Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Kimberly Shipper, P.A.
Docket No. A-17-31
Decision No. 2804
July 24, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Kimberly Shipper, P.A. (Petitioner) appeals the November 9, 2016 administrative law judge decision in the matter of *Kimberly Shipper, P.A.*, DAB CR4731 (ALJ Decision). The ALJ concluded that the Centers for Medicare & Medicaid Services (CMS) properly revoked Petitioner's enrollment in Medicare pursuant to both 42 C.F.R. §§ 424.535(a)(3) and 424.535(a)(9) because she was convicted of a state felony offense – a crime against a person – that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries and because she failed to report the adverse legal action to the Medicare administrative contractor within 30 days of the conviction. We affirm the ALJ Decision for the reasons discussed below.

Legal Background

To receive payment under Medicare, "providers" and "suppliers" must "enroll" in the program. 42 C.F.R. § 424.500.[1] Enrollment confers program "billing privileges" – that is, the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502, 424.505.

Supplier and provider enrollment is governed by regulations in 42 C.F.R. Part 424. The regulations authorize CMS to revoke a currently enrolled supplier's Medicare billing privileges and corresponding supplier agreement for any of the reasons specified in section 424.535(a). Those reasons include a conviction within the preceding 10 years of a "Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.535(a)(3). Such offenses include "[f]elony crimes against persons …." *Id.* § 424.535(a)(3)(i)(A). Revocations are also authorized for physicians and non-physician practitioners who fail to report certain information, including "[a]ny adverse legal action" within 30 days. 42 C.F.R. §§ 424.535(a)(9), 424.516(d)(1)(ii).

[1] "Providers" are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. "Suppliers" include physicians and other health care practitioners. *Id.*

Revocation based on a felony conviction is effective on the date of the conviction. 42 C.F.R. § 424.535(g). After CMS revokes a provider's or supplier's billing privileges, the provider or supplier may not participate in Medicare from the effective date of the revocation until the end of a re-enrollment bar. *Id.* § 424.535(c). A re-enrollment bar must last for a minimum of one year but cannot exceed three years. *Id.*

An initial determination to revoke Medicare enrollment and billing privileges by CMS (or a Medicare administrative contractor, on behalf of CMS) is subject to review. 42 C.F.R. § 498.3(b)(17). A party dissatisfied with an initial determination to revoke may seek reconsideration by CMS or the contractor. *Id.* §§ 498.22(a), 498.5(1)(1). A party dissatisfied with a reconsidered determination may request a hearing before an ALJ. *Id.* §§ 498.5(l)(2), 498.40. A party dissatisfied with an ALJ decision may appeal it to the Departmental Appeals Board. *Id.* § 498.80.

Case Background[2]

Petitioner is a physician assistant who was licensed in Texas and participated in the Medicare program prior to the revocation of her enrollment. CMS Ex. 8. On March 12, 2011, Petitioner, allegedly intoxicated, drove her car into a Texas state trooper's patrol car while the trooper was conducting a traffic stop. CMS Exs. 8, 9. The state trooper was transported to a hospital for head injuries suffered from the crash. CMS Ex. 9.

On April 16, 2013, Petitioner pled guilty to a State of Texas charge of first degree felony aggravated assault against a public servant. CMS Ex. 8, at 8-11. The District Court of Harris County, Texas received and entered the plea of record, deferred an adjudication of guilt, and placed Petitioner on community supervision for 10 years. *Id.* The conditions of Petitioner's community supervision included: random drug and alcohol testing; completion of an alcohol/drug education program; the suspension of Petitioner's Texas drivers' license for two years; service of no more than 180 days in the Harris County Jail; and travel restrictions. CMS Ex. 8, at 11-13.

In an initial determination dated December 3, 2015, Novitas Solutions (Novitas), a Medicare administrative contractor, notified Petitioner that her Medicare privileges were revoked effective April 16, 2013 on two grounds: 1) 42 C.F.R. § 424.535(a)(3) – Felonies. Petitioner's "April 16, 2013 felony conviction for first degree Aggravated Assault of a Public Servant in violation of the Texas Code in the 351st District Court of

[2] The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

Harris County, Texas[;]" CMS Ex. 5, and 2) 42 C.F.R. § 424.535(a)(9) – Failure to Report. *Id*. Petitioner "did not notify CMS of the conviction within 30 days, as required by 42 C.F.R. § 424.516." *Id*. The determination imposed a three-year re-enrollment bar.[3] *Id*. Petitioner requested reconsideration of the initial determination. CMS Ex. 7.

On April 25, 2016, Novitas issued a reconsidered determination sustaining the revocation on the same grounds. Novitas concluded that Petitioner entered into an order of deferred adjudication after she pled guilty to the state felony charge of first degree aggravated assault of a public servant, and "[r]evocation reason 42 CFR §424.535(a)(3) includes guilty pleas and deferred adjudication based on the definition of convicted … in 42 CFR §1001.2." CMS Ex. 7, at 2. Novitas also concluded that Petitioner failed to report the order of deferred adjudication after she pled guilty to the felony, first degree aggravated assault charge, as required under sections 424.535(a)(9) and 424.516(d)(1)(ii). *Id*. at 3. Petitioner requested an ALJ hearing to contest the reconsidered determination.

The ALJ Decision

Although both parties moved for summary judgment, the ALJ decided the case on the written record since neither party offered testimony requiring an in-person hearing. ALJ Decision at 2.[4] The ALJ upheld the revocation, concluding that Petitioner's plea fell "squarely under the purview of 42 C.F.R. § 424.535(a)(3)" because she "pled guilty to a felony and her crime was a crime against a person, consisting of aggravated assault." *Id.* at 3.[5] The ALJ found "without merit" Petitioner's argument that she was not "convicted" because a deferred adjudication is not a conviction under Texas law. *Id.* Whether Petitioner was "convicted," the ALJ stated, is a question of federal, not state law. *Id.* The ALJ further concluded that he had "no authority to hear and decide" Petitioner's

[3] There is "no … right to appeal a decision by CMS concerning the duration of a post-revocation re-enrollment bar . . . [,]" *Vijendra Dave, M.D.*, DAB No. 2672, at 10 (2016), and Petitioner's appeal does not raise such a challenge.

[4] Neither party objects to the ALJ having decided the case on the written record.

[5] The ALJ applied the regulations as amended effective February 3, 2015, which were in effect at the time of the initial determination to revoke Petitioner's billing privileges. *See* 79 Fed. Reg. 72,500 (Dec. 5, 2014). This decision refers to the same version of the regulations unless noted otherwise. The Board has held that the version of the regulations in effect on the date of the initial determination to revoke is controlling. *See, e.g., Norman Johnson, M.D.*, DAB No. 2779, at 18-20 (2017) (citing cases and holding that the version of section 424.535(g) in effect at the time of CMS's initial determination to revoke controlled the effective date of the revocation); *see also Saeed A. Bajwa, M.D.*, DAB No. 2799 at 6 n.6 (2017) (noting the holding in *Johnson* while concluding the Board did not need to decide whether its conclusion that the amended regulations were not applied retroactively to Bajwa "would be different if the amended version [of section 424.535(a)(3)] took effect after the conviction but before CMS's initial determination to revoke" instead of before both the conviction and the revocation action, as was the case). We discuss below Petitioner's contention that the revised regulations were retroactively and impermissibly applied in this case.

"argument that the regulation is ultra vires a statute." *Id.* In addition, the ALJ rejected Petitioner's argument that CMS had retroactively applied the definition of "convicted" in the December 2014 revision of section 424.535(a)(3), which incorporated the definition of "convicted" in section 1001.2. The revision "merely clarified the regulation's intent," the ALJ stated, and in any event, "the plain language of the regulation that pre-existed the additional language state[d] explicitly that a conviction includes adjudicated pretrial diversions." *Id.* The ALJ also stated that this case was "on all fours with" *Lorrie Laurel, PT,* DAB No. 2524 (2013), which pre-dated the amendments and in which the Board "considered this precise question" and held "that a deferred adjudication was a conviction in the nature of a pretrial diversion." *Id.*

The ALJ further concluded that a "basis also exists to revoke Petitioner's participation pursuant to § 424.535(a)(9)" because Petitioner failed to report the adverse legal action to a Medicare contractor within 30 days of the Texas court's entry of deferred adjudication. *Id.* at 4. The ALJ rejected Petitioner's contention that the deferred adjudication was not an adverse legal action and, consequently, she was not obligated to report it. *Id.*

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Enrollment in the Medicare Program*, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-toboard/guidelines/enrollment/.

Discussion

A. The ALJ's determination that CMS properly revoked Petitioner's Medicare enrollment based on 42 C.F.R. § 424.535(a)(3) is supported by substantial evidence and free of legal error.

Petitioner was convicted of a "State felony offense" within the meaning of section 424.535(a)(3).

Section 424.535(a)(3)(i) of the Medicare regulations provides that CMS may revoke a supplier's billing privileges and participation agreement if the supplier –

> …was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 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.

Felony offenses that are detrimental to the program and its beneficiaries include, but are not limited to, "[f]elony crimes against persons, such as … assault, 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)(ii)(A).

Section 1001.2 provides that the term "convicted" means, among other things —

> (c) A Federal, State or local court has accepted a plea of guilty … by an individual or entity; or
> (d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

Applying the foregoing regulations to the undisputed facts in this case, we agree with the ALJ that CMS properly revoked Petitioner's Medicare billing privileges based on 42 C.F.R. § 424.535(a)(3). The State of Texas offense to which Petitioner pled guilty, first degree felony aggravated assault against a public servant, is unquestionably a felony crime against a person. In addition, Petitioner's guilty plea constituted a "conviction" within the meaning of section 424.535(a)(3)(ii)(A) (stating that "convicted" in the case of felony crimes against persons includes "guilty pleas") even though the state court withheld adjudication of guilt.

Petitioner's guilty plea, and the District Court of Harris County's receipt and entry of the plea into the record, also constituted a "conviction" under the precise wording of section 1001.2(c) in that the court "accepted a plea of guilty" by Petitioner. Petitioner argues before the Board that the Court did not "accept" the guilty plea but only "received" it without "entering an adjudication of guilt…." Request for Review and Brief in Support of Appeal of ALJ Decision (RR) at 11 n.6. Section 1001.2(c), however, does not require that a court adjudicate guilt in order for a practitioner to be considered "convicted." Instead, section 1001.2(c) expressly includes convictions pursuant to acceptance of guilty pleas. In addition, we find no logic in the asserted distinction between accepting a guilty plea and receiving it since "accept" and "receive" are commonly-understood to mean the same thing. *See* Definition of *Accept* (transitive verb) **1a**: to receive (something offered) willingly; **6** of a deliberative body: to receive (a legislative report) officially; Definition of *Receive* (transitive verb) **1:** to come into possession of; **4:** to accept as authoritative, true, or accurate [https://www.merriam-webster.com/dictionary/], last accessed July 21, 2017. Moreover, the court's order officially recognized Petitioner's plea as an admission of guilt: "The Court received the plea and entered it of record. Having heard the evidence submitted, the Court FINDS such evidence substantiates Defendant's guilt." CMS Ex. 8, at 10 (emphasis in Order).

The Harris County Court's Order of Deferred Adjudication provided an additional basis for concluding that Petitioner was "convicted" of the felony offense. Under the terms of the court documents, the court "ORDER[ED] that no judgment shall be entered at this time" and "that Defendant be placed on community supervision for the adjudged period so long as Defendant abides by and does not violate the terms and conditions of community supervision." CMS Ex. 8, at 10. In addition, Petitioner signed the statement that she "underst[ood] that failure to abide by the[] Conditions of Community Supervision may result in … an adjudication of guilt." *Id.* at 14. The arrangement thus met the precise definition of "convicted" in section 1001.2(d), that is, an "individual … entered into … deferred adjudication … where judgment of conviction has been withheld."

Accordingly, we sustain the ALJ's conclusion that Petitioner was convicted of a felony offense – in this case a crime against a person – under state law within the meaning of section 424.535(a)(3).

The revocation of Petitioner's enrollment was proper under 42 U.S.C. § 1395cc(b)(2)(D).

The controlling statute, 42 U.S.C. § 1395cc(b)(2)(D), authorizes the Secretary to revoke a supplier's Medicare enrollment if the supplier–

> …has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries.[6]

Petitioner argues that the ALJ erred in sustaining the revocation of her Medicare enrollment because a "deferred adjudication" is not a "conviction" under Texas law, and the governing Medicare statute unambiguously provides that "the predicate-basis for revocation is a felony conviction either under Federal *or* state law." RR at 15 (emphasis in RR). Petitioner argues that a plain reading of the language "convicted of a felony under Federal or State law" means that "[t]his case turns on whether a deferred adjudication is a conviction under Texas law." *Id.* at 15. "Obviously," Petitioner states, since "a deferred adjudication is *not* a conviction under Texas law, an interpretation of 42 C.F.R. § 424.535(a)(3) that a deferred adjudication is a conviction violates the plain language of the statute …." *Id.* at 15.

[6] Congress enacted the provision under the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4302.

We disagree. The order of the wording in the statute links the phrase "under Federal or State law" to the noun immediately preceding it – "felony," not to the word "convicted." Consequently, the Secretary has understood that phrase to refer to the predicate offense for a revocation action based on a conviction, that is, that the offense must constitute a felony under either state law or federal law. *Laurie Laurel, PT* at 4 ("the predicate offense for a revocation action (given a conviction) must constitute a felony under state law if not federal law" under section 424.535(a)(3)). This is consistent with the language of the statute and with the statute's omission of any definition of conviction or any provision requiring the Secretary to use a state law's definition of the term in assessing whether to revoke a supplier's billing privileges.

The Secretary, on the other hand, has defined "convicted," pursuant to the Secretary's authority "to make and publish such rules and regulations … as may be necessary to the efficient administration of" the Medicare program. 42 U.S.C. § 1302(a); *see also* 42 U.S.C. §§ 1395hh(a)(1), 1395cc(j)(1)(A) (according the Secretary rulemaking authority specifically related to provider and supplier enrollment). As explained above, the Medicare enrollment regulations define the term "conviction" to encompass multiple circumstances, including a guilty plea or adjudicated pretrial diversion for a felony against a person, 42 C.F.R. § 424.535(a)(3)(ii)(A); a "Federal, State or local" court's acceptance of a guilty plea, 42 C.F.R. § 1001.2(c); or a "deferred adjudication or other program or arrangement where judgment of conviction has been withheld," 42 C.F.R. § 1001.2(d), all of which apply here.

Moreover, as the ALJ recognized (ALJ Decision at 3), the Board has settled the question raised by Petitioner here, concluding that federal law, not state law, controls what constitutes a "conviction" for the purpose of Federal laws designed to protect the Medicare program and its beneficiaries. *Lorrie Laurel, PT* at 4-6 (holding that a Florida court's acceptance of a guilty plea constituted a "conviction" for purposes of revocation of Laurel's Medicare participation even though the court withheld adjudication of guilt); *see also Henry L. Gupton*, DAB No. 2058, at 4-12 (2007) (finding court's acceptance of guilty plea a "conviction" for purposes of Office of Inspector General exclusion notwithstanding state court's deferral of judgment and ultimate expungement of record), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874, 880 (E.D. Tenn. 2008) ("This court agrees with the Secretary's interpretation of the statute and the conclusion that Dr. Gupton was 'convicted.'"). We also note that the United States Court of Appeals for the Fifth Circuit recently held that a Texas deferred adjudication constituted a "conviction" or "the functional equivalent of a final conviction" within the meaning of the term as it appears in section 4B1.5(a) of the United States Sentencing Guidelines, even though the Guidelines did not expressly define "conviction." *United States v. Mills*, 843 F.3d 210, 213-217 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1601 (2017).

The Board has explained that federal law logically controls the definition of "convicted" in the context of Medicare enrollment and federal health care program exclusion cases because the objectives of the federal civil laws are not the same as the purposes of state criminal laws.[7] *Laurie Laurel, PT* at 5, citing *Henry L. Gupton*, DAB No. 2058, at 7. "While the goals of criminal law generally include punishment, rehabilitation, and deterrence," the Board has stated, "exclusions are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc …." *Id.* Like the overarching objective of program exclusions, the central purpose of the enrollment provisions is to protect beneficiaries and the Medicare Trust Funds from "fraudulent and abusive providers and suppliers." 71 Fed. Reg. 20,754, 20,773 (April 21, 2006). In order to promote program integrity on a department-wide basis, the Secretary thus logically interprets the term "convicted" broadly, to include circumstances in which a practitioner's involvement in the criminal justice system raises sufficient concerns about their integrity or trustworthiness to justify a revocation of Medicare enrollment or exclusion from federal health care programs, even if they were not adjudicated guilty for reasons of state criminal justice policy. *Laurie Laurel, PT* at 5; *Gupton*, DAB No. 2058, at 7-8; *cf. Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111–12, 114 (1983) (holding that whether one has been "convicted" within the meaning of the federal gun control statute at 18 U.S.C. §§ 922(g)(1) and (h)(1) (2000 ed.) "is necessarily … a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State[,]" explaining that "[t]his makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction'"). Thus, as we did in *Laurel* and *Gupton*, we reject here Petitioner's argument that her deferred adjudication under Texas law is not a "conviction" for purposes of the revocation statute and regulations.

> *The ALJ did not err in rejecting Petitioner's arguments that the definition of "convicted" in 42 C.F.R. § 424.535(a)(3), as amended in 2015, violates 42 U.S.C. § 1395cc(b)(2)(D) and was retroactively applied in this case.*

Petitioner further argues that the ALJ erred in refusing to determine that 42 C.F.R. § 424.535(a)(3), as amended in 2015 to incorporate the definition of "convicted" in the program exclusion regulations at 42 C.F.R. § 1001.2, violates the plain language of the Medicare enrollment statute. Petitioner notes that the multi-part definition of "convicted" in section 1001.2 is derived from the federal exclusion statute, 42 U.S.C. § 1320a-7. P.

[7] Section 1128 of the Social Security Act (42 U.S.C. § 1320-a-7) provides for the Secretary to exclude individuals convicted of specified crimes from any federal health care program. The Secretary has delegated the exclusion authority to the Office of the Inspector General and has promulgated regulations implementing the statute at 42 C.F.R. Parts 1001-1006.

Reply at 5. In contrast, 42 U.S.C. § 1395cc(b)(2)(D) does not include the same multi-part definition of "convicted" that appears in the exclusion provisions. Petitioner argues that "CMS cannot properly bootstrap the federal definition of 'convicted' under the … exclusion statute" into the revocation regulations because it directly conflicts with the plain language of 42 U.S.C. § 1395cc(b)(2)(D). RR at 16.

For the reasons discussed above, we reject Petitioner's argument that the amended regulation conflicts with the Medicare statute. Congress elected not to define the term "convicted" in 42 U.S.C. § 1395cc(b)(2)(D), and the Secretary properly exercised the authority to define the term by regulation pursuant to 42 U.S.C. §§ 1302(a), 1395hh(a)(1), and 1395cc(j)(1)(A). The Secretary was free to promulgate a definition of "conviction" similar to that used in the exclusion statutes. Indeed, given the similar protective purposes of those statutes, it was logical for the Secretary to adopt consistent definitions. Furthermore, the ALJ correctly concluded that he had no authority to hear and decide Petitioner's argument that the regulation was ultra vires the statute. *See* ALJ Decision at 3; *1866ICPayday.com*, DAB No. 2289, at 14 (2009) (an ALJ is bound by the applicable regulations and may not invalidate either a law or regulation on any ground, even a constitutional one). Section 424.535(a) specifies the reasons for which CMS may legally revoke a provider or supplier's billing privileges. So long as an ALJ or the Board finds that CMS has shown that a regulatory basis for revocation exists, the ALJ (and the Board on appeal) may not refuse to apply the regulation and must uphold the revocation. *See, e.g.*, *Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (stating that an ALJ and the Board must sustain a revocation "[i]f the record establishes that the regulatory elements are satisfied"); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (stating that the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a "legal basis for its actions"). Since the regulations at issue here provided legal bases for the revocation – Petitioner's conviction of a state felony offense that CMS has determined to be detrimental to the Medicare program and its beneficiaries and her failure to timely disclose the conviction – the ALJ was required to uphold the revocation, and we are required to affirm it.

Petitioner additionally argues that "even if the amendment … did not conflict with the Medicare statute, applying it here is an impermissible retroactive application of the regulation, and it violates Due Process of Law." RR at 22. The amended final rule became effective February 3, 2015. Yet, Petitioner states, CMS applied it to Petitioner's conduct in 2013 resulting in a deferred adjudication issued on April 16, 2013. According to Petitioner, the amendment to the regulation "essentially re-writes the language of the statute" to "superimpose[ ] a federal definition of 'convicted' that eliminates those under 'State law.'" P. Reply at 12. Applying the amended regulation to Petitioner's conduct, Petitioner asserts, violates "[d]ue process of law under the Fifth Amendment [which] requires fair notice of agency interpretations." P. Br. at 22.

This argument is based on the faulty premise that the 2015 amendment effected a substantive change to section 424.535(a)(3). As explained in the preamble to the proposed rule to incorporate the definition of "convicted" at section 1001.2 into the enrollment regulations, CMS offered the amendment as a response to public inquiries about the meaning of the term and to provide practitioners with a better understanding of what arrangements or circumstances would be considered convictions under the enrollment provisions:

> We have received inquiries over the years regarding the proper interpretation of the term ''convicted'' as it is used in the context of § 424.530(a)(3) and § 424.535(a)(3). We believe that utilizing a well-established regulatory definition of the term would **clarify** for the public the types and scopes of convictions that fall within the purview of these two sections. We note that this regulatory definition is based on the definition of ''convicted'' in section 1128(i) of the Act.

78 Fed. Reg. 25,013, 25,022 (April 29, 2013) (emphasis added). The amendment thus did not change the meaning of "convicted" in section 424.535(a)(3) as it existed prior to the amendment but merely provided the public with clarity about the meaning of that term. The amendment logically provided this clarity by incorporating the definition of the term under the exclusion regulations to ensure consistency in how the Department of Health and Human Services administers related provisions with the same goal of promoting federal health care program integrity.

Petitioner's argument that the revocation should be reversed because CMS applied the amended regulation retroactively also erroneously assumes that the revocation would not be valid under the prior version of section 424.535(a)(3). The earlier version of the regulation authorized CMS to revoke a supplier's Medicare enrollment if the "supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the [Medicare] program or its beneficiaries." 42 C.F.R. § 424.535(a)(3) (Oct. 1, 2012). Section 424.535(a)(3)(i)(A) then specifically stated that the felony offenses justifying revocation included –

> **Felony crimes against persons**, such as murder, rape, **assault**, and other similar crimes for which the individual **was convicted, including guilty pleas** and **adjudicated pretrial diversions**.

(Emphasis added.) Thus, even prior to its amendment (including at the time of Petitioner's felonious conduct and guilty plea), the regulation included guilty pleas and adjudicated pretrial diversions as convictions of felony offenses and authorized CMS to

revoke her Medicare enrollment and billing privileges. *See also Laurel* and *Gupton*. Consequently, Petitioner's complaint that she was denied fair notice that her conduct and plea fell within the scope of the Secretary's authority to revoke her Medicare enrollment and billing privileges pursuant to 42 U.S.C. § 1395cc(b)(2)(D) is baseless.

B. The ALJ's determination that a separate basis exists to support the revocation under 42 C.F.R. § 424.535(a)(9) is supported by substantial evidence on the whole record and free of legal error.

Section 424.535(a)(9) of the Medicare enrollment regulations provides that CMS may revoke a supplier's Medicare billing privileges if the supplier does "not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart." Section 424.516(d)(1)(ii) requires, in turn, that physicians and nonphysician practitioners report to their Medicare contractors "[a]ny adverse legal action" within 30 days of the action. Section 424.502 defines "final adverse action" to mean, among other things, a "conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i)) within the last 10 years preceding enrollment, revalidation, or re-enrollment …."

Petitioner argues, "Inasmuch as a deferred adjudication is not a conviction under Texas law (and, thus, it does not meet a proper definition of 'convicted' under §424.535(a)(3)), it need not be reported as an adverse action." RR at 24. Hence, Petitioner asserts, "there is no legitimate evidence to support revocation imposed for violating 42 C.F.R. § 424.535(a)(9)." P. Reply at 10.

We have concluded, as explained above, that Petitioner was "convicted" within the meaning of section 424.535(a)(3); consequently, she was responsible for reporting that conviction within 30 days of April 6, 2013, the date she pled guilty, the court accepted the plea, and the court entered the order of deferred adjudication. As the ALJ explained, "She did not do so." ALJ Decision at 4. To the contrary, she submitted an application for revalidation of her Medicare enrollment on November 7, 2014, affirmatively stating that no final adverse legal actions were imposed against her. CMS Ex. 1, at 17. Accordingly, the ALJ's conclusion that a "basis also exists to revoke Petitioner's participation pursuant to 42 C.F.R. § 424.535(a)(9)" is supported by substantial evidence and free of legal error.

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member