Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Norman Johnson, M.D.
Docket No. A-16-62
Decision No. 2779
March 30, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Norman Johnson, M.D. (Petitioner) appeals a February 8, 2016 decision by an administrative law judge (ALJ), *Norman Johnson, M.D.*, DAB CR4524 (ALJ Decision). That decision sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges based on 42 C.F.R. § 424.535(a)(3).

We affirm the ALJ's conclusion that the revocation was lawful under section 424.535(a)(3). However, we modify his conclusion concerning the revocation's effective date. We hold that the effective date is November 3, 2008, not February 17, 2015 as the ALJ held. In all other respects we affirm the ALJ Decision.

Legal Background

A physician (or other "supplier"[1] of Medicare services) must be enrolled in the Medicare program in order to receive payment for items and services covered by Medicare. 42 C.F.R. § 424.505.

Supplier enrollment is governed by regulations in 42 C.F.R. § 424.500-.575.[2] Those regulations authorize CMS to revoke a supplier's Medicare billing privileges for any of the "reasons" specified in paragraphs (1) through (14) of section 424.535(a).

[1] The term "supplier" is defined in Medicare's regulations to mean "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 (defining terms as used in the Medicare program).

[2] We cite to, and apply, the version of section 424.535 that was in effect on February 17, 2015, the date that CMS's contractor issued the initial revocation determinations. *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016).

Under section 424.535(a)(3), CMS may revoke a supplier's Medicare billing privileges 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." 42 C.F.R. § 424.535(a)(3)(i). Offenses that CMS has determined to be detrimental to the best interests of Medicare include, as relevant here, ***"[f]inancial crimes***, ***such as*** extortion, embezzlement, ***income tax evasion***, insurance fraud and other similar crimes . . . ." *Id.* § 424.535(a)(3)(ii)(B) (italics and emphasis added).

When a revocation is based on a felony conviction, the revocation's effective date is the date of conviction. *Id.* § 424.535(g). A revoked supplier is barred "from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar." *Id.* § 424.535(b), (c). The re-enrollment bar is a minimum of one year but no more than three years. *Id.* § 424.535(c).

A supplier may appeal a revocation determination in accordance with the procedures in 42 C.F.R. Part 498. The supplier must first request "reconsideration" of the initial revocation determination. 42 C.F.R. §§ 498.5(1), 498.22. If dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. *Id.* § 498.40.

Case Background

It is undisputed that on November 3, 2008, Petitioner entered a plea of no contest in a California court to three felony counts of failing to file a state income tax return, that he was convicted on each count, and that his state felony offenses are financial crimes that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries.[3]

[3] The record does not contain a state judicial record evidencing Petitioner's 2008 plea and resulting conviction. However, in response to CMS's summary judgment motion, Petitioner expressly concurred with the statement in that motion's "Statement of Undisputed Material Facts" that he had "entered a plea of [no contest] to three felony counts of failing to file state income tax returns, and [that] conviction was entered on each count." *See* CMS's Sept. 16, 2015 Pre-Hearing Brief and Motion for Summary Judgment, Docket No. C-15-3708, at 2-3; Petitioner's Nov. 16, 2015 Prehearing Brief and Opposition to Motion for Summary Judgment, Docket No. C-15-3708, at 2 (stating that Petitioner "concurs with the Statement of Undisputed Material Facts set forth in the Pre-Hearing Brief and Motion for Summary Judgment filed by CMS" except with respect to statements about his receipt of the notice of revocation); *see also* Petitioner's January 25, 2016 Sur-Reply Brief, Docket No. C-15-3708, at 3 ("It is an agreed fact that Petitioner pled no contest to a felony tax code violation, which is listed as an enumerated offense at 42 CFR 424.535 (a)(3)(I)(B) (3) Felonies (i) Offenses include (B) . . . tax evasion . . . .").

By letter dated February 17, 2015, Noridian Healthcare Solutions (Noridian), a CMS contractor, notified Petitioner that his Medicare billing privileges were being revoked under section 424.535(a)(3) based on his November 3, 2008 entry – in San Bernardino (California) Superior Court – of a no-contest plea to three felony counts of failure to file income tax returns. CMS Ex. 1; P. Ex. 1. The record shows that Noridian's February 17, 2015 revocation letter was sent to Petitioner at two addresses: one (CMS Exhibit 1) was mailed to Petitioner at the address of Bear Mountain Family Medicine, which Petitioner indicates was his "former employer" as of February 17, 2015; the second (P. Ex. 1) was mailed to Petitioner at the address of Desert Valley Medical Group, with whom he was employed on that date.[4] The content of the letters is identical in all respects.

Noridian's February 17, 2015 revocation letter is two pages long. Page one states in relevant part:

> Your Medicare privileges are being revoked effective February 17, 2015 for the following reasons:
>
> 42 CFR 424.535(a)(3) – Felony Conviction
> On November 3, 2008, you pled nolo contendere to 3 felony counts in San Bernardino Superior Court of failing to file income tax return.
>
> If you believe this determination is not correct, you may request a reconsideration before a contractor hearing officer. . . . You must request the reconsideration in writing to this office within 60 calendar days of the postmark date of this letter. The reconsideration must state the issues or findings of fact with which you disagree and the reasons for disagreement. You may submit additional information with the reconsideration that you believe may have a bearing on the decision. . . .

CMS Ex. 1, at 1. Page two states:

> Pursuant to 42 CFR 424.535(c), Noridian is establishing a re-enrollment bar for a period of three years effective with the date of this letter. The enrollment bar only applies to your participation in the Medicare program. In order to enroll, you must meet all requirements for your provider or supplier type. If you have any questions, please contact our office at 855-609-9960 (JE) between the hours of 8:00 AM and 4:00 PM.

[4] The copy of the February 17, 2015 revocation letter that was mailed to the address of Desert Valley Medical Group is attached to Petitioner's October 16, 2015 declaration as well as to Petitioner's "List of Proposed Exhibits," both of which were filed with the ALJ on November 16, 2015.

Id. at 2.

On April 16, 2015, about two months after Noridian issued the initial revocation determination, a California court, pursuant to Petitioner's motion under California Penal Code § 17(b),[5] reduced Petitioner's tax-related offenses to misdemeanors. *See* CMS Exs. 2-3.[6]

The same day, Petitioner, represented by a lawyer, filed a request for reconsideration with Noridian, contending that there was no longer a basis for revocation under section 424.535(a)(3) because his felony tax offenses had just been declared misdemeanors for "'all purposes.'" CMS Ex. 3, at 1 (*quoting* Cal. Penal Code § 17(b)).

In a California court hearing on May 11, 2015, Petitioner presented proof of restitution payments, and the court granted his application, under California Penal Code § 1203.4(a), to have his previously entered convictions set aside and the case dismissed.[7] CMS Ex. 5.

On May 22, 2015, Petitioner mailed Noridian a letter which enclosed a copy of the judicial order granting his section 1203.4(a) petition. CMS Ex. 6.

On June 10, 2015, Noridian denied the motion for reconsideration based on the following rationale:

[5] California Penal Code § 17(b) authorizes a court, upon the application of a defendant, to declare an offense that was prosecuted as a felony to be a misdemeanor when the court has imposed probation, or other punishment in lieu of imprisonment, for the offense. *See People v. Wood*, 62 Cal. App. 4th 1262, 1267-68, 73 Cal. Rptr.2d 308, 311-12 (1998).

[6] CMS stated the reduction was contingent on Petitioner's payment of restitution at a hearing scheduled for May 11, 2015, and Petitioner agreed with this statement. *See* CMS's Sept. 16, 2015 Pre-Hearing Brief and Motion for Summary Judgment, Docket No. C-15-3708, at 3 (Statement of Undisputed Material Facts, stating that on April 16, 2015, "[t]he Superior Court in San Bernardino, California granted a motion by Dr. Johnson to reduce the three felony counts to misdemeanors, contingent on restitution"); Petitioner's Nov. 16, 2015 Prehearing Brief and Opposition to Motion for Summary Judgment, Docket No. C-15-3708, at 2 (stating that Petitioner "concurs with the Statement of Undisputed Material Facts set forth in the Pre-Hearing Brief and Motion for Summary Judgment filed by CMS" except with respect to statements about his receipt of the notice of revocation).

[7] California Penal Code § 1203.4(a) enables the defendant under certain circumstances to be "released from all penalties and disabilities resulting from the offense" of conviction, but the granting of a section 1203.4(a) petition "does not eradicate a conviction or purge a defendant of the guilt established thereby." *Adams v. City of Sacramento*, 235 Cal. App. 3d 872, 877-78, 1 Cal. Rptr. 2d 138, 141 (Ct. App. 1991). As we discuss later, the ALJ rejected Petitioner's argument that the setting aside of his convictions meant he had not been "convicted" of a felony for purposes of section 424.535(a)(3), and Petitioner does not dispute that rejection on appeal to the Board.

> EVALUATION OF SUBMITTED DOCUMENTATION: Although the charges [that is, the three counts of failing to file tax returns] were later reduced to misdemeanor charges the provider still pled nolo contendere to the 3 felony counts on November 3, 2008. These charges were reduced to misdemeanor convictions in 2015 upon payment of taxes owed.
>
> DECISION: [Petitioner] has not provided evidence to show full compliance with the standards for which you were revoked. Therefore, we cannot grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.

CMS Ex. 7, at 1.

On August 7, 2015, Petitioner, represented by a new lawyer, requested an administrative law judge hearing. He attached to the hearing request the ruling on his section 1203.4(a) petition. CMS responded to the hearing request with a motion for summary judgment, asserting that there were no disputes of material fact and that the revocation was lawful under section 424.535(a)(3).

Petitioner submitted a brief opposing summary judgment. Simultaneously he asked the ALJ to remand the case to Noridian (or to CMS) to consider certain "new evidence" proffered with the request for remand.[8] That evidence included his personal declaration in which he alleged circumstances that he believed warranted a lenient exercise of CMS's revocation authority, as well as several pieces of documentary evidence that he designated as Petitioner's Exhibits 8-30. Among those numbered exhibits were letters of support from persons attesting to his character and competence. (Petitioner later refiled his documentary evidence with supporting declarations.[9])

[8] Petitioner cited 42 C.F.R. § 498.56(d) as the legal basis for the requested remand. Section 498.56(d) authorizes the ALJ to remand a case to CMS for consideration of – and, if necessary, a "determination" regarding – a "new issue."

[9] Petitioner's exhibits, as refiled, consisted of: 18 letters of support, all but two of which were accompanied by a signed declaration from the author stating that the letter contained a "true and correct statement of my opinion and belief" (*see* P. Ex. 8-25); two documents containing statements of recognition (by a patient and an employer) for excellent patient care, to which Petitioner attached his personal declaration that he had received those documents in November 2014 (P. Exs. 26-27); a screenshot of a California Department of Consumer Affairs webpage purporting to show his address of record with the Medical Board of California, to which he attached a declaration that this address had been "unchanged" since 1980 (P. Ex. 28); information from a Department of Health & Human Services website indicating that his practice location (Big Bear City, California) is a Primary Care Health Professional Shortage Area and a declaration that he practiced medicine in that location for 37 years and still lived there (P. Ex. 29); and documentation and a declaration that a former employer (Desert Valley Medical Group) emailed him an incomplete copy of Noridian's February 17, 2015 revocation letter on March 10, 2015 (P. Ex. 30).

In opposing summary judgment, Petitioner contended that his 2008 conviction could not properly serve as a basis for revocation given that a state court had reduced his offenses from felonies to misdemeanors (pursuant to Penal Code § 17(b)) and dismissed the underlying criminal charges (pursuant to Penal Code § 1203.4(a)). *See* Pet.'s Nov. 16, 2015 Prehearing Br. and Opposition to Motion for Summary Judgment (Opp. Br.) at 6. Alternatively, Petitioner argued that because a decision to revoke under section 424.535(a) is a matter of agency "discretion," it was necessary for CMS (or its contractor) to consider what he called his "evidence in mitigation" (that is, his personal declaration, letters of support, and other material), together with the fact that he had received relief under California Penal Code sections 17(b) and 1203.4(a), and then to decide whether revocation was still appropriate in light of that evidence and information. *See id.* at 2-4, 6.

Apparently aware that 42 C.F.R. § 498.56(e)[10] requires an administrative law judge to exclude newly submitted documentary evidence absent good cause for a supplier's failure to submit that evidence at the reconsideration stage, Petitioner informed the ALJ that he had not previously submitted his mitigation evidence because Noridian's February 17, 2015 revocation letter, which advised him of his right to seek reconsideration, did not (he claimed) clearly advise him that such evidence could or should be presented with the reconsideration request. Opp. Br. at 2-4 (citing the letter's "vagueness"). In addition, Petitioner alleged that he did not timely receive a complete copy of the February 17, 2015 revocation letter because his former employer (Bear Mountain Family Medicine) never forwarded the letter to him, and because his current employer at the time (Desert Valley Medical Group) sent him only page one of the letter and he did not see page two until after Noridian denied the request for reconsideration. *See* Oct. 16, 2015 Decl. of Norman Johnson ¶ 8 (attached to Pet.'s Nov. 16, 2015 Request for Remand); Opp. Br. at 2, 3, 4. For these and other reasons, Petitioner contended he had shown both the "good cause" required by section 498.56(e) to admit his new documentary evidence into the hearing record as well as grounds to remand the case to CMS (or to Noridian) to consider all of his newly submitted evidence. *Id.* at 4, 5-6.[11]

[10] Section 498.56(e) bars an administrative law judge in a supplier enrollment appeal from admitting or considering "new documentary evidence" (documentary evidence not submitted to CMS or its contractor at the reconsideration level or earlier) unless there is "good cause for submitting the evidence for the first time at the ALJ level."

[11] In a "notice of errata" (filed on November 17, 2015) concerning his "request for remand," Petitioner stated that that the request for remand should have stated that there was "good cause for consideration of the new evidence [by the ALJ] and for its remand" to CMS.

Finally, Petitioner contended that summary judgment was improper because a "disputed issue of material fact" existed as to whether Noridian understood and "exercised its regulatory discretion in deciding to revoke [his] privileges and to impose the maximum 3 year" re-enrollment bar. Opp. Br. at 1, 2, 4-5. He asserted that the ALJ could not properly grant summary judgment until his case was remanded to CMS or Noridian to enable one of those entities to exercise its discretion in light of his mitigation evidence. *Id.* at 2.

CMS replied that "no remand was necessary" because it had "reserve[d] the exercise of discretion to itself." CMS's Reply Brief, Docket No. C-15-3708, at 5-7. In support of that statement, CMS cited instructions in chapter 15 of the Medicare Program Integrity Manual (PIM) that were in effect when it issued the revocation determination. *Id.* at 6. According to CMS, those instructions "explicitly reserve[ ] to the Provider Enrollment Operations Group ('PEOG')," a CMS component, "all decisions on whether to revoke a supplier under section 424.535(a)(3)," with the contractor's "responsibility . . . limited to determining if a supplier's conviction falls within the circumstances set out in" in PIM § 15.27.2(A)(3) "and then forwarding a recommendation for revocation and the proposed text of a revocation letter to PEOG in order for CMS to exercise its discretion."[12] *Id.* at 7. CMS also contended that 42 C.F.R. § 498.56(d), the regulation cited by Petitioner in support of his remand request, does not apply in a proceeding to challenge a supplier revocation determination but that the regulation's requirements were not met in any event. *Id.* at 2. In addition, CMS contended that Petitioner had received "proper notice" of the revocation, noting that he had not alleged that Noridian "sent the [February 17, 2015] notice of revocation to an address other than the contact address [that he] had provided to Medicare." *Id.* at 2-3.

[12] As of the date of the initial revocation at issue here, the PIM required contractors to "obtain approval" from the PEOG "prior to sending a revocation letter" when the revocation, as here, was based on section 424.535(a)(3). *See* CMS Manual System, Pub. 100-08, Transmittal 499 (Dec. 27, 2013), "Update to Chapter 15 of the Medicare Program Integrity Manual," § 15.27.2(A), (B), available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R499PI.pdf (last visited March 28, 2017). Prior to October 2013, a CMS enrollment contractor was permitted to revoke a supplier under section 424.535(a)(3) without prior approval from CMS. *See* CMS Manual System, Pub. 100-08, Transmittal 474 (July 5, 2013 changes to section 15.27.2(A) and 15.27.2(B), available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R474PI.pdf (last visited March 28, 2017)).

On January 26, 2016, Petitioner filed a sur-reply in which he reiterated that Noridian and CMS should have considered various mitigating circumstances when deciding whether to revoke his Medicare billing privileges.[13] Petitioner's Sur Reply Brief, Docket No. C-15-3708, at 3-4. He also argued that he had been denied "due process," particularly at the reconsideration stage, because the initial revocation determination's content and service were "defective." *Id.* at 2, 5. Petitioner asked the ALJ to reverse the revocation on these (and other) grounds or to remand the case to CMS for a "fair hearing." *Id.* at 8.

ALJ Decision

Preliminarily, the ALJ excluded from the record Petitioner's Exhibits 8 through 27, Exhibit 29, and pages 3 and 4 of Exhibit 30 – holding that those materials were irrelevant to "the issue before me," which was whether CMS had a "basis to revoke" Petitioner's billing privileges. *See* ALJ Decision at 3, 11.

The ALJ also rejected Petitioner's due process argument, finding that he had received adequate notice of his rights at the reconsideration and hearing stages of the case:

> In this case, the notice of initial determination stated that Petitioner's Medicare privileges were being revoked effective February 17, 2015, cited the legal and factual basis, advised Petitioner of the right to request reconsideration, and to submit additional information with the request for reconsideration. The notice also advised Petitioner of the three-year re-enrollment bar. The notice of the reconsidered determination dated June 10, 2015, advised Petitioner that revocation of Medicare privileges was upheld, the reasons for the revocation, the legal basis for the revocation, and that he had the right to request review. Petitioner thereafter timely requested a hearing before an ALJ. My review reveals that the notices of initial and reconsidered determination satisfied regulatory requirements. Any lack of clarity in the notices was not prejudicial as Petitioner has effectively exercised the rights related to review available to him under the Act and regulations. Petitioner's argument that he did not receive the notice of initial determination directly from the CMS contractor does not reflect any error on the part of the CMS contractor or any prejudice to Petitioner as he timely exercised his right to request reconsideration.

[13] Petitioner asserted as "mitigating circumstances" that CMS issued the revocation seven years after his conviction for an offense that is "unrelated to the practice of medicine and which did not place Medicare funds at risk"; that he "effectively served a probationary period of seven years with the State Court and continued [to] practice with Medicare privileges without incident"; that the state court "felt that it was in the interest of justice that the charges be withdrawn and the case dismissed"; that he had "no adverse record with Medicare before or after the date of the tax conviction"; that the revocation deprives a medically underserved community of a "needed physician's services"; and that the revocation caused him to lose jobs and made him unemployable. Petitioner's Sur Reply Brief, Docket No. C-15-3708, at 3, 7.

> Petitioner's argument that he was not clear on what material could be submitted on reconsideration is without merit. The regulations governing the reconsideration process are publicly available and Petitioner was represented by counsel. Further, even accepting that he received the second page of the initial determination late, that page contained an invitation for Petitioner to call with any questions, a toll-free number to call, and the hours during which to call. Petitioner does not offer evidence that he or counsel called to request clarification or an extension of time to request reconsideration based on his late receipt of the notice of initial determination.
>
> The Act and regulations accord Petitioner a right to notice and the opportunity to have the decision to revoke his enrollment and billing privileges reconsidered and then administratively reviewed by an ALJ, the Board, and the courts. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5, 498.22(a), and 498.25. Petitioner was notified of the revocation; he exercised his right to reconsideration; he has received de novo review by an ALJ; and there is no real dispute that there is a factual and legal basis for revocation of his enrollment pursuant to 42 C.F.R. § 424.535(a)(3). Petitioner has received the process due him under the Act and the Secretary's regulations.

ALJ Decision at 12-13 (footnote and record citations omitted).

In addition, the ALJ denied Petitioner's request that his case be remanded to CMS to consider his new evidence, stating:

> Pursuant to 42 C.F.R. § 498.56(d), I may remand a case to CMS to consider new issues and, if appropriate, a new determination. Pursuant to 42 C.F.R. § 498.78, I may also remand if CMS requests. CMS opposes remand and Petitioner has not identified new issues that CMS should have the opportunity to address. The gist of the motion to remand is Petitioner wants CMS to consider additional mitigating evidence. However, Petitioner points to no legal requirement for CMS to consider mitigating evidence related to revocation and CMS resists the motion for remand, clearly indicating remand to CMS would be futile.

ALJ Decision at 2.

Turning to the case's merits, the ALJ found "no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3)." ALJ Decision at 7-8. He concluded that undisputed material facts – namely, Petitioner's November 3, 2008 no-contest plea to (and resulting conviction for) three felony counts of failing to file state

income tax returns – gave CMS a basis to revoke his Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B). *Id.* at 9. In reaching that conclusion, the ALJ rejected Petitioner's suggestion that the post-conviction relief he received under California Penal Code sections 17(b) and 1203.4(a) meant that he had not been "convicted" of a qualifying felony under section 424.535(a)(3)(i)(B). *Id.* at 9-11.

The ALJ next discussed the revocation's effective date. While acknowledging that 42 C.F.R. § 424.535(g) called for the revocation to become effective on the date of Petitioner's conviction, the ALJ concluded that "CMS and its contractor properly exercised discretion to make the revocation in this case effective the date of the notification of the initial determination." *Id.* at 9.

Finally, concerning Petitioner's suggestion that Noridian did not exercise its (presumed) discretion under 42 C.F.R. § 424.535(a), the ALJ stated:

> Petitioner argues that Noridian failed to exercise discretion not to revoke Petitioner's Medicare enrollment and billing privileges and, therefore, it is not clear officials at Noridian understood that they had discretion not to revoke in this case. I have concluded that there was a basis for revocation. Noridian issued an initial determination to revoke Petitioner's enrollment and billing privileges. A Noridian hearing officer subsequently upheld the revocation on reconsideration. Petitioner requested my de novo review and CMS has advocated before me that there was a proper exercise of discretion to revoke Petitioner's enrollment and billing privileges. Given the facts, whether or not Noridian understood its discretion is not relevant. CMS, which is fully appraised of the facts including the evidence in mitigation offered by Petitioner, has elected to proceed with the revocation. There is no question that CMS could have at any time during the course of this proceeding reopened and revised the reconsidered determination and withdrawn the revocation. 42 C.F.R. § 498.30. CMS did not choose to do so. It is CMS's exercise of discretion at this stage, not the contractor's, that is at issue.
>
> Further, I have no authority to review the exercise of discretion by CMS or its contractor to revoke where there is a basis for revocation. . . . The scope of my authority is limited to determining whether there is a legal basis for revocation of Petitioner's Medicare enrollment and billing privileges. . . .

ALJ Decision at 13 (citations omitted).

Standard of Review

The ALJ's grant of summary judgment is a legal issue that we address de novo. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 6 (2016). Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to

judgment as a matter of law. *Id.* "The applicable substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the [case] under the governing law will properly preclude the entry of summary judgment." *Southpark Meadows Nursing & Rehab. Center*, DAB No. 2703, at 5 (2016) (internal quotation marks and brackets omitted). In addition, with respect to an allegation of procedural error, the Board reviews the allegation to determine "whether the ALJ committed an error of procedure that resulted in prejudice (including an abuse of discretion under the law or applicable regulations)." *Precision Prosthetic, Inc.*, DAB No. 2597, at 10 (2014) (internal quotation marks omitted).

Discussion

Section 424.535(a) authorizes CMS to revoke a provider or supplier's enrollment and billing privileges on one or more of the grounds specified under paragraphs (1) through (14). The Board has consistently held that ALJ and Board review is confined to deciding whether CMS has established the existence of one or more of the specified permissible grounds for revocation, in this case a qualifying felony conviction. *E.g. Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008); *Lorrie Laurel, P.T.*, DAB No. 2524, at 7-8 (2013); *Dinesh Patel, M.D.*, DAB No. 2551, at 11 (2013).

Although "CMS may have discretion to consider unique or mitigating circumstances in deciding whether, or how, to exercise its revocation authority," *Care Pro Home Health, Inc.*, DAB No. 2723, at 9 n.8 (2016), administrative law judges and the Board may not "substitute [their] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010).

Under paragraph (3) of section 424.535(a), CMS may revoke a supplier's Medicare billing privileges if the following conditions are met: (1) the supplier was convicted, as that term is defined in 42 C.F.R. § 1001.2, of a felony offense; (2) the conviction occurred "within the preceding 10 years"; and (3) the conviction was for an 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)(i). The ALJ held that those requirements were satisfied in Petitioner's case. Petitioner does not challenge that holding in this appeal or identify any underlying disputes of material fact. Accordingly, we summarily affirm the ALJ's conclusion that CMS had a basis to revoke Petitioner's Medicare billing privileges under section 424.535(a)(3). *Cf. Vijendra Dave, M.D.*, DAB No. 2672, at 6 (2016) ("summarily" affirming the ALJ's holding, on summary judgment, that CMS had legally sufficiently grounds to revoke because the supplier failed to challenge the holding on appeal); *Centro Radiologico Rolon, Inc.*, DAB No. 2579, at 7 (2014) (summarily affirming an uncontested conclusion by the ALJ that the regulatory elements necessary for revocation were satisfied).

Instead of challenging the ALJ's holding on the issue subject to review (whether CMS had a basis for exercising its authority to revoke), Petitioner raises four other issues. *See* Pet.'s Request for Appellate Review of Decision of ALJ (RR). Petitioner contends that the ALJ incorrectly resolved the issue of whether Noridian exercised discretion in revoking his Medicare billing privileges (RR at 2-4); overlooked a claim that Noridian improperly served the February 17, 2015 revocation letter (*Id*. at 9-10); should have remanded the case to CMS for a consideration of his "new evidence" (*Id*. at 6-9); and erroneously determined the revocation's effective date (*Id*. at 5-6). As we discuss in the following sections, we agree with Petitioner that the ALJ erred in determining the revocation's effective date but conclude that his other contentions provide no basis to upset the grant of summary judgment.

1. *The ALJ properly rejected Petitioner's argument that remand was necessary because, Petitioner contended, it is not clear that Noridian understood it had discretion not to revoke Petitioner's billing privileges.*

Petitioner contends that the ALJ should have remanded the revocation because, according to Petitioner, the record is unclear as to whether Noridian understood that revocation under section 424.535 is discretionary and, therefore, that Noridian had discretion not to revoke his billing privileges. RR at 2-5, 10; Reply at 2. The ALJ rejected that argument:

> Given the facts, whether or not Noridian understood its discretion is not relevant. CMS, which is fully apprised of the facts, including the evidence in mitigation offered by Petitioner, has elected to proceed with the revocation. There is no question that CMS could have at any time during the course of this proceeding reopened and revised the reconsidered determination and withdrawn the revocation [citation omitted]. CMS did not choose to do so. It is CMS's exercise of discretion at this stage, not the contractor's, that is at issue.

ALJ Decision at 13. We agree with the ALJ's rejection of Petitioner's argument and, at least in this case, the ALJ's conclusion that "[i]t is CMS's exercise of discretion at this stage . . . that is at issue[ ]" although our reasoning, as explained below, differs somewhat from the ALJ's because we address one of CMS's legal arguments more directly than the ALJ did.

Petitioner relies on the Board's decision in *Brian K. Ellefsen, D.O.*, DAB No. 2626 (2015) in which the Board vacated the ALJ Decision and remanded for clarification based on its conclusion that it "was unclear from the record whether WPS recognized that it had the discretion to grant or deny [Ellefsen's] application, despite his 2010 felony convictions for income tax evasion, and thus whether WPS actually exercised that discretion when it denied Petitioner's application." *Id*. at 4. This case, however, is not like *Ellefsen*.

Ellefsen involved a denial of enrollment under section 424.530(a)(3), not, as here, a revocation of enrollment under section 424.535(a)(3). As CMS noted in its briefing to the ALJ in Petitioner's case, at the time of Petitioner's revocation, CMS policy, as embodied in its Program Integrity Manual, required contractors to seek CMS's prior approval for any revocation based on section 424.535(a)(3). *See* CMS Reply Brief in C-15-3708 (Civil Remedies Division) at 5-7; PIM § 15.27.2(A), (B) (versions cited in footnote 12, *supra*). In *Ellefsen*, the Board found that CMS, based on sections 1842 and 1874A of the Social Security Act, had delegated authority to the contractor to act on Dr. Ellefsen's application even though CMS "retained final authority over contractor-issued enrollment decisions by subjecting them to review, when challenged, by departmental ALJs and this Board." DAB No. 2626, at 5-6 and n.3 (citations omitted). Petitioner essentially acknowledges this distinction between *Ellefsen* and his case but objects that "nothing in the record suggests that CMS actively participated in the revocation decision or in the decision to uphold the revocation." Reply at 2.

Petitioner cites no authority for his suggestion that CMS must present evidence of its actual case-by-case review of contractor revocation recommendations under its written policy requiring such review and that CMS understood its discretion not to revoke. Moreover, the Board's decision in *Ellefsen* undercuts that suggestion. In *Ellefsen*, the Board held that ALJs and the Board "may presume that CMS and its contractor actually exercised discretion in denying enrollment under section 424.530(a)(3) – as opposed to taking what they thought was a mandatory action." *Ellefsen*, DAB No. 2626, at 7, citing *e.g. U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"); *U.S. v. Chemical Foundation, Inc*., 272 U.S. 1, 14-15 (1926) (holding that courts can presume that government officials and agents have "properly discharged their official duties" absent "clear evidence to the contrary"). The presumption of regularity is even stronger where, as here, CMS's own rulemaking discusses CMS's understanding that section 424.535(a)(3) authorizes, but does not mandate, revocation, even when the supplier has been convicted of one of that regulation's enumerated felonies. *Cf*. 79 Fed. Reg. 72,500, 72,512 (Dec. 5, 2014) ("[W]e will only exercise our authority under §§ 424.530(a)(3) and 424.535(a)(3) after very careful consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction[, and] [i]t should in no way be assumed that every felony conviction will automatically result in a denial or revocation.").

It was Petitioner's responsibility to present evidence to rebut the strong presumption that CMS here understood its discretion and acted accordingly, but he did not do so. Petitioner relies mainly on similarities between some of the language in the contractor letters here and language in the *Ellefsen* letters. However, under CMS's written policy, CMS, not the contractor, was required to make the revocation determination; accordingly, the language in letters written by the contractor is not necessarily evidence of CMS's understanding (or lack of understanding) of its discretion.

It is also important to note that in *Ellefsen*, the Board emphasized that its decision there "should not be read as requiring that CMS or its contractors use any particular language in their notices to evidence their understanding of their discretion." DAB No. 2626, at 9. Moreover, the language in *Ellefsen* that most strongly influenced the Board's decision to remand for clarification about the contractor's understanding of its discretion was not the language that Petitioner cites but language that does not appear in the revocation notice letters in this case.[14] The initial revocation determination in *Ellefsen* had advised the physician that he "could reapply to enroll" in 2020, after his conviction was 10 years old. *Id*. That statement, the Board said, implied that the contractor lacked the discretion to admit the physician until 2020, even though section 424.530(a)(3) would have permitted the contractor to approve a subsequent enrollment application, filed before his felony conviction was 10 years old, if it determined that other factors justified granting that application. *Id.* at 7-8. The Board's concern about that statement was enhanced by the fact that the contractor's reconsidered determination letter "did not correct the misunderstanding implicit" in the initial determination. *Id*. at 8.

For these reasons, we agree with the ALJ that it is CMS's exercise of discretion that is at issue here, conclude that he was entitled to presume that CMS exercised that discretion based on the record of the case proceedings, and find nothing in the record that rebuts that presumption. We also agree with the ALJ's conclusion that he was not authorized to review CMS's exercise of discretion. *See* ALJ Decision at 13, citing *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F.Supp. 2d 167 (D. Mass. 2010).

[14] We note that the Board in *Ellefsen* remanded to the ALJ, not to the contractor, but that Petitioner here requests a remand to the contractor, another distinction between *Ellefsen* and this case. Reply at 2.

2. *The ALJ committed no error in rejecting Petitioner's claim that he was denied due process.*

In his request for review (RR at 9), Petitioner reprises an issue he raised in his January 26, 2016 sur-reply brief to the ALJ. In the sur-reply, Petitioner contended that he had been denied due process in part because Noridian mailed its February 17, 2015 revocation letter (the initial determination) to his former and then-current employers rather than to the address he had on file with the Medical Board of California – an address that he says has been unchanged for 40 years. Pet.'s Sur Reply Br., Dkt. No. C-15-3708, at 5. In addition, Petitioner reiterated the allegation, made in his October 16, 2015 declaration, that his then-current employer (Desert Valley Medical Group) sent him page one of the February 17, 2015 revocation letter but not page two – the page on which Noridian notified him of the three-year re-enrollment bar – and that he did not actually see page two until after Noridian issued the reconsidered determination. *Id.*

According to Petitioner, it is "not clear" that the ALJ addressed his claim of improper service. RR at 9. We disagree. The ALJ expressly rejected that claim when he held: "Petitioner's argument that he *did not receive the notice of initial determination directly from the CMS contractor* does not reflect any error on the part of the CMS contractor or any prejudice to Petitioner as he timely exercised his right to request reconsideration." ALJ Decision at 12 (italics added).

We see no error in that holding. The record does not substantiate Petitioner's allegation that Noridian improperly addressed the February 17, 2015 revocation letter. Although Petitioner submitted documentation of his personal "address of record" with the Medical Board of California, *see* P. Ex. 28, he proffered no evidence, even a sworn statement, that he gave *that address* to CMS or to its contractors to be used for Medicare-related correspondence. Even if Noridian failed to use a proper mailing address, Petitioner suffered no prejudice at the reconsideration stage because he timely exercised his right to reconsideration and was represented in that endeavor by a lawyer who could have made appropriate inquiries to ensure that he had received a complete copy of the initial revocation determination.

Petitioner suggests that had he timely received page two of the February 17, 2015 revocation, he would have been alerted to submit his so-called mitigation evidence with the reconsideration request and would have asked Noridian to rescind the revocation on that basis. *See* RR at 8; Pet.'s Sur Reply Br., Dkt. No. C-15-3708, at 5. That claim is implausible. Page one of the revocation letter, which Petitioner admits he received on March 9, 2015 (Oct. 16, 2015 Johnson decl. ¶ 8), advised him that he could request reconsideration "within 60 calendar days of the postmark date of this letter" and further advised him to proffer any "additional information with the reconsideration that you

believe may have a bearing on the decision." CMS Ex. 1, at 1. Given that clear instruction, it is unreasonable to think that timely receipt of page two, which contained *no invitation to submit evidence*, would have motivated Petitioner to submit any documentation other than that which he actually submitted with his reconsideration request.[15]

Finally, even assuming a defect in service of the initial revocation determination occurred, it could not have impaired Petitioner's ability to present his case to the ALJ or the Board. As noted, ALJ and Board review is limited to determining whether CMS had a basis for revocation under section 424.535(a). No "mitigating" evidence that Petitioner might have submitted at the reconsideration stage would be relevant to whether CMS had a basis for revocation based on Petitioner's 2008 felony conviction. Furthermore, "CMS's determination of the length of the reenrollment bar under section [424.]535(c) is not subject to review." *Mohammad Nawaz, M.D., et al.*, DAB No. 2687, at 15 (2016).

In sum, the record discloses no defect in service of the February 17, 2015 revocation letter; alternatively, assuming there was a defect, Petitioner did not make a credible showing of actual prejudice. Absent a showing of actual prejudice, the Board will not find that a party has been denied due process based on improper notice of a federal agency's adverse determination. *See Dinesh Patel, M.D.* at 8 (rejecting a due process claim because the physician failed to show that deficiency in the revocation notice actually prejudiced him at the post-reconsideration stages of the appeal process). We therefore affirm the ALJ's conclusion that Petitioner "received the process due him" under the applicable statute and regulations.

3. *The ALJ committed no error in denying Petitioner's request for remand.*

Petitioner contends that the ALJ should have granted his request to remand the case to CMS for consideration of his "new evidence" – that being his declaration, letters of support, and other material that he submitted for the first time at the hearing stage. RR at 6-9. Petitioner contends that there was "good cause" for a remand because a remand was, at that point in the appeal process, the "only avenue" available for having the evidence considered. RR at 6, 7. Petitioner further contends (repeating assertions made in support of his due process argument) that a remand was justified because Noridian's February 17, 2015 letter (the initial revocation determination) failed to convey that he could submit the

[15] Petitioner speculates that timely receipt of page two might have led him to submit the kind of "mitigating" evidence that he later proffered to the ALJ because that page stated that a three-year reenrollment bar had been imposed. *See* RR at 8. Petitioner, however, offers no explanation of why that statement, which invited no challenge to the reenrollment bar, might have spurred him to submit such evidence.

kind of "mitigation" evidence that he later proffered (and now wants CMS to consider on remand), and because he did not timely receive page two of that letter, which, he speculates, "might have" prompted him to present that evidence at the reconsideration stage.[16] RR at 7-8; Oct. 16, 2015 Johnson Decl. ¶ 9 (attached to Pet.'s Nov. 16, 2015 Request for Remand).

Petitioner's argument makes no mention of 42 C.F.R. § 498.56(d), the regulation that the ALJ applied to deny his remand request. Section 498.56(d) provides that if a "new issue" is raised at the hearing stage of the appeal process, an administrative law judge may remand the case to CMS for consideration of the "new issue and, if appropriate, a determination" of that "new issue." CMS contended below that section 498.56(d) does not apply in provider or supplier enrollment hearings because section 498.56(a)(2) states that "new issues" may be considered at the hearing stage "*[e]xcept for provider or supplier enrollment appeals* which are addressed in § 498.56(e)" (italics added). *See* CMS Reply in Docket No. C-15-3708, at 2. The ALJ did not address that legal issue. Instead the ALJ denied remand because he found that "Petitioner has not identified new issues that CMS should have the opportunity to address." ALJ Decision at 2.

Since we agree with this finding and otherwise find no abuse of discretion in the ALJ's denial of Petitioner's request for remand, we need not decide whether section 498.56(d) would have permitted the ALJ to remand. The ALJ stated, "[t]he gist of [Petitioner's] motion to remand is Petitioner wants CMS to consider additional mitigating evidence." *Id*. Petitioner does not dispute that characterization, and we agree with it. Petitioner had already submitted alleged "mitigating evidence" (court records showing the reduction of his felony convictions to misdemeanors) at the reconsideration stage, and Noridian considered this "evidence" but concluded it did not change the revocation decision. CMS Ex. 7, at 1.

We also agree with the ALJ's conclusion that Petitioner has not pointed to any legal requirement that CMS or its contractors must consider mitigation evidence when determining whether to revoke. ALJ Decision at 2. Petitioner objects to that conclusion, stating, "If . . . CMS has a duty to exercise discretion in the revocation process pursuant to [section 424.535], there would seem to be a corollary duty to examine whatever evidence is submitted to it, in order to determine whether the submitted evidence is relevant to its decision as to whether revocation is appropriate or the appropriate length of the reenrollment bar." RR at 8. As we previously stated, CMS may consider at the

[16] In opposing summary judgment, Petitioner contended that these same allegations constituted "good cause" to admit his new evidence to the hearing record under 42 C.F.R. § 498.56(e). We do not address that contention because Petitioner has not appealed any of the ALJ's adverse evidentiary rulings. With respect to his "new evidence," Petitioner's argument on appeal is that the ALJ should have remanded the case and directed CMS (or Noridian) to reconsider the appropriateness of revocation (or, alternatively, the length of the re-enrollment bar) in light of that evidence. *See* RR at 9 (asserting that facts stated in his declaration were "relevant on the issue of whether the *discretionary* revocation should be imposed, and on the issue of what the appropriate duration of the reenrollment bar should be" (italics added)).

reconsideration stage additional information submitted by the revoked provider or supplier and, indeed, the contractor letters inform the provider or supplier of the opportunity to submit such information. However, it does not follow that CMS, as a matter of law, is required to consider such information. Indeed, as the Board stated in *Ellefsen*, "CMS may revoke [under section 424.535(a)(3)] based solely on a qualifying felony conviction, without regard to equitable or other factors." DAB No. 2626, at 9, *citing Fady Fayad, M.D.*, DAB No. 2261, at 16 (2009). If CMS proves that the revocation was based on conviction of a qualifying felony, ALJs and the Board "must sustain the revocation, regardless of other factors, such as the scope or seriousness of the supplier's criminal conduct and the potential impact of revocation on Medicare beneficiaries, that CMS might reasonably have weighed in exercising its discretion." *Ellefsen*, DAB No. 2626, at 9-10 (citing DAB No. 2261, at 16).

Petitioner's allegations that denial of remand constituted procedural unfairness are unfounded. We have already concluded that the ALJ committed no abuse of discretion in declining to remand. Moreover, as previously stated, page one of the February 17, 2015 revocation letter advised Petitioner that he could submit "additional information" in support of his reconsideration request. The letter placed no limit on what information he could submit at that stage, advising him to provide whatever information "[he] *believe[d]* may have a bearing on" the revocation determination. CMS Ex. 1, at 1 (italics added). In addition, section 498.56(e) notified Petitioner and his lawyer that any available documentary evidence needed to be submitted at the reconsideration stage. *See Mohammad Nawaz, et al.*, DAB No. 2687, at 13 (2016). Petitioner says that his reconsideration-stage lawyer did not tell him that he "could or should" submit his mitigation evidence (Oct. 16, 2015 Decl. ¶ 9), but Petitioner is accountable for his lawyer's omission. *See Bryant H. Hudson, III, M.D.*, DAB No. 2442, at 6 n.5 (2012) (stating the "general principle" that "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts of which can be charged upon the attorney" (internal quotation marks omitted)). Finally, we have already rejected (in the previous section) the argument that Noridian improperly served the February 17, 2015 revocation letter and thereby denied Petitioner his right to due process.

4. *In accordance with 42 C.F.R. § 424.535(g), the effective date of the revocation is the date of Petitioner's California felony conviction for failing to file state income tax returns.*

Noridian notified Petitioner that his revocation became effective February 17, 2015, the date of the initial revocation determination. CMS Ex. 1, at 1. Although Petitioner's submissions to the ALJ did not question the effective date, the ALJ raised the subject in his decision. The ALJ decided to leave the effective date intact even though he acknowledged that 42 C.F.R. § 424.535(g) required him to make the revocation effective on the date of Petitioner's felony conviction. The ALJ provided the following reasoning for that holding:

> Pursuant to 42 C.F.R. § 424.535(g), the effective date of revocation is generally 30 days after CMS or its contractor mails notice of its determination to revoke. However, when the basis for revocation is a felony conviction, such as this case, revocation is effective the date of the felony conviction. In November 2008, when Petitioner was convicted, the regulation then in effect provided that "[r]evocation becomes effective within 30 days of the initial revocation notification [without providing the exception for felony and certain other types of convictions]." 42 C.F.R. § 424.535(g) ([Oct. 1,] 2008). Although generally the regulations in effect at the time of action by CMS or its contractor should control, I conclude that CMS and its contractor properly exercised discretion to make the revocation in this case effective the date of the notification of the initial determination to revoke, rather than the date of Petitioner's conviction. Retroactively revoking Petitioner's Medicare enrollment and billing privileges back to November 2008, going back nearly seven years, had the potential for creating possible significant liability for any Medicare claims paid to or on Petitioner's behalf during the period November 2008 and February 17, 2015. I will not review nor upset the exercise of CMS discretion to apply its regulations in an equitable fashion as it has in this case. Accordingly, the date of revocation of Petitioner's Medicare enrollment and billing privileges is February 17, 2015, as determined by CMS and its contractor. . . .

ALJ Decision at 9.

Petitioner now asserts that the ALJ erred by permitting CMS to make the revocation effective on the date of the initial revocation determination. RR at 5-6. As the ALJ acknowledged, Petitioner's case is controlled by the version of section 424.535(g) in effect on the date Noridian issued the initial revocation determination, not by the version in effect on the date of his conviction. *John P. McDonough III, Ph.D.*, DAB No. 2728, at 2 n.1 (2016) (applying the regulations in effect at the time of the revocation); *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016) (same); *Patrick Brueggeman, D.P.M.* at 2 n.1 (same); *cf. Apollo Behavioral Health Hosp., L.L.C.*, DAB No. 2561, at 1 n.2 (2014) (applying regulations in effect when the compliance surveys and related CMS determinations occurred); *Meghani v. I.N.S.*, 236 F.3d 843, 846 (7th Cir. 2001) ("generally a court or agency should apply the law in effect at the time it renders its decision"). As the ALJ accurately noted, section 424.535(g) provided on the date

Noridian issued Petitioner's revocation determination (and still provides) that a revocation based on a felony conviction is effective on the date of conviction. We conclude that the ALJ should have set the effective date of Petitioner's revocation in accordance with that rule.[17]

The ALJ assumed that Nordian made the revocation effective on the date of the initial revocation determination (rather than the date of conviction) as an exercise of discretion in order to relieve Petitioner of potentially substantial overpayment liability. But there is no evidence, or even an assertion by CMS, that Noridian acted on that basis. In any event, ALJs and the Board are not permitted to depart from, or ignore, that regulation's plain text. *Vijendra Dave, M.D.* at 8 (stating that the Board is "bound by applicable statutes and regulations and has no authority to make exceptions to their applicability").

Thus, we reverse the ALJ's determination of the effective date of the revocation and hold that the effective date is the date of Petitioner's conviction. For purposes of section 424.535(a)(3), a person is deemed to have been "convicted" of a felony offense when the court in the person's criminal case has accepted his no-contest or guilty plea. *See* 42 C.F.R. § 1001.2(c); *id.* § 424.535(a)(3)(i) (stating that the term "convicted" has the meaning in section 1001.2). Petitioner admits that on November 3, 2008, he entered a no-contest plea to felony charges of failing to file state income tax forms and was convicted in 2008 on the basis of that plea. *See* Decl. of Norman Johnson ¶¶ 5, 7 (attached to Pet.'s Nov. 16, 2015 Request for Remand) (referring to his "2008 conviction"). In urging us to modify the revocation's effective date, Petitioner does not assert that the date of conviction should be anything other than November 3, 2008, the date he entered his no contest plea. Accordingly, we hold that the revocation became effective on that date.

5. *Petitioner's supplemental affidavit is inadmissible.*

With his reply brief, Petitioner submitted a new declaration (dated May 26, 2016). We exclude that document from the record because Board review is limited to the evidentiary record considered by the ALJ. *See* 42 C.F.R. § 498.86(a) (stating that the Board may admit relevant and material evidence that was not introduced at the hearing stage "[e]xcept for provider or supplier enrollment appeals"); *Medstar Health, Inc.*, DAB No. 2684, at 6 (2016).

[17] The current version of section 424.535(g) has been in effect continuously since January 1, 2009. *See* 73 Fed. Reg. 69726, 69,940-41 (Nov. 19, 2008).

6. *Request for oral argument*

Petitioner's reply brief includes a request for oral argument but no statement as to why such argument is necessary. Furthermore, the issues raised by the parties have been adequately explored in their written arguments. We therefore deny the request for oral argument.

Conclusion

For the reasons stated above, we affirm the ALJ's February 8, 2016 conclusion that CMS lawfully revoked Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(3). We reverse the ALJ's determination that the effective date of the revocation is February 17, 2015 and hold that the revocation's effective date is November 3, 2008.

/s/
Leslie A. Sussan

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member