Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michael Turano, M.D.
Docket No. A-18-97
Decision No. 2922
January 24, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Michael Turano, M.D. appeals the May 4, 2018 decision of an administrative law judge (ALJ), *Michael Turano, M.D.*, DAB CR5093 (ALJ Decision). The ALJ upheld a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1). The ALJ also determined that CMS had a basis to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9) for failure to report a felony conviction, but not based on his failure to report adverse actions concerning his state license to practice medicine because Petitioner was not an enrolled Medicare supplier when those adverse actions were taken. We affirm the ALJ's determination to uphold the revocation pursuant to 42 C.F.R. section 424.535(a)(1) and section 424.535(a)(9).

Legal background

To receive Medicare payment, a physician or other "supplier" of Medicare services must be enrolled in the Medicare program. 42 C.F.R. §§ 400.202 (defining "Supplier"), 424.505.[1] Enrollment confers on a supplier "billing privileges," i.e., the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502 (defining "Enroll/enrollment"), 424.505.

CMS, which administers the Medicare program, regulates the enrollment of suppliers into the program and delegates certain program functions to private contractors. Social Security Act (Act)[2] §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

[1] We apply the regulations in 42 C.F.R. Part 424 that were in effect at the time of CMS's or its contractor's determination to revoke. *See Meindert Niemeyer, M.D.*, DAB No. 2865, at 2 n.2 (2018) (citing *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016)).

[2] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

CMS "may" revoke a supplier's enrollment and billing privilges for any of the "reasons" in 42 C.F.R. § 424.535(a). Section 424.535(a)(1) authorizes CMS to revoke a supplier's billing privileges and participation agreement if the supplier –

> is determined to not be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its . . . supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter. . . .
> (i) CMS may request additional documentation from the . . . supplier to determine compliance if adverse information is received or otherwise found concerning the . . . supplier.
> (ii) Requested additional documentation must be submitted within 60 calendar days of request.

Id. § 424.535(a)(1).[3]

Section 424.535(a)(9) authorizes CMS to revoke a supplier's billing privileges if the supplier "did not comply with the reporting requirements specified in [42 C.F.R.] § 424.516(d)(1)(ii) and (iii)." As applicable here, a physician "must" report "[a]ny adverse legal action" "[w]ithin 30 days." *Id.* § 424.516(d)(1)(ii). A "[f]inal adverse action" includes a Medicare-imposed revocation of billing privileges, suspension or revocation of a state medical license, and conviction of a federal or state felony offense within the last ten years preceding enrollment, revalidation or re-enrollment. *Id.* § 424.502.

Revocation effectively terminates any provider agreement and bars the supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. *Id.* § 424.535(b), (c). CMS may impose a re-enrollment bar of between one year and three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). In accordance with section 424.535(g), revocation takes effect 30 days after CMS or its contractor mails the notice of determination to revoke to the supplier, with exceptions not relevant here.

[3] Section 424.535(a)(1), as quoted here, has been in effect since February 3, 2015. 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). With respect to the "plan of corrective action" referred to in section 424.535(a)(1), the final rule effective February 3, 2015 also revised 42 C.F.R. § 405.809(a)(1) to limit the ability of a supplier to submit a corrective action plan (CAP) to situations in which billing privileges were revoked under section 424.535(a)(1). *See* 79 Fed. Reg. at 72,530-31; *Angela R. Styles, M.D.*, DAB No. 2882, at 2 n.3 (2018). The revised section 424.535(a)(1) also removed language from the prior version of section 424.535(a)(1) which permitted an opportunity to correct before a final determination to revoke except for revocations under sections 424.535(a)(2), (a)(3), or (a)(5). *See* 79 Fed. Reg. at 72,532. A supplier does not have a right to appeal the refusal to reinstate billing privileges on the basis of a CAP. *See Styles* at 9 (citing *Conchita Jackson, M.D.*, DAB No. 2495, at 6-8 (2013) and stating that "CMS's rejection of a CAP is not subject to review").

A supplier may seek reconsideration of an initial (or revised initial) determination to revoke. *Id.* §§ 498.3(b)(17), 498.5(*l*)(1), 498.22(a). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. *Id.* §§ 498.5(*l*)(2), 498.40.

Case background[4]

Petitioner obtained a license to practice medicine in the State of New York in 1987. CMS Exs. 6, at 3; 9, at 1. On November 22, 2011, Petitioner and others were indicted in the United States District Court for the Southern District of New York on five counts charging them with conspiracy to commit fraud, bribery, and money laundering in connection with a scheme to influence a member of the New York State Senate to take certain actions. CMS Ex. 1. On or about December 20, 2011, Petitioner pleaded guilty to one count – conspiracy to commit bribery in violation of 18 U.S.C. § 371. CMS Ex. 2. On or around April 26, 2012, the court adjudicated Petitioner guilty of conspiracy to commit bribery,[5] dismissed the remaining charges, sentenced Petitioner to two years in prison, and ordered him to pay $223,534 in restitution. CMS Ex. 3 (Judgment in a Criminal Case), at 1, 3. The sentencing judge signed the Judgment on May 1, 2012; the Judgment was filed on May 2, 2012. *Id.* at 1.

On June 12, 2013, the State Board for Professional Conduct of the State of New York Department of Health revoked Petitioner's medical license. CMS Exs. 6; 7, at 5. On January 16, 2014, the Administrative Review Board for Professional Medical Conduct of the State of New York Department of Health affirmed the determination that Petitioner's criminal conduct constituted professional misconduct, but reversed the decision to revoke Petitioner's medical license and instead suspended the license for two years, stayed the suspension, and placed Petitioner on probation for five years. CMS Ex. 7, at 1, 7, 10. The suspension of the license took effect seven days later, on January 23, 2014. CMS Exs. 7, at 1; 8, at 1; 9, at 5.

By initial determination dated July 9, 2013, National Government Services (NGS), a CMS Medicare Administrative Contractor, acting for CMS, notified Petitioner that his Medicare enrollment and billing privileges were revoked effective December 20, 2011 pursuant to 42 C.F.R. § 424.535(a)(3), based on a "[f]elony [c]onviction within 10 years" for conspiracy to commit bribery. CMS Ex. 10, at 1. NGS also notified Petitioner that he was barred from re-enrolling in Medicare for three years. *Id.* at 2 (citing 42 C.F.R. § 424.535(c)). Petitioner did not request reconsideration of the July 9, 2013 initial determination. CMS Ex. 29, at 2.

[4] Unless otherwise indicated, the background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

[5] Petitioner does not dispute that the conspiracy to commit bribery to which he pleaded guilty was a felony crime. *See* CMS Ex. 25, at 5 (Petitioner's December 2, 2016 filing, referring to a "felony conviction").

In May 2014, Petitioner submitted an application to re-enroll in Medicare. CMS Ex. 11. In a letter submitted in support of that application Petitioner stated that, on December 20, 2011, he pleaded guilty to "a one-count indictment totally unconnected to [his] medical practice"; that following a 2013 state medical board hearing, his "medical license was revoked purely because of the plea agreement"; and that, on appeal of the state medical board's revocation, the determination to revoke his medical license was "REVERSED." *Id.* at 2. Petitioner also wrote, "With my license fully reinstated without restrictions or penalties, I am in the process of reviving my practice once again, which brings me to my request for reinstatement [in Medicare]." *Id.* at 3 (Petitioner's emphasis). In the section designated for history of final adverse legal actions within Form CMS 855I, he indicated "License Revocation" on "12/20/11" by "NGS" with "License Reinstated 1/16/14" as the resolution. *Id.* at 21. By letter dated October 3, 2014, NGS informed Petitioner that his application was approved. CMS Ex. 15.

Thereafter, in April 2015 and October 2015, Petitioner submitted "Change of Information" forms (CMS Exs. 16, 18), in which he stated that he "won" his appeal of the state medical board's revocation of his license; that the license was "reinstated 1/12/14 without limitations or restrictions"; and that "Medicare reactivated [his] enrollment in 10/2014." CMS Exs. 16, at 12; 18, at 3, 4-5. On May 12, 2015 and December 2, 2015, NGS issued letters notifying Petitioner that his "Change of Information" requests were "approved" and his "file" "updated." CMS Exs. 17, 19.

By initial determination dated June 22, 2016, NGS notified Petitioner that his enrollment and billing privileges were being revoked effective April 26, 2012. NGS cited two bases: 42 C.F.R. § 424.535(a)(3), based on the "April 26, 2012 felony conviction" for conspiracy to commit bribery; and 42 C.F.R. § 424.535(a)(9), because Petitioner failed to report an "adverse legal action," that is, Petitioner was "adjudged guilty of a felony" conspiracy to commit bribery "on April 26, 2012," as required by 42 C.F.R. § 424.516. CMS Ex. 20, at 1. NGS informed Petitioner that a three-year re-enrollment bar, to "begin[] 30 days after the postmark of the letter," was being imposed. *Id.* at 2.

On reconsideration review, by letter dated July 25, 2016, NGS affirmed that the revocation would remain in effect, citing sections 424.535(a)(3) and (a)(9). CMS Ex. 22, at 1. NGS added, "[Petitioner] is currently revoked from the Medicare Program with a 3-year Enrollment Bar, effective 07/22/2016-07/21/2019 for the reason of CONTINUED BILLING AFTER FELONY CONVICTION. At this time, the Enrollment Bar cannot be lifted by our office." *Id.* (NGS's emphasis).

NGS decided to reopen the case. On October 4, 2016, NGS issued a revised initial determination notifying Petitioner that his enrollment and billing privileges were revoked effective November 3, 2016 on three bases: (1) 42 C.F.R. § 424.535(a)(1), because Petitioner submitted an application to re-enroll in Medicare in May 2014, when the three-year re-enrollment bar imposed by the 2013 revocation based on the conviction for conspiracy to commit bribery was in effect; (2) 42 C.F.R. § 424.535(a)(9), for failure to report that conviction and the revocation of his medical license; and (3) 42 C.F.R. § 424.535(a)(4) because in his May 2014 application Petitioner answered "yes" to indicate that he had a "license revocation taken by NGS" and that his "license [was] reinstated 1/16/14," but he did not also report that he was convicted of felony conspiracy to commit bribery, which NGS stated was a "false and misleading" "omission." CMS Ex. 23, at 1 (citing 42 C.F.R. §§ 498.30 and 498.32; stating that the revised determination "replaces and supersedes" the June 22, 2016 determination) and 2.[6] Also on section 424.535(a)(4), NGS noted that, in a subsequent "Change of Information" form, Petitioner verified as true that the only adverse legal action was "license revocation taken by NGS," but did not report his conviction and, moreover, made a "false statement" when he reported that his medical license had been reinstated on January 12, 2014 "without limitations or restrictions" even though the reinstatement was "subject to terms and conditions." *Id.* at 2. NGS barred Petitioner from re-enrolling for three years. *Id.* at 3.[7]

Petitioner submitted a CAP and requested reconsideration of the October 4, 2016 determination. By determination dated January 5, 2017, CMS's Center for Program Integrity, Provider Enrollment & Oversight Group rejected the CAP and affirmed the revocation, citing section 424.535(a)(1), for attempting to re-enroll during the three-year re-enrollment bar imposed by the 2013 revocation, and section 424.535(a)(9), because Petitioner did not report his "April 25, 2012" felony conviction and the "December 2011" medical license suspension within 30 days of these adverse legal actions. CMS Ex. 27, at 1, 6-8. However, with respect to section 424.535(a)(4), CMS noted that Petitioner had reported the conviction and license suspension in a letter attached to his May 2014 submission and on that basis "overturn[ed]" the previously cited section 424.535(a)(4) as a revocation basis. *Id.* at 8.

[6] With exceptions inapplicable here, section 498.30 permits CMS to reopen on its own initiative an initial or reconsidered determination within 12 months after the date of notice of the initial determination.

[7] Evidently, Petitioner requested a hearing on the July 25, 2016 reconsidered determination (docket number C-16-837); CMS moved for dismissal of that request and remand of the case; and the ALJ who was assigned to that appeal dismissed the hearing request and remanded the case. 42 C.F.R. § 498.78(a) (an ALJ may remand any case properly before her to CMS on CMS's motion). Thereafter, on October 4, 2016, NGS issued a revised initial determination. ALJ Decision at 3 (citing CMS Br. at 11-12; P. Br. at 2); CMS's Objections to Petitioner's Exhibits and Witnesses, at 4; CMS Ex. 26, at 2 ¶¶ 11, 12; CMS Ex. 29, at 7; CMS's response brief to the Board (CMS Response) at 12.

ALJ proceedings and decision

Petitioner requested a hearing before an ALJ. The ALJ admitted all 29 exhibits submitted by CMS. The ALJ admitted Petitioner's exhibits 2, 6, 7, and 8; she excluded Petitioner's exhibits 1, 3, 4, 5, 9, and 10, noting that Petitioner did not respond to CMS's objections to those exhibits as new evidence not presented at the reconsideration level of review or earlier. The ALJ determined that Petitioner did not show good cause for submitting those exhibits late. ALJ Decision at 5; 42 C.F.R. § 498.56(e).

The ALJ denied Petitioner's "Request for Discovery," essentially on the ground that the 42 C.F.R. Part 498 regulations that govern the appeal do not confer on the parties a right to discovery and limits discovery to the issuance of subpoenas under section 498.58. ALJ's October 19, 2017 ruling; ALJ Decision at 5. The ALJ also denied Petitioner's request for the issuance of subpoenas to compel the testimony of several individuals employed by CMS or NGS, as well as Petitioner's former attorneys, and the production of documents of communication between those individuals and Petitioner and documents related to the decision to reinstate Petitioner's billing privileges. ALJ Decision at 6-7. Petitioner's subpoena requests, the ALJ noted, neither met the "stringent" content requirements of section 498.58(c), nor conformed to Civil Remedies Division Procedures § 12 provisions concerning the issuance of subpoenas. *Id.* Noting Petitioner's assertion that the witness testimony and documents are directly related to a claim of estoppel against CMS and NGS and relevant to determining whether CMS's decision to revoke his billing privileges was arbitrary and capricious, the ALJ denied the request essentially on the ground that the testimony and documents sought do not relate to the dispositive issue of whether CMS had a legal basis to revoke Petitioner's enrollment and billing privileges and therefore are not "reasonably necessary for the full presentation" of the case. *Id.* at 7 (quoting 42 C.F.R. § 498.58(a)) (internal quotation marks omitted). The ALJ observed that the evidence sought through the issuance of subpoenas "is relevant, if at all, to Petitioner's equitable arguments," but that she was without authority to set aside the revocation on equity grounds. *Id.*

CMS moved for summary judgment. Petitioner opposed that motion. The ALJ proceeded to decision based on the written record without considering whether summary judgment standards were satisfied. CMS proffered written direct testimony of one witness. Petitioner submitted his own affidavit, although, as the ALJ noted, he did not mark the affidavit as an exhibit as directed. ALJ Decision at 5-6; ALJ's Pre-Hearing Order ¶ 5 (instructing the parties how to mark proposed exhibits). In any case, the ALJ concluded that neither party sought to cross-examine any witnesses so an in-person hearing was not necessary. ALJ Decision at 6.

Turning to the issue of whether CMS had a legal basis to revoke under section 424.535(a)(1), the ALJ noted that Petitioner "concede[d] that his enrollment in the Medicare program was revoked, pursuant to 42 C.F.R. § 424.535(a)(3), effective December 20, 2011"; that the revocation was subject to a three-year re-enrollment bar, which expired on December 20, 2014[8]; and that Petitioner further conceded that he reapplied for re-enrollment in May 2014, before the expiration of the re-enrollment bar. ALJ Decision at 8-9 (citing P. Br. at 1-2, 3-5 and CMS Ex. 10, at 2). The ALJ further noted that, based on the information Petitioner furnished in May 2014, "which did not state that he was subject to a re-enrollment bar," NGS approved his application and granted him billing privileges. *Id.* at 9 (citing CMS Exs. 11, 15).

The ALJ determined that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under section 424.535(a)(1) because he submitted a re-enrollment application while a re-enrollment bar was in effect. *Id.* at 8. The ALJ reasoned that, since section 424.535(c) bars a supplier whose enrollment and billing privileges have been revoked from participating in Medicare through the end of the re-enrollment bar, Petitioner, who was subject to a re-enrollment bar through December 20, 2014, could not apply to re-enroll until the expiration of the bar. The ALJ stated that "[c]ommon sense dictates that, if a supplier is subject to a re-enrollment bar, the supplier does not meet Medicare enrollment requirements," which means that CMS (as here) may rely on section 424.535(a)(1) to revoke the billing privileges of a supplier who was barred from re-enrolling through December 20, 2014. *Id.* at 8.

[8] December 20, 2014 was three years after December 20, 2011, which NGS referred to in its July 9, 2013 initial determination as the date of the conviction for conspiracy to commit bribery in setting a three-year re-enrollment bar for revocation under section 424.535(a)(3). On December 20, 2011, Petitioner signed a plea agreement dated December 19, 2011, pleading guilty to that crime. CMS Ex. 2. On May 1, 2012, a U.S. District Judge signed a Judgment in a Criminal Case, reflecting "4/26/2012" as the "Date of Imposition of Judgment"; the Judgment was filed on May 2, 2012. *See* CMS Ex. 3, at 1; ALJ Decision at 3 n.2 (citing CMS Exs. 3, at 1 & 20, at 1; noting reference to April 26, 2012 as the date of conviction in the June 22, 2016 initial determination; and stating that it "not entirely clear that April 26, 2012" is the date of the conviction). The July 25 and October 4, 2016 determinations also referred to April 26, 2012 as the date of conviction. CMS Exs. 22, at 1; 23, at 1-2. The January 5, 2017 reconsidered determination erroneously referred to "April 25, 2012" as the date of conviction. CMS Ex. 27, at 7-8. An individual is deemed to have been convicted when, as relevant here, "[a] Federal . . . court has accepted a plea of guilty" by that individual. 42 C.F.R. § 1001.2(c) (under definition of "Convicted") (referred to in section 424.535(a)(3)). Despite the apparently inconsistent and possibly inaccurate references to the conviction date, as noted earlier, there is no indication that Petitioner requested reconsideration of the July 9, 2013 determination. Moreover, as the ALJ noted, Petitioner did not dispute that the re-enrollment bar imposed by the 2013 determination was in effect through December 20, 2014. And, as the ALJ also noted, the "uncertainty regarding the date of conviction is not material" "because NGS reopened and revised the June 22, 2016 notice and imposed a new revocation date of November 3, 2016," 30 days after the October 4, 2016 revised initial determination. *See* ALJ Decision at 3 n.2; CMS Ex. 23, at 1; 42 C.F.R. § 424.535(g).

The ALJ rejected Petitioner's characterization of his applying for re-enrollment while the re-enrollment bar was in effect as merely an "error in timing" distinguishable from cases involving fraud or abusive billing and his arguments attempting to shift blame to NGS and his former attorneys. *Id.* at 9 & 9 n.6. The ALJ reasoned that, although seeking to re-enroll while the bar was in effect "perhaps [did] not rise to the level of fraud, they can be analogized to abuse of billing" since that action "represent[ed] significant noncompliance," which enabled Petitioner to "gain[ ] access to and reimbursement from the Medicare Trust Fund during a seven-month period when he was barred from doing so, as he well knew." *Id.* The ALJ stated, "The Medicare regulations set forth the requirements for enrolling in the Medicare program and clearly state that a person subject to a re-enrollment bar may not enroll in the program until the end of the bar." *Id.* at 9-10.

With respect to the second basis cited for revocation, section 424.535(a)(9), the ALJ noted that Petitioner did not maintain that he reported his conviction to CMS or NGS within 30 days of the conviction, that is, "on or about April 26, 2012," but instead took issue with CMS's relying on the "'same facts and circumstances' arising from his 2013 revocation" to revoke his billing privileges. *Id*. at 10 (quoting P. Br. at 6). The ALJ noted, however, that the revocation on appeal before her was not based on the same facts and circumstances as the 2013 revocation; rather, the 2013 revocation was "based on the *fact* of Petitioner's conviction in 2012 and was taken based on" section 424.535(a)(3), whereas Petitioner' failure to report the conviction was cited later as "a separate ground for revocation" under section 424.535(a)(9). *Id.* (ALJ's emphasis). Petitioner, the ALJ found, was required to timely report his conviction regardless of whether NGS was already aware of the conviction, but did not report it. Therefore, the ALJ concluded, Petitioner violated section 424.516(d)(1)(ii), and, based on that violation, CMS had a basis to revoke pursuant to section 424.535(a)(9). *Id.* at 10-11.

However, the ALJ disagreed with CMS's argument that CMS was authorized to revoke under section 424.535(a)(9) because Petitioner did not report the revocation of his medical license and subsequent suspension of that license within 30 days. Noting evidence showing revocation of Petitioner's medical license on June 12, 2013 and CMS's revocation of enrollment 27 days later (referring to the July 9, 2013 initial determination), the ALJ reasoned that, "[w]hen CMS revoked Petitioner's Medicare enrollment, his obligation to report his state medical license revocation within 30 days ended." *Id.* at 11 (citing CMS Exs. 6; 7, at 5; 10). The ALJ also noted that the Adminstrative Review Board issued an order reversing the revocation and instead imposing a two-year suspension of Petitioner's medical license during the time the Medicare re-enrollment bar was in effect as a result of NGS's July 9, 2013 determination. The ALJ reasoned that, when Petitioner was not an enrolled Medicare supplier, he was not obligated to report the suspension of his medical license to CMS or its contractor. *Id.*

In sum, with respect to section 424.535(a)(9), the ALJ concluded that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under that regulation based on the failure to timely report the conviction, but not on the failure to report adverse legal actions related to the medical license. *Id.* at 11-12. (CMS has not appealed the ALJ's rejection of the second basis it had claimed under section 424.535(a)(9) so we need not address it further.)

The ALJ further stated that she did not have authority to order CMS to re-enroll Petitioner on the asserted ground that CMS's revocation was arbitrary and capricious. *Id.* at 12 (citing *NMS Healthcare of Hagerstown*, DAB No. 2603, at 6 (2014)). She also said she lacked authority to set aside the revocation based on an assertion that CMS should be estopped from revoking the enrollment because Petitioner allegedly relied to his detriment on reinstatement of his billing privileges by opening a medical office and seeing patients (*id.* at 12-13 (citing *Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 63 (1984) and *Schweiker v. Hansen*, 450 U.S. 785 (1981))), or on other equity-based arguments (*id.* at 13 (citing *US Ultrasound*, DAB No. 2302, at 8 (2010))).

Standard of review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Discussion

Petitioner does not raise any specific argument about the ALJ's determination on either section 424.535(a)(1) or section 424.535(a)(9) as a revocation basis or the ALJ's rationale on either basis. Nor does he raise any argument concerning the effective date of revocation, November 3, 2016. The crux of Petitioner's arguments before the Board is that the ALJ erred in not issuing the requested subpoenas, thereby precluding the development of a "full and fair" evidentiary record. Petitioner's brief in support of request for review (RR, not paginated) at 1.

Below, in section I, we affirm the ALJ's determination to uphold the revocation under sections 424.535(a)(1) and (a)(9) (based on the failure to timely report the conviction). In section II, we address Petitioner's arguments in support of an estoppel claim. In section III, we discuss the ALJ's denial of Petitioner's request for subpoenas. In section IV, we discuss the documents Petitioner submitted with his opening brief to the Board.

I. *CMS had legal bases to revoke Petitioner's enrollment and billing privileges.*

"In an appeal challenging a Medicare enrollment revocation, the Board is limited to reviewing the basis for revocation articulated in the unfavorable reconsidered determination issued by CMS or its contractor." *Vijendra Dave, M.D.*, DAB No. 2672, at 8 n.10 (2016); *accord Styles*, DAB No. 2882, at 9 (reconsidered determination "triggers a supplier's right to appeal a revocation" and the ALJ "may look only to the reasons stated in" that determination); *Donna Maneice, M.D.*, DAB No. 2826, at 8 (2017) ("the basis for revocation as cited in the *reconsidered* determination controls" (emphasis in original)), *reopening denied*, Ruling 2018-1 (April 3, 2018). Here, the controlling reconsidered determination is the one issued on January 5, 2017, for which Petitioner requested a hearing before an ALJ. The January 5, 2017 determination affirmed the revocation under sections 424.535(a)(1) and (a)(9). Thus, the dispositive question before us, as it was before the ALJ, is whether CMS has established a legal ground for revocation under section 424.535(a)(1) or section 424.535(a)(9) (or both). *See Maneice* at 8 ("CMS needs to establish only one ground for revocation").

If CMS has established a lawful basis for revocation, the Board and the ALJ must uphold the revocation. *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (The issue on appeal is whether CMS has established a "legal basis for its actions."); *accord Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (ALJ and the Board must uphold revocation if the regulatory requirements for revocation are met); *Abdul Razzaque Ahmed*, DAB No. 2261, at 19 (2009) (CMS is "legally entitled to revoke" if the regulatory elements are met.), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

CMS is authorized to revoke the billing privileges of a supplier who no longer meets the enrollment requirements for a supplier of its type and has not submitted a CAP. 42 C.F.R. § 424.535(a)(1). A supplier whose billing privileges have been revoked is barred from participating in the Medicare program from the date of the revocation until the end of the re-enrollment bar. *Id.* § 424.535(c). Here, by initial determination dated July 9, 2013, NGS revoked Petitioner's enrollment and billing privileges pursuant to section 424.535(a)(3) based on a felony conviction for conspiracy to commit bribery in violation of 18 U.S.C. § 371. A three-year re-enrollment bar (which, under section 424.535(g), takes effect the day of conviction) was imposed. CMS Ex. 10. In May 2014, Petitioner filed an application to re-enroll in Medicare. CMS Ex. 11. Based on a review of that application, by notice dated October 3, 2014, NGS informed Petitioner that he was re-enrolled. CMS Ex. 15. These are undisputed facts established by the record in this case. Although the determinations issued by NGS or CMS included various references to the date of conviction that may not have been completely accurate or consistent (*see supra*

note 8), there is no question that Petitioner sought to be re-enrolled during the three-year window of time when he was not eligible to participate in Medicare. Even were we to assume that the date of conviction was December 20, 2011 (as stated in the July 9, 2013 initial determination), a three-year re-enrollment bar would have been in effect through December 20, 2014. It is undisputed that Petitioner filed an application to re-enroll in May 2014, when the bar was in effect.[9] We agree with the ALJ's reasoning that a supplier like Petitioner, who was subject to a three-year re-enrollment bar, does not meet Medicare enrollment requirements while that bar is in effect. ALJ Decision at 8-9. A supplier who does not meet Medicare enrollment requirements is subject to revocation under section 424.535(a)(1). NGS's revocation of Petitioner's billing privileges pursuant to section 424.535(a)(1) was therefore lawful.

Although CMS needs to establish one legal basis to revoke and has established such a basis (section 424.535(a)(1)), we note that Petitioner did not dispute his failure to timely report his conviction as required by section 424.516(d)(1)(ii). If he had any evidence to the contrary, he could have submitted (and it would be reasonable to expect him to have submitted) such evidence, but he did not.[10] Thus, we concur with the ALJ that CMS had an additional basis for revocation in section 424.535(a)(9).

II. *We may not reinstate billing privileges based on estoppel or another equity-based claim; even if we could, Petitioner has not made a case for estoppel.*

Petitioner asserts that the ALJ erred in not permitting a full development of the evidentiary record by denying his request for subpoenas. RR at 1. Petitioner states that the ALJ should have issued the subpoenas regardless of whether the ALJ had authority to address his estoppel claim or any other equity-based claim to ensure that a full evidentiary record is developed for any judicial review of the administrative decision, and that the ALJ's refusal to develop the record by issuing subpoenas shows her failure to understand this case. *Id.* at 1-2, 3. Petitioner does not, however, dispute that he asked the ALJ to issue the subpoenas specifically to obtain testimonial and documentary evidence Petitioner believed could support his estoppel theory. Petitioner now reprises his estoppel arguments. RR at 2, 3-5; Reply at 2-4.

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[9] Even were we to assume that the date of conviction was in April 2012 or May 2012, the result would be no different since a re-enrollment application submitted in May 2014 would have been during the three-year bar.

[10] Petitioner rather vaguely says that CMS employees knew about the conviction and were told about it on "numerous occasions" and "numerous times." RR at 2; Reply brief (Reply, not paginated) at 3. But he never produced any evidence that he affirmatively acted to timely report his conviction. Petitioner simply avers as much in service of his claim that CMS should be estopped from revoking his billing privileges because CMS or NGS employees who purportedly were on notice about that adverse history assured him about reinstatement and eventually allowed him to bill, and that he relied on those assurances and re-enrollment. But the *fact* of a qualifying conviction for purposes of the 2013 determination to revoke under section 424.535(a)(3) was never in dispute. Moreover, he submits nothing that suggests that any of the occasions he supposedly informed CMS or NGS about the conviction occurred within the required time frame.

The ALJ did not err in determining she lacked authority to set aside the revocation through the application of equity principles. As the ALJ also correctly stated, and as we also have stated earlier, a lawful revocation based on one (or more) of the revocation grounds in section 424.535(a) must be upheld. Neither the ALJ nor the Board may order reinstatement of billing privileges based on equity principles. *See, e.g., US Ultrasound*, DAB No. 2302, at 8 (cited in ALJ Decision at 13); *Horace Bledsoe, M.D. and Bledsoe Family Medicine*, DAB No. 2753, at 10-11 (2016) (declining to rule on equitable estoppel claim, as well as abuse-of-discretion and constitutional claims); *Cent. Kansas Cancer Inst.*, DAB No. 2749, at 10 (2016) ("The Board . . . is bound by the regulations, and may not choose to overturn the agency's lawful use of its regulatory authority based on principles of equity.") (and cited cases); *Orthopaedic Surgery Assocs.*, DAB No. 2594, at 7 (2014) (Board "lacks the authority to restore . . . billing privileges on equitable grounds"); *Neb Group of Arizona, LLC*, DAB No. 2573, at 6 (2014) (Board "has consistently held that it (and the ALJs) lack the authority to restore a supplier's billing privileges on equitable grounds").

Even if we had authority to reinstate billing privileges based on equity principles, the government cannot be estopped from enforcing valid law or regulations based on misrepresentation of its employees or agents absent, at minimum, evidence that the employees or agents engaged in affirmative misconduct, such that there was 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 reliance. *See Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990); *Richard Weinberger, M.D., and Barbara Vizy, M.D.*, DAB No. 2823, at 18 (2017) (and cited cases).

Petitioner himself acknowledges that affirmative misconduct by government employees or agents is an element of an estoppel claim (Reply at 2, 3) and repeatedly asserts that CMS or NGS employees engaged in affirmative misconduct "as demonstrated by the government's authorization that [Petitioner] could bill." *Id.* at 4; *id.* at 6 (asserting that CMS "encouraged and misguided" him in the course of his applying for re-enrollment); RR at 5 (asserting that CMS made "misrepresentations and communications" which together with the notice of re-enrollment amount to affirmative misconduct). Petitioner's theory is that NGS or CMS employees somehow engaged in affirmative misconduct in giving Petitioner assuarances about reinstatement of billing privileges and eventually permitting him to re-enroll and bill. However, Petitioner fails to make even a plausible argument for how CMS or NGS employees' responding to Petitioner's submittal of a re-enrollment application and communicating with him about the status of that application amounted to affirmative misconduct, such as deliberate misrepresentation. Even were we to accept the highly implausible proposition that CMS or NGS employees acted with intent to mislead Petitioner to induce him to obtain office space and provide care to patients thereby expending resources and incurring costs he later might not be able to

recover through Medicare payments, we do not see how Petitioner could *reasonably* rely on whatever assurances, representation, or advice NGS or CMS employees could have made about reinstatement of billing privileges given that he knew but did not disclose in his reinstatement application that he was under a re-enrollment bar as we explain.

Petitioner had actual notice that he was barred from re-enrollment in Medicare for three years. CMS Ex. 10 (notice of revocation under section 424.535(a)(3), citing section 424.535(c) and stating that a three-year re-enrollment bar was being established and that Petitioner must meet all requirements for his supplier type to re-enroll). He also had legal notice of the provisions in sections 424.535(a)(1), (3) and (9), 424.535(c), and 424.535(g), as well as section 424.516(a) (requiring suppliers to certify that they meet all Medicare requirements). Persons "who deal with the government are expected to know the law . . . ." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984); *see also Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395, at 8 (2011) ("[P]articipants in the Medicare program . . . are presumed to have constructive notice of the statutes and regulations that govern their participation as a matter of law.").

Yet Petitioner applied to re-enroll while the bar was in effect and, moreover, in so doing, he himself made certain affirmative representations, for the apparent purpose of getting his billing privileges reinstated, that appear to be less than fully accurate. CMS Ex. 11, at 2-3 (representing that the medical license revocation based on the plea agreement was reversed and that the license was fully reinstated without restrictions or penalties). He was, at a minimum, less than accurate in indicating in Form CMS 855I that "NGS" took a "License Revocation" action that was "Reinstated 1/16/14." *Id.* at 21. The record indicates that the state medical board's revocation of Petitioner's medical license was reversed on appeal, resulting in the Administrative Review Board's January 16, 2014 decision suspending the medical license for two years and staying the suspension during a five-year probation. CMS Ex. 7, at 1, 7, 10. Nowhere in the re-enrollment application or accompanying letter did Petitioner disclose that he was subject to a three-year re-enrollment bar following NGS's 2013 revocation. Evidently, based on a review of the contents of that re-enrollment application, NGS decided to re-enroll Petitioner. CMS Ex. 15. Under the circumstances presented, we are inclined to agree with the ALJ's observation that:

> Petitioner's own conduct in failing to disclose that he was subject to a re-enrollment bar can be viewed as misleading to an equal extent with any incorrect or incomplete advice provided by CMS or its contractor. By applying to re-enroll before his re-enrollment bar expired and then claiming detrimental reliance based on the contractor's omission to discover that the bar was still in place suggest that Petitioner, at a minimum, is attempting to benefit from sharp practice.

ALJ Decision at 13.

The Board has stated that, for purposes of estoppel, "affirmative misconduct 'appears to require something more than failing to provide accurate information or negligently giving wrong advice.'" *Weinberger & Vizy*, DAB No. 2823, at 19 (citing *Hartford Healthcare at Home, Inc.*, DAB No. 2787, at 10 (2017) (citing *Traylor Prods. & Servs., Inc.*, DAB No. 1331, at 7 (1992))). The picture the record paints is, at most, one of error by NGS in re-enrolling someone who was not even eligible to be reinstated while a re-enrollment bar was in effect, which NGS later addressed through its 2016 determinations, including that in October 2016 on reopening, which was authorized by section 498.30.[11]

III. *The ALJ did not err or abuse her discretion in denying the request for issuance of subpoenas, which Petitioner sought to support his estoppel claim.*

Petitioner sought discovery below through the issuance of subpoenas. He continues to assert, as he did below, that "[t]he subpoenas were necessary for witness testimony to support and develop the elements of Estoppel." Reply at 6. He maintains that the evidence he was seeking through the issuance of subpoenas was reasonably necessary to present his case, but that CMS "deliberately did not disclose this information" and that the denial of his subpoena request "made meaningful discovery impossible." *Id.* at 7.

The regulations in 42 C.F.R. Part 498 which govern this appeal do not provide for pre-hearing discovery as it is available in federal courts through the application of the Federal Rules of Civil Procedures. "The part 498 regulations give the ALJ one and only one tool – namely the subpoena – for compelling the production of relevant evidence that the parties have not voluntarily produced." *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 32 n.16 (2011); *see also Ridgeview Hospital*, Ruling No. 2015-1 (Jan. 12, 2015) denying reconsideration of DAB No. 2593 (Part 498 regulations "do not provide for the sort of freewheeling discovery mechanisms available in some court proceedings" and "merely permit an ALJ to issue subpoenas" under section 498.58); *S.A. Brooks, DPM*, DAB No. 2615, at 17, n.9 (2015) (although "traditional discovery procedures are not available in a Part 498 proceeding, a party in such a proceeding may request a subpoena identifying documents to be produced" under section 498.58).

[11] CMS asserts that the contractor's "mistaken" approval of a "premature" application to re-enroll does not rise to the level of affirmative misconduct required to establish estoppel. CMS Response at 17-18, 24-25. CMS does not assert the applicability of a defense such as unclean hands. In any case, the Board is bound by all applicable laws and regulations and is not empowered to grant equitable relief. *See Cornelius M. Donohue, DPM*, DAB No. 2888, at 9 (2018) (citing *Maneice*, DAB No. 2826, at 7-8 and stating that the Board may not reverse a revocation on laches or other equitable doctrines); *Commonwealth of Virginia*, DAB No. at 2876, at 22 (2018) (citing *Kan. Dep't of Admin.*, DAB No. 2845, at 12 (2018) (equitable defenses of unclean hands, stale claims, laches, waiver and estoppel are "not cognizable in this forum"), *appeal dismissed*, C.A. No. 6:18-cv-01104 (D. Kan. Oct. 17, 2018)).

Because the Part 498 procedures permit only limited discovery through the issuance of subpoenas it is important to determine whether the evidence sought through the issuance of subpoenas is indeed "reasonably necessary for the full presentation of a [Part 498] case" before an ALJ. 42 C.F.R. § 498.58(a). To determine whether the evidence sought is "reasonably necessary for the full presentation of a case," we would need to ask what issue(s) was (were) properly before the ALJ for her resolution. As the ALJ Decision correctly stated, the sole and dispositive issue before her was "[w]hether CMS had a basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1) and 42 C.F.R. § 424.535(a)(9)." ALJ Decision at 7. As the ALJ also determined, and we agree, CMS has shown that revocation under these regulations is lawful. We have set out above our rationale for concurring with the ALJ's determination, though, as we stated, revocation here would have been lawful even if CMS established only section 424.535(a)(1) as the basis for its action. Petitioner has not suggested that any of the testimony or documents he sought to subpoena had any relevance to that dispositive issue.

Whether any employee or agent of CMS or NGS gave assurances or advice concerning the re-enrollment application, which was approved, and whether Petitioner relied on such assurances or advice, are immaterial to the issue that was before the ALJ. Even assuming that Petitioner had relied on whatever assurances or advice CMS or NGS employees gave, that would not change the outcome here, that is, until the expiration of the re-enrollment bar imposed in connection with the section 424.535(a)(3) revocation, Petitioner remained ineligible to participate in and bill Medicare.[12] Notably, he does not claim that anyone from CMS or NGS advised him that he could seek re-enrollment without waiting until the bar expired and that he could be reinstated while the bar was in effect. He nevertheless applied to re-enroll before the expiration of the bar and, evidently based in part on Petitioner's own misrepresentations and omissions, NGS permitted him to re-enroll and bill. Moreover, Petitioner did not dispute his failure to timely report his conviction and produced no evidence that he did timely report. Accordingly, both revocation bases – section 424.535(a)(1) and section 424.535(a)(9) – have been established and were not relevant to the subpoena requests.

The ALJ did not err or abuse her discretion in denying the request for issuance of subpoenas where discovery was sought to support an equity-based claim which the ALJ correctly stated could not be the basis for reinstating billing privileges and where the requests "do not relate to the issue of whether CMS had a basis to revoke" billing

[12] Our rationale in this case, however, should not be construed to mean that CMS or its contractor cannot ever determine it is indeed appropriate to later reinstate billing privileges while a re-enrollment bar is in effect. The history of this case does *not* indicate that that is what NGS or CMS in fact determined, however.

privileges. ALJ Decision at 7; *see Bledsoe*, DAB No. 2753, at 12-13 (holding that the ALJ properly denied a subpoena request that was not reasonably necessary for the full presentation of the case since it sought information to support abuse-of-discretion and other claims that the ALJ had no authority to address), 13 (ALJ did not err where he denied subpoena request for a document that could not have any affect on the outcome of on the dispositive legal question); *Ridgeview Hospital*, DAB No. 2593, at 16 (2014) (ALJ did not err in denying a request for an order to compel CMS to produce documents or to issue subpoenas since the documents sought did not relate to a material disputed issue); *Oaks of Mid City* at 34 (upholding the denial of a subpoena for testimony because its proponent did not show that the testimony was necessary for the full presentation of its case "on the issues properly before the ALJ").

IV. *The documents Petitioner submitted, which duplicate those submitted to the ALJ, are not admitted; to the extent their submittal to the Board may be construed as an argument about the ALJ's ruling excluding some of them, Petitioner has not made a case for ALJ error or abuse of discretion.*

Petitioner submitted documents, marked Petitioner's exhibits 1 through 10, with his opening brief in support of his request for Board review of the ALJ Decision. The Board decides appeals of ALJ decisions on CMS enrollment determinations (which includes revocation of enrollment) based on the evidentiary record developed below during the ALJ proceedings. The Board is barred from admitting new evidence in an appeal such as this one. 42 C.F.R. § 498.86(a) ("*Except for provider or supplier enrollment appeals*, the Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing (or the documents considered by the ALJ if the hearing was waived) if the Board considers that the additional evidence is relevant and material to an issue before it." (Emphasis added.)); *MedStar Health, Inc.*, DAB No. 2684, at 6 (2016) (stating that section 498.86(a) "expressly except[s] provider and supplier enrollment appeals from the general rule authorizing the Board to admit additional evidence that the Board finds is relevant and material"); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 3-4 (2009) (discussing CMS's rationale for excepting provider or supplier enrollment appeals from the general rule authorizing the Board to exercise discretion to admit additional evidence, a revision made to section 498.86(a) in 2008); *Guidelines*, "Development Of The Record On Appeal," ¶ (f) ("The Board may not admit evidence into the record in addition to the evidence introduced at the ALJ hearing or in addition to the documents considered by the ALJ if the hearing was waived. See 42 C.F.R. § 498.86(a)."). We therefore cannot admit any evidence not in the record before the ALJ.

The ten exhibits Petitioner submitted to us appear to duplicate and correspond precisely to the ten exhibits Petitioner submitted to the ALJ. The ALJ admitted Petitioner's exhibits 2, 6, 7, and 8. ALJ Decision at 5. Since Petitioner's exhibits 2, 6, 7, and 8 submitted to us appear to be duplicate copies of Petitioner's exhibits 2, 6, 7, and 8 that the ALJ admitted, there was no need to submit them again as they already are a part of the record of the ALJ proceedings which we review on appeal.

The ALJ excluded documents offered as Petitioner's exhibits 1, 3, 4, 5, 9, and 10, on CMS's objection to their admission for failure to submit those documents at the reconsideration level of review or earlier. *Id.* at 5 & 5 n.3 (stating that, in provider/supplier enrollment appeals, 42 C.F.R. § 498.56(e) requires the ALJ to determine whether the provider or supplier had good cause for submitting evidence to the ALJ that was not previously submitted, and, if the ALJ does not find good cause, the ALJ must exclude that evidence). The ALJ determined that Petitioner "made no showing of good cause to admit P. Exs. 1, 3, 4, 5, 9, and 10" and excluded those exhibits. *Id.* at 5.

Petitioner merely submitted duplicate copies of excluded exhibits 1, 3, 4, 5, 9, and 10 with no explanation of why he was doing so. He makes no argument alleging ALJ error or abuse of discretion in excluding them in reliance on section 498.56(e). He does not dispute his failure to show good cause before the ALJ. Under these circumstances, we need not address that aspect of the ALJ's evidentiary ruling. *Cf. Guidelines*, "Starting the Review Process" ¶ (d) (stating that "[y]our request for review must specify each finding of fact and conclusion of law with which you disagree, and your basis for contending that each such finding or conclusion" by the ALJ "is unsupported or incorrect" and that the Board "expects that the basis for each challenge to a finding or conclusion in the ALJ decision or dismissal will be set forth in a separate paragraph or section and that the accompanying arguments will be concisely stated."). Nevertheless, we note that the ALJ correctly stated that she is required by section 498.56(e) to exclude new evidence offered without good cause. *See Mohammad Nawaz, M.D., and Mohammad Zaim, M.D., PA*, DAB No. 2687, at 13 (2016) and *Zille Shah, M.D., and Zille Huma Zaim, M.D., PA*, DAB No. 2688, at 14 (2016) (finding no ALJ abuse of discretion or legal error in construing the regulation similarly and in excluding new evidence for failure to show good cause; stating that section 498.56(e) provided petitioners adequate notice of the requirement to submit evidence on reconsideration), *aff'd*, *Mohammad Nawaz, M.D. and Mohammad Zaim, M.D., P.A. v. Price*; *Zille Shah, M.D. & Zille Huma Zaim, M.D., P.A. v. Price*, Nos. 4:16cv386 and 4:16cv387, 2017 WL 2798230 (E.D. Tex. June 28, 2017).

Conclusion

The Board affirms the ALJ's determination to uphold the revocation pursuant to 42 C.F.R. §§ 424.535(a)(1) and 424.535(a)(9).

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member