

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Donna Maneice, M.D.  
(NPI: 1932288339),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-866

Decision No. CR4804

Date: March 3, 2017

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Donna Maneice, M.D. (Dr. Maneice or Petitioner) based on Dr. Maneice's felony conviction in 2012 for attempted income tax evasion and filing fraudulent income tax returns. Petitioner requested a hearing before an administrative law judge (ALJ) to dispute the revocation. Because a felony conviction for income tax evasion is considered per se detrimental to the best interests of the Medicare program and its beneficiaries, I must affirm CMS's actions.

**I. Background and Procedural History**

Dr. Maneice is a physician licensed in the states of Alabama and Georgia. P. Exhibit (Ex.) 6 at 1; P. Ex. 2 at 1. She enrolled in the Medicare program as a supplier in June 2012. P. Ex. 6 at 2; *see* 42 U.S.C. § 1395x(d) (defining a "supplier" in the Medicare program to include "a physician or other practitioner.").

In a June 20, 2016 initial determination, a CMS administrative contractor revoked Petitioner's Medicare enrollment and billing privileges, retroactive to June 7, 2012, for the following reasons:

**42 CFR § 424.535(a)(3) – Felonies**

The Centers for Medicare & Medicaid Services has been made aware of your June 7, 2012 felony conviction for Attempt to Evade or Defeat Tax in violation of Title 26 of the United States Code § 7201 and Fraud and False Statements in violation of Title 26 of the United States Code § 7206(1) by the United States District Court, Middle District of Alabama.

**42 CFR § 424.535(a)(9) – Failure to Report**

You were adjudged guilty of a felony for Attempt to Evade or Defeat Tax and Fraud and False Statements by the United States District Court, Middle District of Alabama on June 7, 2012. You did not notify CMS of this adverse legal action, as required by 42 CFR § 424.516.

CMS Ex. 2 at 1 (emphasis in original). The CMS administrative contractor barred Petitioner from reenrolling in the Medicare program for three years. CMS Ex. 2 at 2.

Petitioner requested reconsideration of the revocation, filing arguments and documents to support her request. CMS Ex. 3. In the reconsideration request, Petitioner conceded her felony conviction in 2012 for tax evasion. CMS Ex. 3 at 4. However, Petitioner asserted that she “first disclosed her conviction to the [CMS administrative contractor] and CMS on June 19, 2012 in compliance with 42 C.F.R. § 424.516(d)(1)(ii) . . . [and] provided four enclosures with that letter that included the plea agreement and final judgment.” CMS Ex. 3 at 4. Petitioner also stated that “[o]n multiple other occasions she has made this disclosure to [the CMS administrative contractor] and CMS” and that Petitioner was approved as a Medicare supplier. CMS Ex. 3 at 4. Petitioner attached to the reconsideration request a copy of the June 19, 2012 letter providing a detailed disclosure of her conviction. CMS Ex. 3 at 31-34. She also included a similar letter disclosing her conviction dated February 8, 2013. CMS Ex. 3 at 35-38.

On August 16, 2016, the CMS administrative contractor's hearing officer issued an unfavorable reconsidered determination. CMS Ex. 1. In upholding the revocation, however, the hearing officer modified the bases for revocation. The hearing officer stated that CMS would no longer proceed with revocation based upon a violation of 42 C.F.R. § 424.535(a)(9), but would uphold the revocation based only upon 42 C.F.R. § 424.535(a)(3). In explaining the reason for revising the bases for revocation, the

hearing officer acknowledged that Petitioner's enrollment record showed that she had timely reported her conviction to CMS:

[Petitioner] did self-report the felony to [the CMS administrative contractor] on or about May 12, 2012 with additional documentation received June 25, 2012. The documentation was submitted by a supplier group, Riverdale Medical Center LLC, for which Dr. Maneice had an active reassignment but was not associated as an owner or managing employee. The processing analyst at [the CMS administrative contractor] failed to properly elevate the disclosure for review and subsequent action against Dr. Maneice's individual enrollment record as appropriate. This oversight is considered to be a result of clerical error.

CMS Ex. 1 at 2. The hearing officer went on to state, however, that "[t]his was the only identified incident of disclosure . . . all identified CMS-855I forms submitted and certified by Dr. Maneice after the felony conviction were completed indicating 'No' in the adverse action section (Section 3.1 of form CMS-855I)." CMS Ex. 1 at 2.

The hearing officer stated that revocation based upon 42 C.F.R. § 424.535(a)(3) would be upheld because Petitioner's June 7, 2012 felony conviction was "within the preceding 10 years." CMS Ex. 1 at 3. The hearing officer noted that the fact that Petitioner's disclosure of her conviction was not acted upon due to clerical error did not nullify a revocation action under 42 C.F.R. § 424.535(a)(3). The hearing officer found that the effective date of revocation was set appropriately as the date of conviction, June 7, 2012, per 42 C.F.R. § 424.535(g). CMS Ex. 1 at 3.

Petitioner, through counsel, timely requested a hearing. I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. In accordance with the Order, CMS filed its prehearing exchange, which included a motion for summary judgment and brief (CMS Br.), and 14 exhibits. Petitioner filed a brief in opposition to summary judgment (P. Br.) and six exhibits, including Petitioner's declaration (P. Ex. 6).

## **II. Decision on the Record**

Neither CMS nor Petitioner objected to any of the proposed exhibits that the parties submitted in this case. *See* Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e). Therefore, I admit CMS Exs. 1-14 and P. Exs. 1-6 into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b); *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823 at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Petitioner submitted her written direct testimony. P. Ex. 6. However, CMS did not seek to cross-examine Petitioner. Consequently, I will not hold an in-person hearing in this matter, and I issue this decision based on the written record. Order ¶¶ 8-11; CRDP § 19(d).

### **III. Issue**

Whether CMS had a legitimate basis to revoke Dr. Maneice's Medicare enrollment and billing privileges.

### **IV. Jurisdiction**

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

### **V. Findings of Fact, Conclusions of Law, and Analysis**

My findings of fact and conclusions of law are set forth in italics and bold font.

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) to create regulations governing the enrollment of suppliers in the Medicare program, and to discontinue the enrollment of a physician or other supplier who "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the [Medicare] program or program beneficiaries." 42 U.S.C. § 1395u(h)(8), 1395cc(j).

Under the Secretary's regulations in effect at the time of Petitioner's felony conviction in 2012, CMS may revoke a supplier's Medicare enrollment and billing privileges when a supplier is: (a) convicted of a federal or state felony offense; (b) within ten years preceding enrollment or revalidation of enrollment; and (c) the felony offense is one that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). This section includes a non-exhaustive list of

the types of felony offenses that CMS considers detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i)(A)-(D) (2011).<sup>1</sup>

There are three different types of review an ALJ may have to perform when reviewing CMS's determination to revoke based on section 424.535(a)(3) depending on whether the felony for which a supplier was convicted (1) is specifically listed in the regulations, (2) is similar to a crime listed in the regulations, or (3) has been determined to be detrimental to the best interests of the Medicare program and its beneficiaries through a case-by-case determination.

When a supplier is convicted of a felony specifically listed in the regulations, an ALJ applies a deferential review standard. Such felonies are considered per se detrimental to the best interests of the Medicare program and its beneficiaries. *Letantia Bussell, M.D.*, DAB No. 2196 at 9 (2008).

When a supplier is convicted of a felony similar to the ones listed in the regulations, an ALJ must look to the circumstances surrounding the conviction to determine if the felony conviction is similar to one of the offenses listed in the regulations. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 11 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Even if a criminal offense is not similar to one of the listed crimes in the regulations, it still may be found to be detrimental to the best interests of the

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<sup>1</sup> The Secretary revised section 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). The modifications to the text include: 1) expanding the list of individuals whose felony conviction can result in revocation of the supplier to include a supplier's manager; 2) simplifying the time frame as to when a felony conviction can be a basis for revocation from ten years preceding enrollment or revalidation of enrollment to "within the preceding 10 years"; 3) defining "convicted" based on the definition found at 42 C.F.R. § 1001.2; 4) changing the phrase "CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries" from the present perfect to the present tense; 5) and adding the second clause to the phrase "Offenses include, but are not limited in scope and severity to," which refers to a list of examples of the types of felonies that CMS considers to be detrimental to the best interests of the Medicare program and its beneficiaries. 79 Fed. Reg. at 72,532. I note that in the reconsidered determination, the hearing officer stated that Petitioner's conviction was within the preceding ten years (CMS Ex. 1 at 3), thus indicating that the hearing officer applied the new version of 42 C.F.R. § 424.535(a)(3). In their briefs, the parties did not acknowledge or discuss the revisions to section 424.535(a)(3). However, CMS cited and applied the language of both the old and new versions of section 424.535(a)(3) in making its arguments. CMS Br. at 1, 5. In this case, I apply the version of 42 C.F.R. § 424.535(a)(3) that was in effect at the time of Petitioner's conviction. However, it would make no difference were I to apply the modified version of section 424.535(a)(3) because it would not change the result in this case.

Medicare program and program beneficiaries if it is one that falls into one of the four general categories of crimes listed in the regulations (i.e., felony crimes against persons, financial crimes, any felony that placed the Medicare program or its beneficiaries at immediate risk, and any felonies that would result in mandatory exclusion under section 1128(a) of the Social Security Act). *Ahmed*, DAB No. 2261 at 10, 12.

When a supplier is convicted of a felony that is neither listed in the regulations nor similar to a felony listed in the regulations, an ALJ must determine whether CMS's case-by-case determination that a felony offense is detrimental to the best interests of the program and its beneficiaries is reasonable. *See Fady Fayad, M.D.*, DAB No. 2266 at 8, 16-17 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699, 704 (E.D. Mich. 2011).

1. ***Petitioner pled guilty to attempted income tax evasion and filing a false income tax return, in violation of 26 U.S.C. §§ 7201 and 7206(1) and 18 U.S.C. § 2, and on June 7, 2012, the U.S. District Court for the Middle District of Alabama (District Court) imposed a judgment against Petitioner and sentenced her to six months of house arrest, a three-year term of probation, 200 hours of community service, and restitution in the amount of \$85,396.00.***

On August 31, 2011, a federal grand jury convened by the District Court issued a Second Superseding Indictment charging Dr. Maneice and her husband with four counts of tax evasion from 2004-2007; five counts of filing false tax returns from 2004-2007, and one count of failing to file a tax return for 2007, in violation of 18 U.S.C. § 2 and 26 U.S.C. §§ 7201, 7206(1), and 7203. CMS Ex. 6. The indictment charged that Petitioner filed the false tax returns for tax years 2004 through 2007 in April 2011. CMS Ex. 6 at 7-9.

On November 16, 2011, Petitioner pled guilty to Counts 3 and 9 of the Second Superseding Indictment, which were felony charges of tax evasion and filing a false tax return for the tax year 2006. CMS Ex. 7; *see also* CMS Ex. 6 at 4-5, 8-9; CMS Ex. 8 at 1. On June 7, 2012, the District Court imposed judgment on Petitioner and adjudicated her guilty of one count of "Attempt to Evade or Defeat Tax" and one count of making fraudulent and false statements in a tax return, in violation of 26 U.S.C. §§ 7201 and 7206(1) and 18 U.S.C. § 2. CMS Ex. 8 at 1. The District Court dismissed the other counts in the indictment. CMS Ex. 8 at 1. The District Court sentenced Petitioner to six months of house arrest, a three-year term of probation, 200 hours of community service, and restitution of \$85,396.00. CMS Ex. 8 at 2-4. The District Court filed a Judgment in a Criminal Case against Petitioner on June 11, 2012. CMS Ex. 8 at 1.

Petitioner does not dispute Petitioner's conviction related to felony income tax evasion. P. Br. at 2.

**2. CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(3) to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was convicted of felony offenses that are per se detrimental to the best interests of the Medicare program and its beneficiaries.**

As stated above, CMS may revoke a supplier's Medicare billing privileges if the supplier is: (1) convicted of a federal or state felony offense; (2) within ten years preceding enrollment or revalidation of enrollment; and (3) the felony offense is one that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3) (2011).

In the present case, the record establishes that Petitioner was convicted of two offenses on June 7, 2012. CMS Ex. 8; P. Br. at 2. Petitioner testified that she obtained Medicare billing privileges on June 29, 2012, although there is no other documentary evidence to support this date. P. Ex. 6 at 2. Based on this testimony, I conclude that Petitioner's conviction occurred within ten years of her enrollment. However, even if Petitioner's initial date of enrollment was not June 29, 2012, Petitioner's conviction necessarily took place within ten years preceding the revalidation of her enrollment since suppliers are required to revalidate enrollment at least every five years. 42 C.F.R. § 424.515.

In addition, the offenses that Petitioner was convicted of committing are felonies under 18 U.S.C. § 3559(a). This is because a violation of 26 U.S.C. § 7201 has a maximum term of imprisonment of not more than 5 years and a violation of 26 U.S.C. § 7206(1) has a maximum term of imprisonment of not more than 3 years.

The next issue is whether Petitioner was convicted of a felony detrimental to the best interests of the Medicare program and its beneficiaries. The pertinent regulatory provision lists "financial crimes" as one of the categories of offenses considered detrimental to the Medicare program and its beneficiaries. The regulation provides:

(a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:

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(3) *Felonies.* The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.

(i) Offenses include —

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

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

The record is clear that Petitioner’s felony conviction was for attempted income tax evasion. Petitioner was convicted of violating 26 U.S.C. § 7201, which states: “Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . .”

Petitioner was also convicted of 26 U.S.C. § 7206(1), which makes it a felony to “[w]illfully make[] and subscribe[] any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.”

When pleading guilty to violating both of these statutes, Petitioner admitted the following facts involving both her and her husband, William Paul, which are set forth in the plea agreement:

### **FACTUAL BASIS**

21. The Defendant admits the allegations charged in Counts 3 and 9 of the Indictment and understands that the nature of the charges to which the plea is offered involves proof as follows:

a. Between 2004 and 2007, within the Middle District of Alabama, the Defendant received taxable income from medical practices, owed a substantial tax and willfully failed to report the income on federal income tax returns and willfully failed to pay the income taxes. The Defendant disguised the income from the medical practices as loans and misrepresented to [Internal Revenue Service (IRS)] employees that the payments to her were loans and not income. In particular, the Defendant failed to report as income approximately \$90,980 in 2004, \$59,275 in 2005, \$160,410 in 2006, and \$107,400 in 2007. The Defendant owed taxes in the following approximate amounts: \$14,202 in 2004, \$8,755 in 2005, \$35,424 in 2006, and \$27,015 in 2007.



b. William Paul aided and abetted the Defendant in her attempt to evade the payment of her taxes. William Paul assisted the Defendant in disguising the payments to her from the medical practices as loans when, in fact, in 2010, as both Defendant and William Paul then and there well knew, the payments were income. William Paul misrepresented to IRS employees that the payments were loans, when in fact they were income to the Defendant. To further assist in evading the payment of the Defendant's taxes, William Paul caused Rheumatology Specialists Arthritis and Osteoporosis Center, Inc. (a/k/a Children & Adult Arthritis & Osteoporosis Center, Inc.) to not file a federal tax return for the 2006 tax year.

c. On or about April 7, 2011, [Defendant] did willfully make and subscribe a false 2007 U.S. Individual Income Tax Return (IRS Form 1040) which was verified by a written declaration that it was made under the penalties of perjury and which she did not believe to be true and correct as to every material matter. That income tax return, which was filed with the Internal Revenue Service, reported total income of \$2,589 on line 22, whereas, as she then and there well knew and believed, she received total income in addition to the amount stated on the return.

d. The actions of the Defendant recounted above were in all respects voluntary, knowing, deliberate, and willful, and were not committed by mistake, accident or other innocent reason.

CMS Ex. 7 at 9-10.

Petitioner does not dispute that she was convicted of the felonies of attempted tax evasion and filing a false income tax return. As indicated above, the offense of "income tax evasion" is one of the enumerated felonies listed in the category of "financial crimes" under 42 C.F.R. § 424.535(a)(3)(i)(B). Therefore, these convictions taken together amount to an offense that is per se detrimental to the best interests of the Medicare program. *See Bussell*, DAB No. 2196 at 9.

Accordingly, based on the evidence of record, I conclude that CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B).

*3. Neither equitable estoppel nor laches applies in this case.*

Petitioner argues that CMS has acted unfairly and unreasonably in revoking her Medicare enrollment and billing privileges four and a half years after it first became aware of her conviction. Petitioner argues that, due to CMS's delay in revoking her, the equitable doctrine of laches should operate to bar CMS from excluding her. Petitioner contends further that CMS should be equitably estopped from taking the revocation action because she disclosed her conviction "on multiple occasions" to CMS. RFH; P. Ex. 6; P. Br. at 3. Petitioner alleges that she first notified CMS of her plea agreement in December 2011 and again notified CMS of her conviction in June 2012 and February 2013. Petitioner argues that in establishing her medical practice, she relied upon CMS's representations in the form of "multiple approvals for billing privileges" during the years 2012 through 2015, and was unaware that CMS could still bring a revocation action years later. Petitioner claims that had she known that her Medicare enrollment and billing privileges would be revoked, she would have sought employment in 2012 that did not require her to be enrolled in Medicare. Petitioner states that as a result of the revocation, she has lost her job and suffered financial damages. P. Ex. 6; P. Br. at 6-7.

More specifically, Petitioner contends that she notified CMS of her plea agreement on December 23, 2011. P. Br. at 3. As support for this statement, Petitioner cites a letter she wrote dated December 23, 2011. The letter, which has no addressee, states, among other things, that she decided "to plead guilty to one count of tax evasion and one count of filing a false tax return." CMS Ex. 10 at 2.

The record also contains a four-page letter dated June 19, 2012, written by Petitioner and addressed to "Medicare Provider Credentialing Attn: Credentialing committee." In this letter, Petitioner described the circumstances surrounding the IRS's criminal investigation of her and her husband for tax evasion and stated that she pled guilty to tax evasion and was sentenced on June 7, 2012. P. Ex. 1. According to the letter, Petitioner enclosed the following documents: a "Malpractice Face Sheet," the plea agreement, the District Court's final judgment, and four character reference letters. P. Ex. 1 at 4; CMS Ex. 3 at 34.

On May 12 and June 25 and 26, 2012, Petitioner's employer, Riverdale Medical Center LLC, acting on Petitioner's behalf, sent the CMS administrative contractor documentation by fax and mail relating to her felony conviction. The documents consisted of Petitioner's above-mentioned letters dated December 23, 2011, and June 19, 2012, the District Court's judgment and sentencing documents, and various character reference letters. CMS Ex. 10. CMS does not dispute that the CMS administrative contractor received these documents disclosing Petitioner's felony conviction. CMS Br. at 2-3; *see* CMS Ex. 10 at 35; CMS Ex. 1 at 2.

However, Petitioner asserts that she sent another letter dated February 8, 2013, again addressed to “Medicare Provider Credentialing.” P. Ex. 2.<sup>2</sup> In almost all respects, the letter is identical to her June 19, 2012 letter.

Between 2013 and 2015, Petitioner filed several CMS-855R and CMS-855I applications.<sup>3</sup> With the exception of an October 2015 CMS-855I application, which was returned to Petitioner, CMS, through its administrative contractor, approved the applications. Based on the exhibits filed by the parties, below is a list of the filings:

- February 2013: Petitioner filed a CMS-855R application to reassign her billing privileges to a new group. On February 21, 2013, CMS approved the application effective January 2, 2013. P. Ex. 3; CMS Ex. 3 at 39-40.
- January 2015: Petitioner filed a CMS-855R application to reassign her billing privileges to another group. On April 10, 2015, CMS approved the application, with an effective date of January 1, 2015. CMS Ex. 11 at 4; *see* CMS Ex. 13 at 2.
- Subsequent to January 2015: Petitioner filed another CMS-855R application to reassign her billing privileges to yet another group. On July 2, 2015, CMS approved this application, with an effective date of March 20, 2015. P. Ex. 5; P. Br. at 3.
- June 25, 2015: Petitioner filed a CMS-885I application to update her name, specifically, to change her last name from “Paul” to “Maneice.” CMS Ex. 11. In Section 3 of the application, Petitioner indicated that she had no final adverse legal action that had been taken against her. CMS Ex. 11 at 12; *see* CMS Ex. 13 at 2 (August 15, 2016 letter to the CMS administrative contractor admitting that Petitioner had checked “No” instead of “Yes” in Section 3). On August 4, 2015, CMS approved the CMS-855I, and Petitioner’s last name was updated. CMS Ex. 13 at 14-15.<sup>4</sup>

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<sup>2</sup> Petitioner did not list any address for “Medicare Provider Credentialing” or provide any proof of mailing of this letter.

<sup>3</sup> The form CMS-855I is the Medicare enrollment application for physicians and non-physician practitioners and physician and non-physician practitioner organizations. The instructions for the CMS-855I state that the form is to be used for enrollment, and it is also to be used by those currently enrolled who need to make changes to enrollment information. The form CMS-855R is the Medicare enrollment application for the reassignment of Medicare benefits. An individual reassigning his or her benefits must complete both a CMS-855I and a CMS-855R if he or she is not enrolled in Medicare.

<sup>4</sup> Throughout CMS Ex. 13, there are duplicate copies of the cited documents.

- October 12, 2015: Petitioner filed a CMS-855I on October 12, 2015. CMS Ex. 12 at 3-37. In Section 3 of the application, Petitioner marked the box “Yes” to indicate that she had a final adverse legal action taken against her, but did not specifically list her conviction or provide other details as requested. CMS Ex. 12 at 19. Petitioner’s prospective new group withdrew the application, and CMS returned the application on October 15, 2015. CMS Ex. 12 at 1, 2.

Petitioner’s equitable arguments are unavailing. I do not have the authority to grant equitable relief. *See US Ultrasound*, DAB No. 2302 at 8 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground . . .”). Moreover, even if I had such authority, I would find that Petitioner has not established the elements of estoppel, which are as follows:

[T]he party seeking relief must, at minimum, show that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government’s employees or agents engaged in “affirmative misconduct.” *See Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Estate of James v. U.S. Dept. of Agriculture*, 404 F.3d 989, 995 (6th Cir. 2005); *Tennessee Dept. of Health and Environment*, DAB No. 1082 (1989).

*Rosewood Living Ctr.*, DAB No. 2019 at 13 (2006) (emphasis in original). Here, although Petitioner claims that she has been treated unfairly by CMS and has relied on CMS’s representations, Petitioner has not demonstrated any intentional misrepresentation or affirmative misconduct by CMS personnel or those employed by the CMS administrative contractor. The fact that CMS’s contractor failed to appropriately act upon the information Petitioner provided regarding her conviction does not amount to affirmative misconduct on its part. CMS Ex. 1 at 2 (“This oversight is considered to be a result of clerical error.”). Therefore, Petitioner’s equitable estoppel argument must be rejected.

Likewise, with respect to Petitioner’s laches argument, nothing in the regulations gives me the authority to overturn the revocation based on the four-year delay by CMS in bringing the revocation action against Petitioner. Under 42 C.F.R. § 424.535(a)(3),

CMS was authorized to act when a supplier has a felony conviction within 10 years preceding its enrollment or revalidation of its enrollment. Petitioner has not identified any statute of limitations that legally bars the revocation, even when it is so delayed.

I have concluded that CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). I have no authority to review the exercise of discretion by CMS to revoke a supplier. *Bussell*, DAB No. 2196 at 13; *see Ahmed*, DAB No. 2261 at 19. Rather, "the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke." *Bussell*, DAB No. 2196 at 13 (emphasis in original). An ALJ's review of CMS's revocation is "limited to whether CMS had established a legal basis for its actions." *Id.* Thus, once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id.* at 10.

**4. *The effective date of Petitioner's revocation is June 7, 2012, the date of her conviction. 42 C.F.R. § 424.535(g).***

The regulation at 42 C.F.R. § 424.535(g) states that when a revocation is based on a felony conviction, the revocation of the supplier's billing privileges is effective as of the date of the felony conviction. Petitioner's guilty plea and the District Court's entry of judgment are both considered to be a conviction. 42 C.F.R. § 424.535(a)(3)(i).

Therefore, under the regulations, CMS properly set the revocation effective date as June 7, 2012, which is the date the District Court entered judgment against Petitioner. CMS Ex. 8 at 1.

However, it is worth noting that the purpose behind the retroactive revocation of Medicare billing privileges set forth in section 424.535(g) is not served by retroactively revoking Petitioner in this case. When the Secretary promulgated the provider and supplier enrollment and revocation regulations in 2006, the Secretary made all revocations effective 30 days following notice of the revocation. 71 Fed. Reg. 20,754, 20,780 (April 21, 2006). However, in 2008, the Secretary identified the failure of providers and suppliers to report information about adverse legal actions as a problem.

While physician and NPP [Nonphysician Practitioner] organizations and individual practitioners are required to report changes within 90 days of the reportable event, in many cases, there is little or no incentive for them to report a change that may adversely affect their ability to continue to receive Medicare payments. For example, physician and NPP organizations and individual practitioners purposely may fail to report a felony conviction as described in § 424.535(a)(3),

or other final adverse action, such as a revocation or suspension of a license to a provider of health care by any State licensing authority, or a revocation or suspension of accreditation, because reporting this action may result in the revocation of their Medicare billing privileges. Thus, unless CMS or our designated contractor becomes aware of the conviction or final adverse action through other means, the change may never be reported by a physician and NPP organization or individual practitioner. Alternatively, if CMS or our designated contractor becomes aware of the conviction or final adverse action after the fact, we have lacked the regulatory authority to collect overpayments for the period in which the physician and NPP organizations and individual practitioners should have had their billing privileges revoked.

73 Fed. Reg. 69,725, 69,777 (Nov. 19, 2008). One change that the Secretary made to the regulations to resolve this problem was to retroactively revoke the Medicare billing privileges for convicted felons to the date of conviction. 73 Fed. Reg. at 69,865-66, 69,940-41. However, nowhere in the preamble to the final rule was there discussion of a scenario where a supplier provides timely notice of a criminal conviction, is enrolled, and then, due to a CMS administrative contractor's error, is not revoked until years later.

In the present case, Petitioner provided timely notice to CMS of her conviction; however, the CMS administrative contractor mishandled this notice. Although the hearing officer who issued the reconsidered determination acknowledged this, the hearing officer also stated Petitioner failed to indicate that she was subject to an adverse legal action on all subsequent CMS-855I applications that Petitioner filed.<sup>5</sup> According to the record in this case, the hearing officer's statement is not accurate. It is true that in June 2015 Petitioner filed a CMS-855I enrollment application that inaccurately indicated no adverse legal actions had been taken against her. However, in September 2015, Petitioner filed a CMS-855I application in which she indicated that she was subject to an adverse legal action. In any event, by the time Petitioner filed the CMS-855I applications with CMS in 2015, Petitioner had already been billing the Medicare program for three years for services she provided to Medicare beneficiaries.

Although Petitioner was convicted of attempted income tax evasion, a crime that is considered under the regulations to be per se detrimental to the Medicare program and its

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<sup>5</sup> As detailed earlier, Petitioner filed several CMS-855R applications in the intervening years after 2012 until mid-2015. However, unlike the CMS-855I application, the CMS-855R application does not ask whether the provider or supplier completing the application has been subject to an adverse legal action. CMS Ex. 14.

beneficiaries, this does not mean that CMS lacked the discretion and authority not to revoke her. *Brian K. Ellefsen, DO*, DAB No. 2626 at 6-7 (2015). Therefore, it was not unreasonable, given the background of Petitioner's conviction and the testimony she provided for prosecutors against her husband, that CMS might have permitted Petitioner to enroll as a supplier. *See P. Ex. 1.*

Petitioner states that she now faces significant financial hardship, and had she known that CMS would revoke her Medicare billing privileges at a later date, she would have sought employment in 2012 that did not require Medicare enrollment. However, because there is no flexibility in the regulations, I have no choice but to uphold the effective date of revocation of Petitioner's Medicare enrollment and billing privileges, but I find the timing of the revocation to be both unfortunate and unfair.

## **VI. Conclusion**

I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

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/s/

Scott Anderson  
Administrative Law Judge