would subject him to a mandatory exclusion under section 1128(a)(3) of the Act, the conviction warrants revocation of Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(3)(ii)(D) (stating that a conviction for an offense that would result in mandatory exclusion under section 1128(a) warrants revocation because such an offense has been deemed to be *per se* detrimental to the Medicare program and its beneficiaries).

Petitioner has not submitted admissible evidence that Dr. Conner was not a managing employee when he continued to be listed on Petitioner's enrollment application as a managing employee well after the date of his conviction. To the contrary, the evidence establishes that Petitioner continued to report that Dr. Conner was a managing employee when it submitted an update of its enrollment information on September 15, 2015. CMS Ex. 5 at 4. While Petitioner contends that "it inadvertently left the provider's name on its

enrollment applications due to administrative error" (P. Br. at 1), it has not demonstrated, through the submission of admissible evidence, that it erroneously listed Dr. Conner as a managing employee.[11]

CMS may revoke a supplier's billing privileges and supplier agreement if a managing employee of the supplier was convicted of an enumerated felony offense in the previous 10 years. 42 C.F.R. § 424.535(a)(3)(i). Petitioner does not dispute that Dr. Conner entered a plea of guilty to the charge of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 371 (conspiracy to commit offense or to defraud United States) and § 1347, on June 14, 2016, and that a U.S. District Judge accepted that plea and adjudged him guilty on July 14, 2016.[12] P. Ex. 6 at 15-16. Petitioner unpersuasively argues that Dr. Conner resigned from his position as "Site Medical Director of Baylor Medical Center at Trophy Club effective September 1, 2015, ending his managing employee status, and was terminated as an employee on August 31, 2015."[13] P. Br. at 2. Petitioner's current claim is inconsistent with the argument it presented in its reconsideration request, in which Petitioner explained that "we were unaware of the

[11] Petitioner's request for reconsideration alleges administrative error regarding the "deactivation for Dr. Conner's enrollment" and asserts that Dr. Conner "has not worked a shift" since September 26, 2015. However, the reconsideration request does not address Dr. Conner's role as a managing employee at the time it submitted the September 15, 2015 update of its enrollment information. In fact, Petitioner's only allegation that it committed administrative error with respect to listing Dr. Conner as a managing employee is in its brief, and it had not submitted any evidence showing that it committed administrative error, such as the written direct testimony of any witnesses. *See* Pre-Hearing Order, § 8.

[12] Title 18 of the United States Code indicates that an offense is considered to be a felony based on the maximum term of imprisonment, and that an offense that is punishable by more than one year of imprisonment is considered to be a felony. 18 U.S.C. § 3559(a). The maximum period of imprisonment for Dr. Conner's offense is ten years. 18 U.S.C. §§ 1347(a)(2), 3559(a)(4).

[13] I reiterate that I have not admitted into the record the majority of the evidence that Petitioner submitted in support of this argument. However, I note that P Ex. 2, a copy of an email with the subject "Resignation," indicates that Dr. Conner intended to resign as the site medical director at a future date due to "unforeseen circumstances and family responsibilities," but that he planned to "stay on in [an as needed] status to help when my schedule permits and as things settle down at home." Thus, it is unclear whether Petitioner intended to remain in a management role following his intended date of resignation. Further, because Petitioner did not submit this evidence in a timely manner, neither CMS nor its contractor had an opportunity to consider the probative value of this document, nor could CMS or its contractor request additional supporting information.

criminal proceedings as Dr. Conner is still a current licensed and non-excluded provider" and that "Dr. Conner's enrollment with Meadowmere Emergency Physicians was not timely deactivated" due to an administrative error. CMS Ex. 2. Petitioner further explained, in its request for reconsideration, that Dr. Conner last worked for Petitioner on September 26, 2015. CMS Ex. 2 at 1.

The simple fact is that Petitioner, in a September 15, 2015 enrollment application for purposes of updating its enrollment record, listed Dr. Conner as a managing employee. CMS Ex. 5 at 4. In fact, in this application, as compared to the previous application, Petitioner added a middle initial for Dr. Conner, evidencing that it was aware that it had listed Dr. Conner on its enrollment application. CMS Ex. 5 at 4; *see* CMS Ex. 4 at 6. While Petitioner claims that it listed Dr. Conner on the September 2015 enrollment application because of an administrative error (P. Br. at 1), even if accepted as true, a mistake in completing the application does not absolve Petitioner of fault; Petitioner has not identified any provision under law that absolves it of responsibility for an uncorrected error in its enrollment application. Further, even if Petitioner made an administrative error in September 2015 when it submitted its enrollment application, it failed to update its enrollment information to reflect that Dr. Conner was no longer a managing employee.

Dr. Conner continued to be listed on Petitioner's enrollment record at the time he was convicted of felonious conspiracy to commit health care fraud. CMS and Novitas has a legitimate basis to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3).

### *5. Petitioner did not inform CMS within 30 days of Dr. Conner's felony conviction.*[14]

CMS may revoke a supplier's Medicare enrollment and billing privileges based on the supplier's failure to timely report a final adverse legal action, as is set forth in 42 C.F.R. § 424.535(a)(9):

> (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.

Pursuant to 42 C.F.R. § 424.516(d)(1)(ii), physician organizations *must* report "[a]ny adverse legal action" within 30 days of the reportable event, and 42 C.F.R. § 424.502

[14] I recognize that Dr. Conner's felony conviction in the preceding 10 years, alone, is a sufficient basis for CMS to have revoked Petitioner's Medicare enrollment and billing privileges. Nonetheless, I will address the second basis for revocation relied upon by Novitas.

(Definitions) lists a conviction of a felony offense as defined in section 424.535(a)(3)(i) within the last 10 years preceding enrollment, revalidation, or re-enrollment as a final adverse action. Failure to timely report an adverse legal action subjects a physician organization to revocation of its Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(9).

Petitioner does not allege that it informed Novitas within 30 days of Dr. Conner's felony conviction.[15] To the contrary, Petitioner admits in its brief that it "did report the conviction within 30 days once it finally learned of it via this revocation process," which did not begin until it received the October 13, 2016 letter from Novitas. CMS Ex. 3; P. Br. at 5-6. Petitioner continued to list Dr. Conner on its enrollment record up until the time that Novitas informed it, in October 2016, that its enrollment was being revoked.

Petitioner cannot escape responsibility for its failure to timely report Dr. Conner's conviction. Even if Petitioner is correct in its assertion that it was unaware of Dr. Conner's conviction, such ignorance does not negate the fact that it continued to list Dr. Conner on its enrollment through the time of his conviction. As long as Petitioner listed Dr. Conner as a managing employee on its enrollment record, Petitioner had an obligation to timely report his felony conviction. Petitioner did not notify Novitas or CMS within 30 days of Dr. Conner's conviction, and CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges. 42 C.F.R. § 424.516(d)(1)(ii).

### *6. Petitioner does not dispute the June 14, 2016 effective date of revocation.*

Novitas determined that Petitioner should be revoked effective June 14, 2016, which is the date that Dr. Conner entered a plea of guilty to the charge of conspiracy to commit health care fraud. Pursuant to 42 C.F.R. § 424.535(g), the effective date of revocation of a supplier's billing privileges is the date of the conviction. Petitioner does not dispute the date that CMS and Novitas determined as the date of conviction, and therefore, I will not disturb the June 14, 2016 effective date of revocation.

### *7. The three-year length of the re-enrollment bar is not reviewable.*

The DAB has explained that "CMS's determination regarding the duration of the re-enrollment bar is not reviewable." *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The DAB explained that "the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b)." *Id.* The DAB further explained that "[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation's text, include CMS decisions regarding the

[15] Even if I were to consider the date of conviction to be July 14, 2016, which is the date the U.S. District Judge accepted the June 14, 2016 guilty plea, Petitioner did not provide notice within 30 days of July 14, 2016. CMS Ex. 6 at 19.

severity of the basis for revocation or the duration of a revoked supplier's re-enrollment bar." *Id.* The DAB discussed that a review of the rulemaking history showed that CMS did not intend to "permit administrative appeals of the length of a re-enrollment bar." *Id.* I have no authority to review this issue and I do not disturb the three-year re-enrollment bar.

## V. Conclusion

For the reasons explained above, I affirm the determination revoking Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie C. Rogall
Administrative Law Judge