Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Sunsites Pearce Fire District
Docket No. A-18-48
Decision No. 2926
February 4, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Sunsites Pearce Fire District (Sunsites) appeals the decision of an Administrative Law Judge (ALJ) granting summary judgment to the Centers for Medicare & Medicaid Services (CMS) and upholding the revocation of Sunsites's participation in the Medicare program as an ambulance service, *Sunsites Pearce Fire District*, DAB CR5012 (January 25, 2018) (ALJ Decision). Sunsites argues that summary judgment was inappropriate because material facts were in dispute. Sunsites further contends that CMS improperly revoked it, on the grounds that its managing employee was not convicted of a felony detrimental to the Medicare program and that Sunsites therefore did not mislead CMS when it certified in its application that the managing employee had no final adverse legal actions.

For the reasons explained below, we conclude that CMS properly revoked Sunsites's participation in the Medicare program and agree with the ALJ that summary judgment was appropriate. We therefore uphold the ALJ Decision and sustain the revocation determination.

Legal Background

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act) §§ 1811, 1833.[1] Medicare is administered by CMS, which delegates certain program functions to private contractors that function as CMS's agents in administering the program – in this case, Noridian Healthcare Solutions (Noridian) was the delegated contractor.

[1] The current version of the Social Security Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.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.

The relevant regulations governing Medicare enrollment are found in 42 C.F.R. Part 424, subpart P (§§ 424.500 through 424.570). In order to receive Medicare payment for items or services furnished to program beneficiaries, a provider or supplier must be "enrolled" in Medicare. 42 C.F.R. § 424.505. The regulations at 42 C.F.R. § 400.202 define a "supplier" as "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare."[2] A key purpose of enrollment is to ensure that suppliers comply with eligibility and other requirements for program participation and payment. To that end as well, every supplier must provide accurate and truthful responses to all information requests and attest to the accuracy of any information submitted in the enrollment process. *Id*. § 424.510(d)(2), (d)(3).

Section 424.535(a) authorizes CMS to revoke the Medicare enrollment and participation of a supplier for any of the fourteen "reasons" specified in that section. *Id*. § 424.535(a). Among the authorized bases for revocation, CMS or its delegated contractor may revoke if a supplier certifies on its enrollment application as being true information that is misleading or is false. *Id*. § 424.535(a)(4). CMS or a contractor may also revoke if any owner or managing employee of a supplier was "convicted," within the previous ten years, of a felony that CMS determines is detrimental to the best interests of Medicare and its beneficiaries. *Id*. § 424.535(a)(3).[3]

A supplier may appeal a revocation determination in accordance with the procedures in 42 C.F.R. Part 498. *Id.* § 424.545(a). The supplier must first request "reconsideration" of the initial revocation determination. *Id*. §§ 498.5(*1*), 498.22. If dissatisfied with CMS's "reconsidered determination," the supplier may request a hearing before an ALJ. *Id*. § 498.40. An adverse ALJ decision may be appealed to the Board. *Id*. § 498.80.

Case Background[4]

On May 30, 2013, Sunsites, a rural fire district in Arizona operating an ambulance service, identified its interim fire chief (to whom we shall refer by his initials JS) as its managing employee in an enrollment application it submitted to Noridian. ALJ Decision at 2. JS had been charged in state court in 2011 with felony disorderly conduct consisting of recklessly discharging a weapon near a person. On the motion of the County Attorney

[2] Sunsites participated in Medicare as a supplier, so we limit the rest of this discussion to suppliers.

[3] This provision was amended effective 2015. 79 Fed. Reg. 72,500, 72,531-32 (Dec. 5, 2014). The parties dispute the significance of the changes in wording for this case and we discuss the differences in our analysis section below.

[4] The facts set out in this section are undisputed unless otherwise indicated and are drawn from the ALJ Decision and the record before the ALJ. We summarize them for the convenience of the reader and none are intended to replace or supplement the ALJ's findings.

for Cochise County, Arizona, the Superior Court of Arizona suspended prosecution of JS for two years pending participation in an adult diversion program (which included performing community service). CMS Ex. 12, at 6, 7, 10. By court order dated April 18, 2012, the charges were dismissed with prejudice following JS's successful completion of the program. *Id*. at 13. Sunsites did not include this information in the part of the 2013 application requiring certification of whether any managing (or other key) employees were subject to "final adverse legal actions." After two requests from Noridian to provide the relevant certification, Sunsites affirmatively certified that JS had not been subjected to any adverse legal action. CMS Ex. 8, at 7. The application was accepted on January 24, 2014. P. Ex. 14.

In 2016, Sunsites submitted a revalidation application identifying JS as "fire chief." CMS Ex. 9. On March 31, 2017, Noridian notified Sunsites that its Medicare privileges were being revoked effective March 4, 2013, pursuant to 42 C.F.R. § 424.535(a)(3) and (a)(4). CMS Ex. 1. Sunsites sought reconsideration on two bases: (1) that the diversion program did not constitute a conviction and was not an adverse legal action requiring reporting and (2) that Sunsites had in 2017 officially removed JS from all Medicare duties and filed a new application identifying a replacement as managing employee for Medicare. CMS Exs. 2, 11. The reconsideration request was denied and Sunsites filed its appeal with the ALJ.

The ALJ found no dispute of material fact and granted summary judgment to CMS, upholding Sunsites's revocation. ALJ Decision at 1. The ALJ rejected Sunsites's contentions that JS's diversion program did not constitute a "conviction" under the regulation as in effect prior to 2015 and that the post-2015 version could not be applied retroactively. *Id*. at 4. According to the ALJ, the court's treatment of JS's offense was an "adjudicated pretrial diversion" and thus covered by the express terms of the pre-2015 regulatory language. *Id*. The ALJ also concluded that CMS had non-reviewable discretion to determine that the nature of JS's felony was "detrimental to the Medicare program" pursuant to 42 C.F.R. § 424.535(a)(3). *Id*. at 4-5 (citing *Letantia Bussell*, DAB No. 2196 (2008)). Finally, the ALJ held that the 2017 change in JS's duties did not compel Noridian to renew Sunsites's enrollment and upheld the effective date of the revocation as March 4, 2013. *Id*. at 5.

Sunsites then filed this appeal to the Board.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address *de novo* viewing the facts in the light most favorable to petitioner and giving petitioner the benefit of all reasonable inferences. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2-3 (2009) (citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004)). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)).

The Board's standard of review on a disputed conclusion of law is whether the ALJ's decision is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*), accessible at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html.

Analysis

Much of the dispute before us hinges on Sunsites's position that what it refers to as the fire chief's "legal issue from 2011" was not a conviction of a felony, because the Arizona adult diversion program was not an "adjudicated pretrial diversion," and therefore not a conviction, under the pre-2015 regulation. P. Br. at 1, 4. We therefore first address Sunsites's focus on the changes in section 424.535(a)(3) and explain why JS's diversion program constitutes a conviction under either version of the regulation, although the 2015 version (in effect at the time of the notice of revocation) is the version properly applied here. *Neil Niren, M.D. and Neil Niren, M.D., P.C.*, DAB No. 2856, at 2 n.2 ("The regulations in effect on the date of the initial determination to revoke apply.") (2018) (citing *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016)).[5] We then respond to Sunsites's dispute of CMS's authority to treat the conviction as "detrimental to the Medicare program."

[5] The ALJ states that CMS did not rely "on the pre-2015 language to support its [summary judgment] motion although it argues that the 2015 clarification does not expand the reach of the regulation but merely clarifies it." ALJ Decision at 4 n.2. CMS's motion nowhere states that it relies on the pre-2015 regulation, although it does state that the 2015 version did not expand the definition of "conviction." CMS Motion for Summary Judgment (MSJ) in C-17-1191, at 6 n.2. In any case, the issues on appeal are limited to the bases for revocation set out in the reconsideration determination. *Vijendra Dave, M.D.*, DAB No. 2672, at 8 n.10 (2016) (and cited cases). In the reconsideration letter, CMS expressly relied on the 2015 regulations as to both bases for revocation. CMS Ex. 3, at 4 ("For purposes of the implementation of administrative action, the version of 42 C.F.R. § 24.535(a)(3) that was in effect on the date that CMS's contractor issued the initial revocation determination is the version that is appropriately applied in this decision.").

The revocation decision, as noted, was based on two grounds: 42 C.F.R. § 424.535(a)(3) and (a)(4). We turn next to the second ground for revocation – the failure to disclose JS's final adverse legal action. At all relevant times, section 424.535(a)(4) authorized revocation of any supplier that certifies as true information that is misleading or false. We reject Sunsites's arguments that it did not violate this provision by certifying that JS had no adverse final legal action on the grounds that it was not required to provide information about managing employees at the time, and that JS's pretrial diversion did not constitute a reportable adverse action.

Finally, we discuss why Sunsites's efforts to correct the basis for revocation did not require reinstatement or preclude summary judgment.

1. The ALJ correctly concluded that JS was convicted of a felony within 10 years of the 2016 application.

As we noted earlier, section 424.535(a)(3) was revised effective in 2015. Prior to its revision, section 424.535(a)(3) provided:

> (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:
>
> . . .
>
> (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 Medicare program and its beneficiaries.
>
> (i) Offenses include –
> (A) 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. . . .

After the revision, the same section provided as follows (with relevant new wording in bold):

> (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:
>
> . . .

> (3) *Felonies.*
>
> (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, **convicted (as that term is defined in 42 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.
>
> (ii) Offenses include, but are not limited in scope or severity to –
>
> (A) 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. . . .

Both versions expressly include "adjudicated pretrial diversions" as part of the term "convicted." The revised version also incorporates the definition of "convicted" at section 1001.2 into the enrollment regulations. Sunsites argues that JS's pretrial diversion program participation should not be considered an "adjudicated" pretrial diversion. P. Br. at 10-14. Sunsites argues further that the ALJ misinterpreted the regulatory revision as merely clarifying rather than expanding the definition of "conviction." *Id*. at 14-15.

Sunsites first asserts that the regulation did not define "convicted" before 2015 and that therefore its "common use" should be applied, which Sunsites suggests is "to find or prove to be guilty." *Id*. at 10 (quoting www.merriam-webster.com/dictionary/convict, last accessed December 6, 2017) (internal quotation marks omitted). Sunsites is mistaken because the regulations at all times defined "conviction" as including "adjudicated pretrial diversion" programs.

Sunsites next contends that "adjudicated" should be understood based on a dictionary definition of "adjudicate" to mean "to make an official decision about who is right in (a dispute): to settle judicially." *Id*. (quoting www.merriamwebster.com/dictionary/adjudicated) (internal quotation marks omitted). Even if we were to accept this lay definition as relevant, we would not agree with the inference that Sunsites draws from it, i.e., that an adjudicated pretrial diversion only exists when the individual has "participated in a program that deferred or commuted a sentence after he had entered a guilty plea or been convicted of a felony." *Id*. The definition Sunsites relies on includes settling a matter judicially. When a court approves

a pretrial diversion and accepts the completion as a basis to dismiss a criminal charge, the matter has been settled judicially. This is further reinforced by the legal definition of "adjudicate" in Black's Law Dictionary as "to rule on judicially." Black's Law Dictionary (10th ed. 2014). Unquestionably, a court ruled judicially on JS's diversion and on its completion.[6]

We also agree with the ALJ that Sunsites's theory "ignores the presence of the word 'pretrial' in the relevant phrase. The regulation [prior to 2015] . . . clearly encompassed arrangements made prior to trial in which individuals agreed to be subject to court supervision and other requirements in lieu of entering a guilty plea or facing a jury." ALJ Decision at 4. Sunsites argues that the ALJ should not have accepted CMS's arguments that the motions before and orders by the court processing JS's charges and his pretrial diversion to dispose of his case constituted "adjudication" on the ground that a "decision or finding that [JS] committed disorderly conduct . . . is a prerequisite for a matter to be 'adjudicated.'" P. Br. at 11. We find no authority for the proposition that adjudication can only be said to occur when a court decides the merits of the case before it.

Sunsites seeks to rely on several ALJ decisions and two Board decisions to show that, unlike JS, the convicted individuals involved in those cases were found guilty or pled guilty before entering into diversion programs. *Id*. at 12-13. ALJ decisions are not precedential but only carry weight to the extent they offer persuasive analyses. *John M. Shimko, D.P.M.*, DAB No. 2689, at 5 (2016). None of the decisions Sunsites cites hold that a prior finding of guilt was a prerequisite to an adjudicated pretrial diversion. In fact, the Board's decision in *Kimberly Shipper* actually cuts against Sunsites's position. *Kimberly Shipper, P.A.*, DAB No. 2804 (2017), *appeal docketed*, No. 6:17-cv-00253-RP-JCM (W.D. Tex. Sept. 22, 2017). The Board found that Ms. Shipper's participation in a deferred adjudication program in which the court "received" but did not "accept" her guilty plea constituted "conviction" under the federal law, regardless of state definitions of the term. *Id*. at 5. The Board specifically noted that the deferred adjudication constituted an "**additional** basis for concluding that Petitioner was 'convicted' of the felony offense," independent of the guilty plea, which implies that either alone would be sufficient. *Id*. at 6 (emphasis added). The Board found that the diversion program "met

[6] Sunsites complains that the ALJ referenced motions before the court without sufficient "examination" of the motions. P. Br. at 11. But Sunsites acknowledges that two of the motions consist of an April 6, 2011 motion for the court "to suspend prosecution" to permit JS's inclusion in the diversion program and an April 16, 2012 request for "dismissal of the case, with prejudice." *Id*. at 12 (citing P. Ex. 11, at 7-8 and 10). The court's actions on these two motions clearly demonstrate that JS's participation in the pretrial diversion and its ultimate resolution of the charges through dismissal were fully adjudicated. Sunsites also stressed during oral argument that the charges were dismissed "with prejudice," without explaining why that fact helps its claim that no adjudication occurred. Oral Argument Tr. at 11. Dismissal with prejudice generally constitutes a final disposition and, if anything, further confirms that the court adjudicated the matter to conclusion.

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.'" *Id*. Moreover, the Board expressly held that the regulations do "not require that a court adjudicate guilt in order for a practitioner to be considered 'convicted.'" *Id.*

The petitioner in *Kimberly Shipper* argued, as Sunsites does here, that applying the 2015 regulation which included the cross-reference to the definition of "convicted" in the exclusion regulations of the Office of Inspector General was improperly retroactive where Ms. Shipper's conviction occurred in 2013. *Id*. at 9. The Board rejected the argument because it was "based on the faulty premise that the 2015 amendment effected a substantive change to section 424.535(a)(3)." *Id.* at 10. The Board held that the added reference merely served to make clearer the scope of the term "conviction," but did not expand it beyond the preexisting scope. *Id*. CMS, the Board explained, acted in "response to public inquiries" over the years, to assist in understanding which "arrangements or circumstances would be considered convictions under the enrollment provisions." *Id*. Thus, CMS stated in the preamble to the regulatory revision that it believed "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," and noted "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).[7] Moreover, the consistent interpretation of the term "conviction" as used in the two sections of the Act is logical in that both revocation and exclusion serve the "same goal of promoting federal health care program integrity" by removing providers whose prior conduct represents a threat to those programs and their beneficiaries. *Shipper* at 10.

Finally, Sunsites argues that its reading of "adjudicated pretrial diversion" as limited to "diversion upon a guilty plea or diversion after a conviction" is "more appropriate" on the ground that "[a]ny other interpretation renders the word 'adjudicated' superfluous." P. Br. at 13. Sunsites argues that its interpretation does not render the reference to "guilty plea" superfluous because "a guilty plea does not always equate to an individual's participation in a diversion program," but "[r]ather, a guilty plea is sometimes accepted and a sentence rendered." *Id*.

We disagree. It is Sunsites's reading that would make superfluous the regulatory language (in both versions of section 424.535(a)(3)) referring to felony offenses of which an individual "was convicted, including guilty pleas and adjudicated pretrial diversions." If the only pretrial diversion programs that qualified under this wording were those in

[7] Sunsites looks to other parts of the preamble to support its claim that the 2015 revision expanded the definition of "convicted" (P. Br. at 14-15; P. Reply Br. at 7-8) but the language on which it relies refers to other changes in the regulation, including expanding the categories of felonies on which revocation might be based and the categories of personnel whose convictions must be reported and may be considered in determining whether to revoke.

which a guilty plea or conviction had occurred, it would be unnecessary to specifically mention pretrial diversions at all. The fact that guilty pleas may be followed by sentencing rather than diversion does not explain why pretrial diversion should be separately mentioned if a finding of guilt by a court were a prerequisite to an adjudicated pretrial diversion. Moreover, the word "adjudicated" is not superfluous as we read it. What the individual here and those involved in all the cases cited by Sunsites have in common is that their participation in diversion programs was based on court involvement -- they were charged in courts, courts ordered and supervised their participation, and courts determined whether they successfully completed their programs and resolved the outstanding charges accordingly – as opposed to, for example, diversion programs operated by prosecutors or other agencies without court involvement. *See, e.g., Ellen L. Morand*, DAB No. 2436, at 5-6 (2012) (distinguishing deferred prosecution from deferred adjudication under section 1128(i)(4) of the Act in context of an exclusion brought by Office of Inspector General).

We conclude that Sunsites has not identified any material dispute of fact and that CMS was entitled as a matter of law to summary judgment in its favor upholding Sunsites's revocation under section 424.535(a)(3).

2. The ALJ correctly found that Sunsites was subject to revocation under section 424.535(a)(4).

It is undisputed that Noridian specifically instructed Sunsites in 2013 to identify JS as "officer/director" and to fill out the section about whether JS had any adverse legal actions. CMS Ex. 7, at 2. It is undisputed that Sunsites identified JS as its officer/director and certified that JS had not been subject to any final adverse action as listed in the application form itself. CMS Ex. 8, at 6-7, 10.

While we have held above, consistent with Board precedent, that the 2015 revisions did not expand the scope of the term "convicted" beyond that under the prior version, we have also noted that the 2015 version did make some substantive changes in other areas. One such change, as CMS acknowledges (CMS Br. at 9 n.3), was expanding the application of the basis for revocation from felony convictions of the supplier itself and its owners to also include "managing employees." CMS rejects any implication by Sunsites that JS was not a managing employee (*id*.), but noted in its MSJ that JS, as fire chief, was listed in CMS enrollment records "as both a managing employee and an officer/director." MSJ at 7 n.3. Sunsites did not focus on this question much in its briefing,[8] but in oral argument Sunsites asserted that JS was neither the supplier nor the

[8] CMS took the position at oral argument that Sunsites actually waived this issue because it failed to raise the question of whether JS's position was one that required reporting of adverse events prior to its reply brief to the Board. Oral Argument Tr. at 16.

owner, but as fire chief was only a managing employee who should not have been subject to the provisions relating to felonies under the pre-2015 regulation. Oral Argument Tr. at 8-10. However, the question of whether JS was a managing employee, an officer/director/owner, or both, is ultimately not material, because the issue in relation to section 424.535(a)(4) is simply whether the information that Sunsites provided in its 2013 application was misleading or false.[9] It clearly was.

Revocation under section 424.535(a)(4) is not limited to failing to disclose felony convictions that would support revocation under section 424.535(a)(3). Instead, a supplier may be revoked under section 424.535(a)(4), as we have mentioned earlier, whenever it certifies as true information that is misleading or false. As CMS points out, the application form and instructions have consistently (from long before the 2015 regulatory revision) required that applicants certify whether any managing employee had been subject to an adverse legal action, including any felony conviction and encompassing adjudicated pretrial diversions. Oral Argument Tr. at 16-17.[10] Sunsites's 2013 application, as ultimately amended in response to Noridian's development requests, certified that JS was not the subject of any final adverse action as listed in the application form. CMS Ex. 8, at 6-7, 10; *see also* CMS Ex. 9, at 13 (showing the list of adverse actions in the Form 855). In 2013, as we have explained above, JS's adjudicated pretrial diversion constituted a felony conviction for an offense listed on the form. Sunsites did not respond to the Noridian information requests by denying that JS, as fire chief, was properly subject to the requirement to disclose prior adverse actions, but instead provided misleading or false information about his conviction.

We therefore conclude that CMS was authorized as a matter of law to revoke Sunsites's enrollment on this basis as well.

3. CMS was within its discretion to treat JS's conviction as detrimental to the Medicare program, and the ALJ did not err in deferring to that determination.

The felony offense of which we have determined JS was "convicted" within the meaning of either version of the regulation was, as Sunsites described it, "disorderly conduct by recklessly handling and discharging a firearm in the presence of another individual." P.

[9] In relation to section 424.535(a)(3), the addition of managing employee is not relevant to our analysis because, as explained earlier, CMS can revoke the Medicare billing privileges of any supplier falling within the scope of 424.535(a)(3) at the time of revocation, i.e., even if the conviction of a particular employee was not a basis for revocation prior to the revision of the regulation, that would not preclude CMS from acting if the conviction occurred within the preceding 10 years when the regulation was extended to that category of employees.

[10] Notably, as quoted by Sunsites, the 2013 application asks about whether the named individual "ever had a final adverse legal action listed on page 13" of the form imposed against him, not whether any managing employee had such an action imposed, so no question exists that the response was in reference to JS personally not to whoever filled a particular role. P. Reply Br. at 6.

Br. at 4 (citing P. Ex. 10). Specifically, it is undisputed that JS fired off a semi-automatic handgun in the presence of an ex-girlfriend. P. Ex. 10. The reconsideration determination stated this offense was detrimental to the Medicare program (as required to apply section 424.535(a)(3)) for two reasons. CMS Ex. 3, at 5. First, CMS found it per se detrimental as a "crime against persons" analogous to assault. CMS Response Br. at 12 (citing 42 C.F.R. § 424.535(a)(3)(ii)(A)); *Bussell,* DAB No. 2196, at 9). Second, CMS determined even if it were not categorically per se detrimental, the conduct involved reckless risk to personal safety and as such was detrimental to the safety of Medicare beneficiaries. *Id*.

The ALJ held that CMS had "non-reviewable discretionary authority" to determine whether a felony offense was "detrimental" to Medicare within the meaning of the regulations. ALJ Decision at 5 (citing *Bussell,* DAB No. 2196). The petitioner in *Bussell* was convicted of income tax evasion, which is one of the felony offenses named in the regulation (then at 42 C.F.R. § 424.535(a)(3)(i)(B); currently at 42 C.F.R. § 424.535(a)(3)(ii)(B)). The Board found that inclusion in the regulatory list constituted a determination that a conviction for that offense was always detrimental in light of CMS's explanation in the preamble to the final rule stating that those included in the regulation are "felonies that we determine to be detrimental to the Medicare program or its beneficiaries." *Bussell* at 9 (quoting 71 Fed. Reg. 20,754, at 20,768 (Apr. 21, 2006)) (emphasis and internal quotation marks omitted). The Board further stated that, even were income tax evasion not per se detrimental, "the determination that her income tax evasion was detrimental to the program and beneficiaries would clearly be within CMS's discretion to make and in no way arbitrary or capricious." *Id*. at 10 n.11.

The same analysis applies here. Section 424.535(a)(3)(ii)(A) does not name felony disorderly conduct but embraces felonies against persons including assault "and other similar crimes." The statute under which JS was charged, prohibiting disorderly conduct "with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so" "by recklessly handling, displaying or discharging a deadly weapon or dangerous instrument," identifies the offense in a way which highlights its hostile impact on other persons in a manner endangering their safety. CMS Ex. 12, at 1 (state court criminal complaint, quoting Ariz. Rev. Stat. 13-2904.A.6). While disorderly conduct may not be comparable to murder or rape, as Sunsites asserts, and JS may not have actually inflicted "any serious physical injury on anyone" (P. Br. at 16), the felony charge involved here thus showed willingness to recklessly place another person's safety and even life at risk. We agree that CMS could reasonably view this offense as a felony

against persons that was similar to assault. Furthermore, in this case, as in *Bussell*, even if we disagreed that the felony was within the scope of section 424.535(a)(3)(ii)(A), we would consider it within CMS's discretion, and in no way arbitrary or capricious, to determine that JS's particular criminal conduct would make his participation detrimental to the Medicare program and its beneficiaries.

4. CMS was not required to reverse Sunsites's revocation based on its restriction of JS's Medicare involvement.

Sunsites contends that its revocation should have been reversed based on section 424.535(e). P. Br. at 17-18. That provision states that, where a revocation "was due to adverse activity (sanction, exclusion, or felony) against an owner, managing employee, or an authorized or delegated official . . ., the revocation may be reversed if the . . . supplier terminates and submits proof that it has terminated its business relationship with that individual within 30 days of the revocation notification."

Sunsites argues that factual disputes should have precluded summary judgment related to the "communications" between it and Noridian after the revocation was issued about how it might "solve this problem going forward." Oral Argument Tr. at 13. According to Sunsites, Noridian employees advised it to "take certain action to separate [JS's] involvement with respect to Medicare." *Id*. Sunsites points to three declarations which it proffered in support of this argument: one by JS himself (P. Ex. 2); one by the Chair of Sunsites's District Board (P. Ex. 1); and one by an individual with the title of Sunsites's "Medicare Manager" (P. Ex. 12).[11] The upshot of their declarations collectively, taken as true for purposes of summary judgment, are summarized below.

The District Board Chair says that Sunsites's counsel informed him, after conversations with two Noridian employees, that "relieving [JS] of all Medicare duties would resolve any problems and would allow Noridian/CMS to reverse the revocation decision." P. Ex. 1, at 2-3, ¶¶ 19-20. The declaration goes on to say that, based on this advice, the District Board passed a resolution on April 26, 2017 to terminate JS's duties with respect to "all

[11] Sunsites contends that the ALJ "ignored" material statements in these declarations to which CMS objected in part. P. Br. at 17. We disagree. The ALJ stated that, because he "decide[d] this case based on the undisputed material facts," he need not rule on the objections or admit either party's exhibits as evidence. ALJ Decision at 1. He also stated that he would nevertheless "refer to some of the parties' exhibits, only for purposes of illustrating facts that are not in dispute." *Id*. As the Board has held, an ALJ need not rule on admission of exhibits to resolve a motion for summary judgment, but, in that situation, the exhibits are "properly treated as an offer of proof, that may be evaluated if necessary to determine whether a genuine issue of material fact exists." *Illinois Knights Templar Home*, DAB No. 2274, at 6-7 (2009) (citation omitted). The ALJ's language is less than clear, particularly as applied in this case given the outstanding objections to these exhibits, but we presume that he did follow the long-standing requirement to consider all the exhibits proffered by Sunsites, viewing them in the light most favorable to the non-movant in determining to grant summary judgment. In any case, we review summary judgment de novo and have ourselves fully considered the exhibits.

Medicare matters and reassign those matters" to the Medicare Manager. *Id*. at 3, ¶¶ 21-22 (emphasis in original). The District Board Chair opines that this decision "effectively terminated" Sunsites's "business relationship with [JS] as it relates to Medicare matters." *Id*. ¶ 24. JS affirms that he was removed by the District Board's decision from all Medicare duties which were reassigned and further avers that he has not, since then, "reviewed, approved, responded to, or in any way handled any Medicare matters" for Sunsites. P. Ex. 2, at 3 ¶¶ 25-27. The Medicare Manager also confirms that, after the decision, her duties were expanded to include all Medicare matters, that she alone reviews, submits, approves and responds to any Medicare billing, and that she ensures that JS is "screened off" from all Medicare matters. P. Ex. 12, at ¶¶ 7, 10-12.

Sunsites expressly denies that the Noridian employees misled it or acted with any "nefarious intent," but also insists that CMS did not present any evidence conflicting with the statements in Sunsites's declarations. Oral Argument Tr. at 12-15, 29. Nevertheless, Sunsites argues that the ALJ should have proceeded to hearing and should have permitted cross-examination of Noridian employees who would "have presumably testified." *Id*. at 14.

To begin with, Sunsites is mistaken in its presumption that Noridian employees would have testified had the ALJ held a hearing. The ALJ's prehearing order, dated October 2, 2017, clearly informed the parties that they must submit written direct testimony for any witness they wish to present and that an in-person hearing would only be convened if a party requests to cross-examine a witness whose testimony was submitted by the opposing party. Acknowledgment and Prehearing Order in DAB C-17-1191, at 5-6. Sunsites proffered testimony from the three witnesses discussed in this section and CMS requested to cross-examine all three, if summary judgment were not granted (as well as objecting to parts of their declarations for reasons which we have declined to resolve in the summary judgement context). CMS did not proffer any witnesses and Sunsites did not seek to subpoena or present as witnesses any Noridian employee. Therefore, even had summary judgment not been appropriately granted (which we have found it was), any in-person hearing would have been convened only to permit CMS to cross-examine Sunsites's witnesses.

In any case, what the Noridian employees told Sunsites's counsel, and what counsel or Sunsites may have in good faith understood, about what measures might suffice to reverse the disallowance are not material.[12] The only relevant issues are whether, in fact, Sunsites **did** terminate its business relationship with JS within the meaning of the regulation and, if so, whether CMS was required to reinstate it. Neither issue can be resolved in Sunsites's favor.

The Board has not previously addressed the situation of a managing employee/official retaining his position while being "screened" from Medicare matters, but has considered the meaning of terminating a business relationship in the context of an owner with a felony conviction in *Central Kansas Cancer Institute*, DAB No. 2749 (2016). In that case, a physician-owner of a cancer center argued that the center had "terminated its business relationship" with him by his stopping all patient care at the center and ceasing to receive any payments for such services. *Id*. at 11. The Board emphasized that he continued to have a legal relationship with the supplier, based on his ownership rights and obligations, so long as he had not sold his interest even if his "daily contacts" changed, and concluded that he had failed to show any authority for the proposition that termination of the business relationship can be "satisfied by anything short of the convicted individual's sale of his or her ownership interest." *Id.* at 11-12.

JS's role as fire chief of the supplier is not identical to the ownership position of the physician owner in *Central Kansas*. Sunsites has not cited any authority to us, however, for the proposition that termination of the business relationship of an ambulance company with the fire chief can be satisfied by constraining his role in Medicare matters rather than actually ending his managerial or official position. Sunsites argues that the ALJ should not have based his judgment on "his belief that the evidence presented was insufficient to 'explain precisely how this arrangement is supposed to work,'" because

[12] Indeed, we assume for purposes of summary judgment that Sunsites's witnesses are truthfully reporting their understanding of the conversations involved. Nevertheless, as a matter of law, mistaken information provided by an employee or contractor cannot estop the federal government from enforcing the law, certainly in the absence of any showing of affirmative misconduct which Sunsites expressly denied alleging at oral argument, as quoted above. *See Richard Weinberger, M.D., and Barbara Vizy, M.D.*, DAB No. 2823, at 18 (2017) ("[I]f estoppel lies against the government at all, courts have held that at a minimum the detrimental reliance must result from 'affirmative misconduct' by agents of the government." (citing *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990)*; Linkous v. United States*, 142 F.3d 271, 277-78 (5th Cir. 1998); *Pac. Islander Council of Leaders*, DAB No. 2091, at 12 & n.11 (2007)); *see also Foot Specialists of Northridge*, DAB No. 2773, at 19 (2017))). For the same reason, we accept as true for these purposes Sunsites's assertions that its revocation will have negative consequences (P. Br. at 8) (although, as is apparent, Sunsites could have avoided these by actually terminating JS's role in the organization), but we cannot disturb a lawfully authorized revocation based on such equitable arguments. *See, e.g., Brian K. Ellefsen, D.O.*, DAB No. 2626, at 9 (2015) (and cases cited therein) ("CMS may revoke a provider's or supplier's billing privileges based solely on a qualifying felony conviction, without regard to equitable or other factors.").

that amounted to resolving a question of the weight or credibility of the evidence on summary judgment "which is impermissible." P. Reply Br. at 14 (quoting ALJ Decision at 5). We are not persuaded that further elucidation of how Sunsites's arrangement with its convicted fire chief "is supposed to work" would be material, however, because the language of the regulation does not appear to allow simply fencing off the convicted person from direct involvement in Medicare matters. The regulation instead refers broadly to the "termination" of an entire "business relationship." We need not, in any case, conclude that CMS lacks authority to reinstate a supplier who severs its relationship with a convicted owner, official or managing employee by something less than complete sale of the business or removal from the position.

The Board has repeatedly held that section 424.535(e) is "permissive in nature" in that "the term 'may' in the regulation implies that CMS's authority to reverse a revocation is discretionary, even when a supplier terminates its business relationship with the convicted individual and submits proper notice . . . ." *Main St. Pharmacy, LLC*, DAB No. 2349, at 8 (2010) (citing *Alden-Princeton Rehab. and Health Care Ctr., Inc.*, DAB No. 1709 (1999)); *Maine Dep't of Human Servs.*, DAB No. 516 (1984) (both emphasizing significance of use of "may" rather than "shall" to imply discretion); *see also Meadowmere Emergency Physicians, PLLC*, DAB No. 2881, at 15 (2018). Here, as in *Main Street*, Sunsites "presented no persuasive reason to view CMS's declining to reverse this revocation as abusive, arbitrary or capricious." DAB No. 2349, at 8 (quoting *Main St. Pharmacy, LLC*, DAB CR2160, at 7 (2010)) (internal quotation marks omitted).

Conclusion

For the reasons explained above, we uphold the ALJ Decision and sustain CMS's revocation of Sunsites's Medicare billing privileges.

/s/
Christopher S. Randolph

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member