Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mark A. Kabat, D.O.,
(NPI: 1700064391 / PTANs: 396916YKZ4, CO301654),

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-453

Decision No. CR4949

Date: October 5, 2017

DECISION

The Medicare enrollment and billing privileges of Petitioner, Mark A. Kabat, D.O., are revoked pursuant to 42 C.F.R. § 424.535(a)(3).[1] Pursuant to 42 C.F.R. § 424.535(f)(2007), which was in effect at the time of Petitioner's conviction, the effective date of revocation is October 9, 2016, 30 days after the September 9, 2016, notice of the reopened and revised initial determination.

I. Background and Procedural History

On December 3, 2015, Novitas Solutions (Novitas), a Medicare Administrative Contractor (MAC), notified Petitioner that his Medicare enrollment and billing privileges were revoked effective October 24, 2007, pursuant to 42 C.F.R. §§ 424.535(a)(3) and (9). Novitas also notified Petitioner that he was subject to a three-year bar to re-enrollment pursuant to 42 C.F.R. § 424.535(c), effective 30 days from the notice of revocation. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 28-29, 48-49. On March 4, 2016, counsel for Petitioner requested reconsideration of the initial determination to revoke Petitioner's Medicare enrollment and billing privileges. CMS

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[1] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

Ex. 1 at 50-56. On June 2, 2016, a CMS hearing officer upheld the revocation of Petitioner's Medicare enrollment and billing privileges on reconsideration. CMS Ex. 1 at 21-25, 42-46; 106-12.

On September 9, 2016, Novitas issued a revised initial determination that Petitioner's Medicare enrollment and billing privileges were revoked effective October 24, 2007, pursuant to 42 C.F.R. § 424.535(a)(3) with a three-year bar to re-enrollment effective 30 days from the revised notice of revocation. CMS Ex. 1 at 103-04, 181-82. On November 4, 2016, counsel for Petitioner requested reconsideration of the revised initial determination to revoke Petitioner's Medicare enrollment and billing privileges. CMS. Ex. 1 at 7-19. On February 3, 2017, a CMS hearing officer upheld the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 1 at 1-6.

On March 16, 2017, Petitioner requested a hearing before an administrative law judge (ALJ). On March 27, 2017, the case was assigned to me for hearing and decision, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction.

On April 20, 2017, CMS filed a prehearing brief and motion for summary judgment (CMS Br.) with CMS Ex. 1. On May 25, 2017, Petitioner filed a response in opposition to the CMS motion for summary judgment and cross-motion for summary judgment (P. Br.). Petitioner did not submit exhibits, but specified that he would rely on CMS Ex. 1. On June 12, 2007, CMS filed a reply brief. Petitioner did not object to my consideration of CMS Ex. 1 and it is admitted as evidence.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act

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[2] Petitioners are "suppliers" under the Act and the regulations. A "supplier" furnishes services under Medicare and the term supplier applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act.
(Footnote continued next page.)

§§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through MACs such as Novitas. Act § 1842(a) (42 U.S.C. § 1395u(a)).

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its MAC may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The effective date of the revocation is controlled by the applicable regulation. After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for a minimum of one year, but no more than three years. 42 C.F.R. §424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of: its reconsidered determination to the supplier; the reasons for its determination; the conditions or requirements the supplier failed to meet; and the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act unless waived. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

The issues in this case are:

(Footnote continued.)

Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

Whether summary judgment is appropriate;

Whether there is a basis for the revocation of Petitioners' Medicare enrollment and billing privileges; and

Whether the effective date of revocation may be determined by the retroactive application of a regulation.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

A provider or supplier denied enrollment in Medicare or whose enrollment has been revoked has a right to a hearing and judicial review pursuant to section 1866(h)(1) and (j) of the Act and 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17); 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. Act §§ 205(b), 1866 (h)(1) and (j)(8); *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing, but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless the cross-motions for summary judgment have merit.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. pt. 498. 42 C.F.R. §§ 405.800, 405.803(a), 424.545(a), 498.3(b)(5), (6), (15), (17). The regulations do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g.*, *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.) do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498, for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Conv. Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Conv. Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

In this case, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) that requires a hearing in this case. The issues in this case raised by Petitioner related to the basis for revocation of his Medicare enrollment and billing privileges must be resolved against him as a matter of law. The undisputed evidence shows that there was a basis for revocation of Petitioner's Medicare enrollment and billing privileges. The issue of the correct effective date must also be resolved as a matter of law and there are no factual disputes related to that issue that require a hearing. Accordingly, summary judgment is granted in part and denied in part for CMS and Petitioner as explained hereafter.

2. Petitioner was convicted on October 24, 2007, of the felony offense of obscene communication and use of computer services to seduce, in violation of Florida Statute § 847.0135(3)(2007).

3. The Secretary has determined and provided by regulation that felony crimes against persons, such as murder, rape, assault, and similar crimes, are detrimental to the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii)(A).

4. Petitioner's conviction of obscene communication and use of computer services to seduce is a felony crime against a person similar to the examples listed in 42 C.F.R. § 424.535(a)(3)(ii)(A), and presumptively detrimental to the Medicare program and its beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3).

5. Petitioner's conviction occurred within the ten years preceding the revocation action.

6. There is a basis for the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

7. CMS and the MAC incorrectly determined the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges as the date of his conviction, by retroactively applying the 2009 revision of 42 C.F.R. § 424.535 to a felony conviction that occurred on October 24, 2007, before the regulation was effective.

8. Petitioner's Medicare enrollment and billing privileges are revoked effective October 9, 2016, 30 days from the reopened and revised initial determination to revoke. 42 C.F.R. § 424.535(g) (2007).

9. I have no authority to review CMS's determination to impose a three-year bar on Petitioner's Medicare re-enrollment.

10. Pursuant to 42 C.F.R. § 424.535(c), the three-year bar to re-enrollment runs from the date of the initial determination to revoke, but the Secretary and CMS have discretion not to enroll a supplier convicted of a felony determined detrimental to the best interests of Medicare or its beneficiaries for up to ten years from the date of conviction. Act § 1866(b)(2)(D) (42 U.S.C. § 1395cc(b)(2)(D)); 42 C.F.R. § 424.530(a)(3).

a. Facts

The material facts are not disputed.

On October 24, 2007, Petitioner pleaded no contest to a third-degree felony offense of obscene communication and use of computer services to seduce in violation of Florida Statute § 847.0135(3)(2007).[3] CMS Ex. 1 at 177-80; P. Br. at 3. Petitioner does not dispute that his no contest plea was accepted, a judgment of conviction was entered, and he was sentenced to 60 days in jail followed by sex offender probation for three years subject to specified conditions. CMS Ex. 1 at 177-80.

On December 3, 2015, Novitas notified Petitioner that his Medicare enrollment and billing privileges were being revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9) effective October 24, 2007. The notice advised that the revocation was based on Petitioner's October 24, 2007 felony conviction of obscene communication and use of computer services to seduce in violation of Florida Statute § 847.0135(3)(2007). Novitas imposed a three-year re-enrollment bar, beginning 30 days from the notice of revocation. CMS Ex. 1 at 28-29.

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[3] The statute provides as follows:

> 847.0135. Computer pornography; traveling to meet minor; penalties. –
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> * * * *
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> (3) Certain Uses of Computer Services or Devices Prohibited. – Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
> (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
>
> * * * *
>
> commits a felony of the third degree . . . .

Fla. Stat. § 847.0135(3)(2007).

On September 9, 2016, Novitas notified Petitioner that it was issuing a revised initial determination that his Medicare enrollment and billing privileges were being revoked effective October 24, 2007, pursuant to 42 C.F.R. § 424.535(a)(3). Novitas cited as grounds for the revocation Petitioner's felony conviction. Novitas imposed a three-year re-enrollment bar beginning 30 days from the date of the reopened and revised initial determination. CMS Ex. 1 at 103-04.

There is no dispute that Petitioner reported his felony conviction to the prior Medicare contractor, Trailblazer, in 2008. Therefore, in the reconsidered determination issued on June 2, 2017, Novitas decided not to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9) for failure to report the conviction. CMS Ex. 1 at 44, 83, 139. Trailblazer enrolled Petitioner effective May 5, 2008. CMS Ex. 1 at 98, 154.

b. Analysis

(i.) There is a basis for the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

Congress granted the Secretary authority to revoke the enrollment of a provider or supplier convicted under federal or state law of a felony offense that the Secretary determines is detrimental to the program or its beneficiaries. Act § 1866(b)(2)(D). The Secretary delegated to CMS the authority to revoke a supplier's billing privileges if CMS determines that the supplier was, "within the preceding 10 years, convicted (as that term is defined in 42 C.F.R. § 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." 42 C.F.R. § 424.535(a)(3) (2015). The Secretary has specified those crimes that are presumptively detrimental to the best interests of the program and its beneficiaries in 42 C.F.R. § 424.535(a)(3)(ii). The listing of presumptively detrimental felonies in 42 C.F.R. § 424.535(a)(3)(ii) is not exhaustive but specifically permits revocation for detrimental felonies similar to the crimes listed. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 10 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

The elements necessary for revocation pursuant to 42 C.F.R. § 424.535(a)(3) are clear. CMS may revoke a supplier's Medicare billing privileges if the following conditions are met: (1) the supplier was convicted of a federal or state felony offense within the 10 years preceding the revocation action; and (2) CMS has determined that the supplier's felony offense is detrimental to the best interests of the Medicare program and its beneficiaries. *See Fady Fayad,* M.D., DAB No. 2266 at 7 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

The first issue to resolve is whether or not the offense of which Petitioner was convicted falls within any of the types of presumptively detrimental offenses listed in 42 C.F.R. § 424.535(a)(3)(ii):

> (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.
>
> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
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> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

Petitioner's crime was neither a financial crime nor a crime that placed Medicare or a beneficiary at immediate risk and I conclude that 42 C.F.R. § 424.535(a)(3)(ii)(B) and (C) have no application in this case. Section 1128(a) of the Act, which is referred to in 42 C.F.R. § 424.535(a)(3)(ii)(D,) requires that the Secretary exclude from participation in Medicare any individual convicted of a program related crime, patient abuse, felony health care fraud, or a felony related to controlled substances. Petitioner's conviction does not fall within the various crimes enumerated in section 1128(a) of the Act. There is no evidence that the target of Petitioner's criminal conduct was either a Medicare-eligible beneficiary or a patient. Therefore, only 42 C.F.R. § 424.535(a)(3)(ii)(A) is potentially applicable as that subsection permits revocation of enrollment based on a felony crime against a person. Petitioner was convicted of a violation of Fla. Stat. § 847.0135(3), a third-degree felony. The Florida statute criminalizes the following conduct:

> Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
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> (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by

> the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child . . . .

The conduct to which Petitioner pleaded no contest and for which he was convicted was clearly a crime against a person, albeit an unspecified person. Although not murder or rape, the offense was clearly similar to an assault, more specifically, sexual assault or similar conduct that ended without consummation but rather amounted to an attempt to engage in unlawful sexual conduct with a child or one believed to be a child. *See Black's Law Dictionary* 122-23 (8th ed. 2004) (various definitions of assault).

Petitioner does not dispute that he was convicted of the felony offense in 2007 or that the felony conviction occurred within the ten years preceding the initial determination to revoke on December 3, 2015 or the revised initial determination to revoke on September 9, 2016.

Accordingly, I conclude that:

- Petitioner was convicted within the ten years preceding the revocation of his Medicare enrollment and billing privileges;
- Petitioner was convicted of a felony offense;
- Petitioner's felony offense falls within the definition of the presumptively detrimental offense of a felony against a person under 42 C.F.R. § 424.535(a)(3)(ii)(A);
- The elements for revocation under 42 C.F.R. § 424.535(a)(3) are satisfied; and
- There is a basis for revocation of Petitioner's enrollment pursuant to 42 C.F.R. § 424.535(a)(3).

Having found that there is a basis for revocation, I have no authority to review the exercise of discretion by CMS to revoke Petitioners' Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 10 (2013); *Fady Fayad, M.D.*, DAB No. 2266 at 16 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Ahmed*, DAB No. 2261 at 16-17, 19.

Petitioner's arguments focus primarily upon the procedural process followed by CMS and the notion that those procedures were defective and amounted to a deprivation of due process, particularly adequate notice of what to defend. Petitioner argues that CMS and Novitas inadequately explained the basis for finding Petitioner to have been convicted of an offense detrimental to Medicare or its beneficiaries. P. Br. I do not find the arguments persuasive. The notice of initial determination dated December 3, 2015, clearly advised Petitioner that revocation was pursuant to 42 C.F.R. § 424.535(a)(3) based upon his conviction of a felony. The notice specifically described the felony.

Although the notice did not specifically state the subsection of 42 C.F.R. § 424.535(a)(3)(ii) into which Petitioner's conviction fit, it was nevertheless clear that revocation was pursuant to 42 C.F.R. § 424.535(a)(3). The notice also cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation, but Novitas subsequently withdrew that basis after considering Petitioner's evidence on reconsideration. CMS Ex. 1 at 23. The December 3, 2015, notice accurately advised Petitioner regarding the bar to re-enrollment and his right to request reconsideration. CMS Ex.1 at 28-29. Petitioner exercised his right to request reconsideration. The first reconsidered determination was issued by Novitas on June 2, 2016. Petitioner's request for reconsideration was successful in part because the hearing officer removed 42 C.F.R. § 424.535(a)(9) as a basis for revocation. The reconsidered determination cited Petitioner's felony conviction, which was described in detail, as the basis for revocation pursuant to 42 C.F.R. § 424.535(a)(3). The reconsidered determination set forth the text of 42 C.F.R. § 424.535(a)(3)(ii) but did not specify into which of the presumptively detrimental offense categories Petitioner's conviction fit. The notice also accurately described Petitioner's right to request ALJ review, a right he exercised. CMS Ex. 1 at 11, 21-25; P. Br. at 5. Subsequent to Petitioner requesting ALJ review Novitas issued a revised initial determination on September 9, 2016. Although it is not clear why, Petitioner states his request for hearing was rendered moot by the revised initial determination and ALJ review did not occur. CMS Ex. 1 at 11. The September 9, 2016, notice of the reopened and revised initial determination advised Petitioner that revocation was pursuant to 42 C.F.R. § 424.535(a)(3) and described in detail the offense of which Petitioner was convicted. The notice did not indicate whether Petitioner's felony conviction fit within any of the four presumptively detrimental offenses described in 42 C.F.R. § 424.535(a)(3)(ii). The notice accurately advised Petitioner of his right to request reconsideration and he exercised that right. CMS Ex. 1 at 103-04. Petitioner requested reconsideration by letter dated November 4, 2016, in which he set forth in detail his arguments in his 13-page letter and multiple exhibits. CMS Ex. 1 at 7-19. On February 3, 2017, a CMS hearing officer issued a reconsidered determination. The hearing officer upheld revocation pursuant to 42 C.F.R. § 424.535(a)(3). The hearing officer set forth the full text of 42 C.F.R. § 424.535(a)(3) but did not specifically state whether or not Petitioner's offense fit within one of the four presumptively detrimental offenses described in 42 C.F.R. § 424.535(a)(3)(ii). The hearing officer specifically described the documents considered on reconsideration. The hearing officer described in detail the offense of which Petitioner was convicted. The hearing officer adequately advised Petitioner of his right to request ALJ review and Petitioner exercised the right. CMS Ex. 1 at 4-6. I provide Petitioner de novo review as to whether or not there is a basis for revocation of his enrollment and billing privileges. I am not bound by the prior determinations of CMS and Novitas as to the existence of a basis. However, if I conclude as I have here that there is a basis for revocation, I do not review the exercise of discretion by CMS or the MAC to revoke. *Douglas Bradley, M.D.*, DAB No. 2663 at 17 n. 13 (2015).

Based on my de novo review in this case, I have concluded that there is a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(3). I also conclude that Petitioner has been accorded all process due under section 1866 of the Act and 42 C.F.R. pts. 424 and 498. Novitas clearly did not expressly characterize Petitioner's felony conviction as falling into one of the four categories of presumptively detrimental offenses described in 42 C.F.R. § 424.535(a)(3)(ii). However, I find no prejudice as Petitioner was clearly notified multiple times that revocation was pursuant to 42 C.F.R. § 424.535(a)(3) based on his conviction, which was also clearly described in all notices, albeit with an incorrect citation for the Florida statute to which he pleaded guilty. Although Novitas may have erred multiple times citing the Florida statue that Petitioner violated, there is no question that Petitioner knew the felony offense of which he was convicted. Novitas' incorrect citations of the Florida statute caused Petitioner no prejudice. I also conclude that there was no prejudice to Petitioner based on any defects in the procedures followed by Novitas and CMS because Petitioner has fully exercised his right to review and to present and defend his case. Finally, my review is de novo and unaffected by any procedural defects which, in this case, amounted to harmless error at most.

Petitioner argues Novitas did not comply with requirements of 42 C.F.R. § 498.32 when reopening and revising the initial determination. P. Br. at 11, 19-21. The regulation provides:

> (a) Notice. (1) CMS or the OIG, as appropriate, gives the affected party notice of reopening and of any revision of the reopened determination.
>
> (2) The notice of revised determination states the basis or reason for the revised determination.
>
> (3) If the determination is that a supplier or prospective supplier does not meet the conditions for coverage of its services, the notice specifies the conditions with respect to which the affected party fails to meet the requirements of law and regulations, and informs the party of its right to a hearing.

42 C.F.R. § 498.32(a). Novitas issued the reopened and revised determination by letter dated September 9, 2016. The letter advised Petitioner of the basis for revocation of his Medicare enrollment and billing privileges and his right to request reconsideration. The notice satisfies the requirements of 42 C.F.R. § 498.32(a)(1) and (3). The notice does not specifically state why reopening and revision were necessary and, to that extent, the notice does not comply with 42 C.F.R. § 498.32(a)(2). Petitioner points out that the reopened and revised initial determination changed nothing. Petitioner speculates that the reopening and revision was done in order to cut off the prior ALJ proceedings because CMS did not want to defend its prior action. Petitioner also implies that Novitas

reopened and revised in order to effectively extend the re-enrollment bar beyond three years, which appears to be consistent with the fact Novitas reopened and revised the initial determination rather than the reconsidered determination due to the fact that the re-enrollment bar runs from the date 30 days after the notice or revocation pursuant to 42 C.F.R. § 424.535(c). P. Br. at 19-22. However, Petitioner does not explain how the Novitas procedural error of failure to state the reason for reopening and revision caused Petitioner any prejudice, except to the extent the reopening and revision restarted the period of the bar to re-enrollment effectively extending it to nearly four years, an issue I discuss hereafter. I conclude that the fact the notice of the reopened and revised determination did not state why reopening and revision was necessary is not grounds for relief.

(ii.) Novitas and CMS incorrectly determined the effective date of revocation.

In the reopened and revised initial determination dated September 9, 2016, Novitas determined that the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges was October 24, 2007, the date of Petitioner's conviction. CMS Ex. 1 at 103. The reconsidered determination also states that the effective date of revocation is October 24, 2007. CMS Ex. 1 at 1. Petitioner is understandably concerned that if this effective date is upheld, CMS may declare that all Medicare claims filed by or on behalf of Petitioner from October 24, 2007 to September 9, 2016, were not eligible for payment and will declare an overpayment for any claims during the period actually paid to Petitioner. Petitioner argues that Novitas incorrectly determined that the effective date of revocation was the date of his conviction, because at the time determination of the effective date in that manner was not authorized by the Secretary in his regulations. The gist of Petitioner's argument is that if CMS and the MAC had acted promptly to revoke based on Petitioner's conviction prior to 2009, the effective date would have been 30 days after the notice of revocation not the date of the conviction. P. Br. at 19.

I infer that Novitas applied 42 C.F.R. § 424.535(g)(2015) to determine the date of revocation in this case. The regulation provides that revocation is effective 30 days after CMS or its contractor mails the notice of the revocation determination to the provider or supplier. An exception exists in certain cases, such as when the revocation is based on a felony conviction, in which case the revocation is effective the date of the felony conviction. 42 C.F.R. § 424.535(g).

In October 2007, when Petitioner was convicted, the regulation in effect provided that "[r]evocation becomes effective within 30 days of the initial revocation notification." 42 C.F.R. § 424.535(f)(2007). There was no provision at the time of Petitioner's conviction

that provided that the revocation was effective the date of the felony conviction. I conclude as a matter of law[4] that the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges should be determined under the regulatory provisions in effect on the date of Petitioner's October 24, 2007 conviction. It was not until January 1, 2009, that CMS revised its regulation, providing that when revocation is based on a felony conviction, the effective date of revocation is the date of the conviction. 42 C.F.R. § 424.535(g); 73 Fed. Reg. 69,940. In this case, Novitas retroactively applied 42 C.F.R. § 424.535(g) to determine that the date of Petitioner's felony conviction was the effective date of Petitioner's revocation. Pursuant to 42 U.S.C. § 1871(e)(1)(A) of the Act (42 U.S.C. § 1395hh(e)(1)(A)), the regulations of the Secretary are not applied retroactively, unless the Secretary determines that:

> (i) such retroactive application is necessary to comply with statutory requirements; or
>
> (ii) failure to apply the change retroactively would be contrary to the public interest.

Act § 1871(e)(1)(A). CMS has not shown that the retroactive application of 42 C.F.R. § 424.535(g) is necessary for the Secretary to comply with any statutory requirement or that the failure to apply the regulation retroactively would be contrary to the public interest.

The Board approved the retroactive application of 42 C.F.R. § 424.535(g) in *Norman Johnson, M.D.*, DAB No. 2779 at 18-20 (2017). In *Johnson*, the Board held that the Petitioner's case "is controlled by the version of section 424.535(g) in effect on the date [the CMS contractor] issued the initial revocation determination, not by the version in effect on the date of his conviction." *Id.* at 19. The Board therefore applied the version of 42 C.F.R. § 424.535(g) in effect at the time the 2015 initial revocation determination was issued in finding that the Petitioner's 2008 conviction was the effective date of revocation. *Id.* at 19-20. However, the *Johnson* decision does not mention or discuss the limit Congress imposed upon retroactive application of the Secretary's regulation in section 1871(e)(1)(A) of the Act, a statute with which I am bound to comply. The statute specifically states that regulations are not applied retroactively unless one of two determinations is made by the Secretary. There is no evidence that the Secretary has made either of those determination related to 42 C.F.R. § 424.535(g).

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[4] I do not consider equitable arguments that Petitioner suffers substantial prejudice by the delayed revocation action and the retroactive application of the regulation.

Therefore, I conclude that it would be contrary to section 1871(e)(1)(A) of the Act to retroactively apply the 2009 revision of 42 C.F.R. § 424.535(g) to Petitioner's conviction that occurred on October 24, 2007. Applying 42 C.F.R. § 424.535(f)(2007), the regulation in effect when Petitioner was convicted, I conclude that the effective date of revocation should begin within 30 days after the date of the reopened and revised initial determination on September 9, 2016, that is, October 9, 2016.

Petitioner argues that CMS and Novitas have effectively imposed nearly a four-year bar to re-enrollment in violation of 42 C.F.R. § 424.535(c)(1), which limits such bars to three years maximum. Petitioner's analysis is that Novitas imposed a three-year bar in its initial determination dated December 3, 2015, and pursuant to 42 C.F.R. § 424.535(c)(1) that bar was effective 30 days later on January 2, 2016. However, when Novitas issued the reopened and revised initial determination on September 9, 20116, the notice provided for a three-year bar effective 30 days from the date of the notice of the reopened and revised determination, which was October 9, 2016. Petitioner reasons that CMS and Novitas effectively imposed a bar to re-enrollment of three years and nine months. P. Br. at 21-23; CMS Ex. 1 at 28, 103.

When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c). There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS or the MAC imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545, 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 10-11 (2016). Thus, whether or not Petitioner's argument has merit, I have no jurisdiction to review issues related to the duration of Petitioner's re-enrollment bar or whether it was imposed in violation of the delegation of authority under 42 C.F.R. § 424.535(c).[5]

Petitioner argues that Petitioner reported his felony conviction to the prior Medicare contractor, Trailblazer, in 2008. CMS Ex. 1 at 44, 83, 139. Trailblazer enrolled Petitioner effective May 5, 2008, despite his conviction. CMS Ex. 1 at 98, 154; P. Br. at 3. Petitioner does not specifically assert based on the prior enrollment by Trailblazer in 2008, that CMS should be estopped from revoking Petitioner's Medicare enrollment and billing privileges in 2015 based on his 2007 conviction. Out of an abundance of caution I note that, as a matter of law, estoppel against the federal government, if available at all, is presumably unavailable absent "affirmative misconduct," such as fraud. *See, e.g., Pacific*

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[5] I do not intend to suggest that the Board, which conducts final review on behalf of Secretary when requested, could not address this issue.

Islander Council of Leaders, DAB No. 2091, at 12 (2007); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

Some of Petitioner's arguments may be construed to request equitable relief. However, I have no authority to grant Petitioner equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010). Furthermore, I am bound to follow the Act and regulations and have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009).

III. Conclusion

For the foregoing reasons, I conclude that there was a basis to revoke Petitioners' Medicare enrollment and billing privileges effective October 9, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge