

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Donna Maneice, M.D.
Docket No. A-17-73
Decision No. 2826
October 13, 2017

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Donna Maneice, M.D. (Petitioner) appeals the March 3, 2017 decision of an administrative law judge (ALJ), *Donna Maneice, M.D.*, DAB CR4804 (ALJ Decision). The ALJ Decision sustained a determination by the Centers for Medicare & Medicaid Services (CMS), pursuant to 42 C.F.R. § 424.535(a)(3), to revoke Petitioner’s Medicare enrollment and billing privileges effective June 7, 2012 based on her felony conviction for financial crimes on that date. The Board affirms the ALJ Decision.

Legal Background

To receive payment under Medicare, a physician or other “supplier” of Medicare services must be enrolled in the program. 42 C.F.R. § 424.505.¹ Enrollment confers on a supplier “billing privileges,” that is, the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502 (definition of “Enroll/enrollment”), 424.505.

Supplier enrollment is governed by the regulations in 42 C.F.R. Part 424, subpart P. Those regulations authorize CMS to revoke a supplier’s Medicare billing privileges for any of the “reasons” specified in subsection 424.535(a).² One such reason is where a supplier was, within the preceding ten years, convicted of a felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries, to include financial crimes such as income tax evasion. 42 C.F.R.

¹ The term “supplier” refers to “a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare.” 42 C.F.R. § 400.202.

² Section 424.535 was revised effective February 3, 2015. 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). Unless indicated otherwise, we cite to, and apply, the revised section 424.535 since that version was in effect on June 20, 2016, the date of the initial revocation determination (CMS Ex. 1). See *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016) and *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016) (noting the February 3, 2015 revision of section 424.535 and stating that the version of the regulations in effect on the date of the initial determination to revoke applies).

§ 424.535(a)(3)(i) and (ii)(B). Revocation based on a felony conviction is effective on the date of the conviction. *Id.* § 424.535(g). A revoked supplier is barred from participating in Medicare from the date of the revocation until the end of the re-enrollment bar, which must last for a minimum of one year but cannot exceed three years. *Id.* § 424.535(c).

A supplier may seek reconsideration of a revocation determination. 42 C.F.R. §§ 498.5(l)(1), 498.22. 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 Background³

Petitioner is licensed to practice medicine in Alabama and Georgia. P. Ex. 6, at 1; P. Ex. 2, at 1. On August 31, 2011, Petitioner was indicted for attempt to evade income tax and for filing false income tax returns for years 2004 through 2007, and for failing to file a tax return for year 2007. CMS Ex. 6. On November 16, 2011, Petitioner pled guilty to attempted tax evasion and the filing of a false tax return for year 2006 (Counts 3 and 9), and agreed to pay \$85,396 in restitution for the amount of tax she failed to pay for years 2004 through 2007. CMS Ex. 6, at 4-5, 8-9; CMS Ex. 7, at 1-2, 4-5, 9-10. On June 7, 2012, the U.S. District Court for the Middle District of Alabama 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 – felony crimes – in violation of 26 U.S.C. §§ 7201 and 7206(1) and 18 U.S.C. § 2. CMS Ex. 8, at 1. The court sentenced Petitioner to six months of house arrest, three years of probation, and 200 hours of community service, and ordered her to pay \$85,396 in restitution. *Id.* at 2-5.

By initial determinations dated June 20, 2016,⁴ Cahaba Government Benefit Administrators, LLC (Cahaba), a CMS contractor, notified Petitioner that her Medicare enrollment and billing privileges were revoked effective June 7, 2012, on two regulatory grounds: (1) 42 C.F.R. § 424.535(a)(3), based on her June 7, 2012 felony conviction for attempted tax evasion and the filing of false tax returns; and (2) 42 C.F.R. § 424.535(a)(9), based on failure to report the felony conviction, as required by 42 C.F.R. § 424.516. CMS Ex. 2, at 1, 3. Cahaba barred Petitioner from re-enrolling in Medicare for three years. *Id.* at 2 and 4, citing 42 C.F.R. § 424.535(c).

³ The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

⁴ On June 20, 2016, Cahaba issued two substantively similar initial determinations. One was sent to Petitioner in Atlanta, Georgia and, the other, to Petitioner in Winfield, Alabama. The two initial determinations together comprise CMS Exhibit 2, pages 1-4.

On reconsideration, Cahaba affirmed its determination to revoke pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 1. Cahaba acknowledged that, “on or about May 12, 2012,” Petitioner disclosed her November 2011 guilty plea, and that in late June 2012, Petitioner, through her then-employer, a medical facility, submitted documentation about her conviction. *Id.* at 2; CMS Ex. 10, at 3-35⁵; P. Ex. 1. Cahaba explained that it erred in previously citing 42 C.F.R. § 424.535(a)(9) as a second basis for revocation because Petitioner “did in fact self-report her felony conviction of June 7, 2012 to Cahaba within the 30 day requirement per 42 CFR §424.516(d)(1).” CMS Ex. 1, at 2. Cahaba stated that, while it did not “elevate[] to proper review and action” the disclosure made “on or about May 12, 2012” “due to clerical error,” that failure “d[id] not nullify revocation” under subsection 424.535(a)(3) because Petitioner ““was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2)[⁶] of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.”” *Id.* at 2-3, quoting 42 C.F.R. § 424.535(a)(3)(i) (eff. Feb. 3, 2015).

Petitioner requested a hearing before an ALJ. CMS moved for summary judgment, asserting that Petitioner did not dispute that she was convicted, in 2012, of felony offenses of attempted tax evasion and the filing of a false tax return “within 10 years preceding the date CMS made the revocation determination” – which “CMS has determined through the rule-making process that certain financial crimes such as ‘income tax evasion . . . is detrimental per se to the program and its beneficiaries’ and detrimental to Medicare ‘as a matter of law.’” CMS’s Motion for summary judgment and brief (CMS’s MSJ) at 5, quoting *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008); *id.* at 1 (paraphrasing revised subsection 424.535(a)(3)). Accordingly, CMS asserted, it lawfully revoked Petitioner’s enrollment and billing privileges under subsection 424.535(a)(3). *Id.*

In her opposition to CMS’s motion and supporting brief (Pet.’s Response to MSJ), Petitioner did not argue that there was a disputed material fact related to her felony conviction. Petitioner instead invoked equitable doctrines. She asserted that laches should be applied to bar CMS from revoking her enrollment and billing privileges because CMS’s delay in taking such action despite being made aware of her conviction was unreasonable and unexcused. Pet.’s Response to MSJ at 4-5 (not paginated). She also asserted that CMS should be estopped from revoking her enrollment and billing

⁵ CMS Exhibit 10 includes Petitioner’s unaddressed statement, dated December 23, 2011, concerning her November 2011 guilty plea. CMS Ex. 10, at 2. This statement appears to have been faxed to Cahaba by Petitioner’s then-employer, but the fax cover sheet does not indicate the date on which the fax was sent. *See id.* at 1. In any case, there is no dispute that the plea and subsequent felony conviction were disclosed to Cahaba by late June 2012.

⁶ 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”).

privileges because she continued to practice medicine as an employee of a medical facility, gaining tenure and increased compensation, relying on “multiple” instances of CMS’s “approval” and “renewal” of her billing privileges since her conviction, which she had disclosed years earlier. *Id.* at 5-6; P. Ex. 6 (Petitioner’s November 18, 2016 sworn declaration), at 2 (stating, “CMS approved me to bill for Medicare services [on] June 29, 2012” and “subsequently on other occasions”). Petitioner stated that, had she known that CMS would later revoke her billing privileges, she would have obtained employment that did not require her to have Medicare billing privileges. Pet.’s Response to MSJ at 6. She also stated that she lost her positions at two medical facilities due to her revocation. *Id.* at 3, 5. According to Petitioner, CMS’s “multiple approvals” of her billing privileges since her conviction, despite knowledge of her conviction, were “tantamount to CMS waiving its right to penalize her for her conviction.” *Id.* at 7.

ALJ Decision

By decision based on the written record, the ALJ upheld CMS’s determination to revoke Petitioner’s enrollment and billing privileges.⁷ ALJ Decision at 4 (stating that, since CMS did not seek to cross-examine Petitioner, who submitted her written direct testimony, P. Ex. 6, he was issuing a decision based on the written record) and 15 (affirming CMS’s revocation action). Neither party objects to the ALJ having decided the case without holding an in-person hearing.

In upholding the revocation under 42 C.F.R. § 424.535(a)(3) (2011),⁸ the ALJ first found that Petitioner was convicted of felony offenses of attempted tax evasion and the filing of a false tax return. *Id.* at 6-7. Based on Petitioner’s written testimony that she obtained Medicare billing privileges on June 29, 2012, the ALJ found that the conviction

⁷ CMS appears to read the ALJ Decision to mean that the ALJ decided the case by granting its motion for summary judgment. *See* CMS’s response to Petitioner’s brief to the Board (CMS’s Response) at 1 (referring to the ALJ’s “sustaining, on summary judgment” the revocation determination), 3 (“ALJ . . . granted the motion in CMS’ favor”). However, it is clear that the ALJ upheld CMS’s determination to revoke Petitioner’s enrollment and billing privileges based on the written record, not on summary judgment.

⁸ The ALJ noted that 42 C.F.R. § 424.535(a)(3) was revised effective February 3, 2015, but applied the earlier version of the regulation that was in effect in 2012, at the time of Petitioner’s conviction. ALJ Decision at 5 n.1. As we indicated in footnote 2, the ALJ should have applied the revised regulation since the revised regulation was in effect at the time of the revocation determination. In any case, as the ALJ noted, *id.*, the revocation would be lawful regardless of which version of the regulation is applied since Petitioner’s felony conviction for “income tax evasion” establishes a basis for revocation under the plain language of either version. We note, moreover, that Petitioner does not raise any dispute concerning which version of the regulation applies.

“occurred within ten years of her enrollment.”⁹ *Id.* at 7, citing P. Ex. 6, at 2. Moreover, the ALJ found that the offense of “income tax evasion” is one of several “financial crimes” specifically identified as a felony offense authorizing revocation in 42 C.F.R. § 424.535(a)(3)(i)(B) (2011) and “that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.” *Id.* at 7. The ALJ further found that attempted tax evasion and filing a false income tax return, felony conviction of which Petitioner does not dispute, “together amount to an offense that is per se detrimental to the best interests of the Medicare program.” *Id.* at 9, citing *Bussell* at 9. Accordingly, the ALJ concluded that CMS had a lawful basis to revoke Petitioner’s enrollment and billing privileges. *Id.* at 7, 9. The ALJ moreover stated that he was not authorized to look behind CMS’s discretionary determination whether to revoke; once CMS does revoke, an ALJ is authorized to determine only whether CMS had a legal basis to revoke. *Id.* at 13, citing *Bussell* at 13 and *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff’d*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

The ALJ further determined that he lacked authority to grant equitable relief. *Id.* at 12, citing *US Ultrasound*, DAB No. 2302, at 8 (2010) and *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009). With respect to Petitioner’s argument based on laches, the ALJ stated that no applicable regulation authorized him to overturn the revocation based on allegedly unreasonable delay by CMS in revoking, and in any case Petitioner did not identify any statute of limitations barring revocation even when so delayed. *Id.* at 12-13. As for estoppel, the ALJ stated that even if he were authorized to grant equitable relief, he would not find estoppel since Petitioner had not made any showing of intentional misrepresentation or affirmative misconduct by CMS or Cahaba personnel, both of which are necessary, at minimum, to establish estoppel against the government. *Id.* at 12. The failure to take appropriate action on the status of Petitioner’s billing privileges upon learning about her conviction “as ‘a result of clerical error,’” the ALJ said, did not amount to “affirmative misconduct” to establish estoppel. *Id.*, citing CMS Ex. 1, at 2 and *Rosewood Living Ctr.*, DAB No. 2019, at 13 (2006). Lastly, the ALJ determined that the effective date of Petitioner’s revocation is June 7, 2012, the date on which the court entered judgment of conviction based on Petitioner’s guilty plea. *Id.* at 13, citing 42 C.F.R. § 424.535(g).

⁹ The ALJ credited Petitioner’s written testimony as to when she obtained Medicare billing privileges despite finding no documentary support for that date in the record. ALJ Decision at 7. However, he also found that 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.” *Id.*, citing 42 C.F.R. § 424.515. On appeal, Petitioner does not dispute either of these ALJ findings.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program*, accessible at <http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/index.html?language=en>.

Discussion

- A. *In 2012, Petitioner was convicted of felony financial crimes of attempted tax evasion and the filing of a false tax return, either of which establishes a basis for revocation of her Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) (eff. Feb. 3, 2015).*

Subsection 424.535(a)(3)(i), as in effect since February 3, 2015, authorizes CMS to 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 in scope or severity to, “[f]inancial crimes, such as . . . income tax evasion, . . . and other similar crimes for which the individual was convicted, including guilty pleas . . .” 42 C.F.R. § 424.535(a)(3)(ii)(B) (eff. Feb. 3, 2015). Under 42 C.F.R. § 1001.2(c), a person is deemed to have been “convicted” when, as relevant here, “[a] Federal . . . court has accepted a plea of guilty” by that individual.

Applying the foregoing regulations to the undisputed facts established by the record on which the ALJ rendered his decision, the ALJ correctly concluded that CMS properly revoked Petitioner’s enrollment and billing privileges pursuant to subsection 424.535(a)(3). There is no question that attempted income tax evasion and the filing of a false income tax return are crimes financial in nature. Indeed, the regulation expressly identifies “income tax evasion” as one of numerous examples of financial crimes detrimental to the best interests of the Medicare program and its beneficiaries. Petitioner pled guilty to both attempted tax evasion and the filing of a false tax return, and the court

accepted her plea and entered judgment of conviction on June 7, 2012, thus establishing a felony conviction for those crimes within the meaning of section 1001.2, on June 7, 2012, that is, “within the preceding 10 years.”¹⁰

ALJs and the Board may only decide whether CMS has established a legal ground for revocation. *See Bussell* at 13 (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”). *Accord Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (an ALJ and the Board are required to uphold revocation if the record establishes that the regulatory elements for revocation are satisfied); *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009) (if CMS establishes a qualifying felony conviction as the basis for revocation, the Board must uphold revocation without regard to factors, such as the scope or seriousness of the supplier’s criminal conduct, that CMS might reasonably have weighed in determining whether to revoke), *aff’d, Fayad v. Sebelius*, 803 F. Supp.2d 699 (E.D. Mich. 2011); *Ahmed*, DAB No. 2261, at 19 (CMS is “legally entitled to revoke a supplier’s billing privileges” where the elements of subsection 424.535(a)(3) are met). Having properly concluded that the basis for a revocation existed, the ALJ was required to affirm the revocation, and so are we.

B. The ALJ correctly determined that he had no authority to grant equitable relief; neither does the Board.

Instead of challenging the ALJ’s holding on the dispositive issue – that CMS had a legal basis for revocation – Petitioner reprises arguments that essentially amount to a request for equitable relief based on laches and estoppel that the ALJ stated he was without authority to grant. Petitioner’s brief in support of request for review (RR) at 4-6 (not paginated).

CMS is authorized to revoke Medicare billing privileges under subsection 424.535(a)(3) based solely on a qualifying felony conviction, without regard to equitable or other factors. *Fayad*, DAB No. 2266, at 15-17. On appeal of CMS’s revocation, neither the ALJ nor the Board has authority to reverse an authorized revocation for reasons of equity. *See, e.g., Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 15 (2016) (the ALJ and the Board may not “restore a supplier’s billing privileges on equitable grounds”); *Horace Bledsoe, M.D. & Bledsoe Family Medicine*, DAB No. 2753, at 11 (2016) (declining to rule on petitioners’ estoppel claim, and stating that the Board may not overturn CMS’s lawful revocation of petitioners’ billing privileges on equitable grounds); *Complete Home Care, Inc.*, DAB No. 2525, at 7 (2013) (ALJ correctly concluded that he lacked authority to restore the supplier’s billing privileges for equity reasons; the Board,

¹⁰ CMS could have revoked under subsection 424.535(a)(3) even if Petitioner had been convicted only of one of the two felony crimes. The regulation does not require conviction for multiple felony crimes.

too, lacked such authority). As we discussed earlier, the ALJ correctly determined that CMS had a legal basis for revoking Petitioner's billing privileges and, accordingly, was required, as is the Board, to uphold the revocation. For these reasons, we do not reach Petitioner's estoppel and laches claims, and uphold the revocation under subsection 424.535(a)(3).

We do note, however, that Petitioner's request for relief in reliance on laches and estoppel is anchored in her position that Petitioner disclosed her guilty plea and subsequent conviction without delay, which ignores the fact that Cahaba cited subsection 424.535(a)(9) (failure to disclose her felony conviction) as only one of two regulatory bases for revocation in its *initial* determination. CMS Ex. 2, at 1, 3. In its *reconsidered* determination, Cahaba stated that its prior revocation determination was not "nullif[ied]" by its earlier reliance on subsection 424.535(a)(9) as a secondary basis because it had also determined that revocation was proper under subsection 424.535(a)(3) and on reconsideration was affirming revocation under subsection 424.535(a)(3). CMS Ex. 1, at 2-3. In an appeal of a revocation determination, the basis for revocation as cited in the *reconsidered* determination controls. *See Vijendra Dave, M.D.*, DAB No. 2672, at 8 n.10 (2016) ("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."), citing *Keller Orthotics, Inc.*, DAB No. 2588, at 7 (2014) and *Precision Prosthetic, Inc.*, DAB No. 2597, at 11 (2014). We have concluded that CMS's revocation is authorized by subsection 424.535(a)(3) and, as previously stated, CMS needs to establish only one ground for revocation. Therefore, Petitioner's disclosure of her guilty plea and conviction and the initial determination's reliance on subsection 424.535(a)(9) as a secondary basis, even if in error, could not change the outcome of her case.

Petitioner argues that it is unfair that her billing privileges were revoked in 2016, effective June 7, 2012, when CMS could have acted earlier. This argument is essentially another argument about equity which, as we have already discussed, ALJs and the Board have no authority to entertain. To the extent Petitioner is challenging the effective date of the revocation, the ALJ correctly concluded that 42 C.F.R. § 424.535(g) mandates an effective date of revocation based on the date of Petitioner's conviction. ALJ Decision at 13. By operation of subsection 424.535(g), the effective date of Petitioner's revocation must be June 7, 2012. *See Norman Johnson, M.D.*, DAB No. 2779, at 18-20 (2017) (reversing an ALJ's failure to apply subsection 424.535(g) when determining the effective date of the petitioner's revocation based on a felony conviction).

Conclusion

The Board affirms the ALJ Decision.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member