Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Linda Silva, P.A.
Docket No. A-18-124
Decision No. 2966
August 23, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Linda Silva, P.A. (Petitioner), a physician assistant, appeals the July 13, 2018 decision by the Administrative Law Judge (ALJ) to dismiss her request for a hearing, *Linda Silva, P.A.*, DAB CR5134 (ALJ Decision). Petitioner filed the hearing request after the Centers for Medicare & Medicaid Services (CMS) revoked her Medicare billing privileges and rejected the corrective action plan she filed in response to the revocation. The ALJ concluded that Petitioner was not entitled to a hearing because CMS did not issue a reconsidered determination concerning the revocation. Because we agree with the ALJ that Petitioner was not, for that reason, entitled to a hearing, we affirm the dismissal of her hearing request. We also deny Petitioner's request for "equitable relief" from the revocation.

Legal Background

A "supplier" of health care services (such a physician assistant) must be enrolled in Medicare in order to bill the program for services furnished to program beneficiaries. 42 C.F.R. § 424.500. Regulations governing Medicare enrollment are in 42 C.F.R. Part 424, subpart P (sections 424.500-.575). Those regulations authorize CMS to revoke an enrolled supplier's Medicare billing privileges for any of the "reasons" specified in paragraphs (1) through (14) of section 424.535(a).[1] Under paragraph (1) of section 424.535(a), CMS may revoke a supplier's Medicare billing privileges when the supplier is found to be noncompliant with "enrollment requirements" (as specified in the regulations and elsewhere) and "has not submitted a plan of corrective action as outlined in" 42 C.F.R. Part 488.

[1] In this decision, we cite to and apply the version of the enrollment regulations that was in effect on May 15, 2017, the date of the initial revocation determination. *John P. McDonough III, Ph.D.*, DAB No. 2728, at 2 n.1 (2016).

A supplier who has had her billing privileges revoked is "barred from participating in the Medicare program from the date of the revocation until the end of the re-enrollment bar." 42 C.F.R. § 424.535(c). The re-enrollment bar is a minimum of one year, but not greater than three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c)(1).

A supplier may appeal an "initial determination" by CMS to revoke her billing privileges in accordance with the procedures in 42 C.F.R. Part 498. *Id.* §§ 424.545(a), 498.3(b)(17), 498.5(*l*). Under those procedures, the supplier must first file a "written" request for "reconsideration" of the initial determination. *Id.* §§ 498.5(*l*)(1), 498.22(a). A reconsideration request must be filed with CMS within 60 days from the supplier's receipt of the (mailed) notice of initial determination unless the supplier asks CMS in writing to extend the deadline. *Id.* § 498.22(b)(3) and (d). Receipt of the notice of initial determination is presumed to occur five days after the date on the notice, absent a showing that the notice was actually received earlier or later. *Id.* § 498.22(b)(3).

If a reconsideration request is "properly filed in accordance with [42 C.F.R.] § 498.22," then, as specified in section 498.24, CMS "considers" the initial determination, the findings upon which the determination is based, the evidence used to make the determination, and the evidence submitted in support of the reconsideration request. *Id.* § 498.24(b). Based on that review, CMS makes a "reconsidered determination" – that is, a determination which affirms or modifies the initial determination to revoke – and mails a notice of that determination to the affected supplier. *Id.* § 498.24(c), 498.25(a)(1). If the reconsidered determination is adverse to the supplier, the mailed notice "specifies the conditions or requirements of law or regulations that the affected party fails to meet, and informs the party of its right to a hearing." *Id.* § 498.25(a)(3). An initial determination is "binding" unless it is "reconsidered in accordance with [42 C.F.R.] § 498.24"; "[r]eversed or modified by a hearing decision"; or "revised" in accordance with provisions authorizing "reopening." *Id.* § 498.20(b).

A supplier dissatisfied with a reconsidered determination may request a hearing before an administrative law judge. *Id.* §§ 498.5(*l*)(2), 498.40(a). The hearing request must be filed within 60 days from receipt of the notice of reconsidered determination unless the party seeking the hearing files a written request to extend the filing deadline and shows "good cause" for the requested extension. *Id.* § 498.40(a), (c).

An administrative law judge may dismiss a hearing request when the requesting party "is not a proper party or does not otherwise have a right to a hearing." *Id*. § 498.70(b). A party whose hearing request is dismissed by the ALJ may appeal the dismissal order to the Board. *Id*. § 498.80.

Case Background[2]

The initial determination and subsequent proceedings before Noridian

By letter dated May 15, 2017, Noridian Healthcare Solutions, a CMS contractor, issued an initial determination to revoke Petitioner's Medicare billing privileges effective March 11, 2017. CMS Ex. 1, at 47, 64. The initial determination:

- stated that Petitioner's billing privileges had been revoked under 42 C.F.R. § 424.535(a)(1) because the Arizona Regulatory Board of Physician Assistants had suspended her license on March 11, 2017;
- advised Petitioner that she could, within 60 calendar days of the May 15, 2017 letter's "postmark," request reconsideration if she believed that the initial determination was incorrect;
- further advised Petitioner that she could, within 30 days, submit a "corrective action plan" (CAP) in the event she was able to "correct the deficiencies [that resulted in the revocation] and establish [her] eligibility to participate" in the Medicare program; and
- informed Petitioner that, as a result of the revocation, Noridian had imposed a three-year re-enrollment bar.

Id. at 47-48, 64-65.

Petitioner responded to the initial determination by timely filing a CAP that Noridian received on May 26, 2017. *Id.* at 3, 5, 49-53, 56-61. The CAP stated that Petitioner's practitioner license had been reactivated and was in good standing as of May 24, 2017. *Id.* at 50, 59. The CAP also included a screenshot from the website of the Arizona Regulatory Board of Physician Assistants showing that her license was "active" and had been "renewed" effective May 24, 2017. *Id.* at 52.

On July 13, 2017, Noridian issued a letter to Petitioner rejecting the CAP and stating that she could "not appeal the adverse determination for the CAP."[3] *Id.* at 5.

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[2] The facts in this background narrative are undisputed, unless otherwise indicated.

[3] In support of the decision on the CAP, Noridian's July 13, 2017 letter states that Petitioner's "license [had been] suspended from March 11, 2017 through May 24, 2017"; that the "suspension put [Petitioner] out of compliance with Medicare Requirements"; and that Petitioner "had not provided evidence to show full compliance with the standards for which [he had been] revoked" and thus could not be granted "access to the Medicare Trust Fund (by way or issuance) of a Medicare number." CMS Ex. 1, at 5.

On or about September 5, 2017, Petitioner filed a second CAP with Noridian. *Id.* at 6, 8-10; Pet.'s Opp. to Motion to Dismiss at 4. In that filing, Petitioner asserted that when she filed her first CAP, she believed that her billing privileges would be restored because she had corrected the noncompliance that triggered the revocation by showing that her license was "current, active, and in good standing." CMS Ex. 1, at 8. Petitioner further stated that she "called Noridian on multiple occasions" to learn why the first CAP had been denied and was told by a Noridian employee, in a September 5, 2017 telephone call, that the CAP had been denied because Medicare patients had been billed during the period of her license suspension and because the CAP did not address that circumstance. *Id.* at 8-9. While acknowledging that she had provided services to patients while her license was suspended, Petitioner asserted (in the second CAP) that the patients were "not meant to be," but were nonetheless "accidentally," billed for those services. *Id.* at 9. She also stated that patients and their insurers (including Medicare) had been reimbursed for any payments made for services that she rendered while her license was suspended. *Id.* Based on these and other representations, Petitioner asked Noridian to reactivate her Medicare billing privileges "as soon as possible." *Id.* at 10.

Noridian treated Petitioner's second CAP as a request for reconsideration. In a letter dated September 18, 2017, Noridian thanked Petitioner for "submitting [her] reconsideration" and informed her that the deemed reconsideration request "did not meet" certain regulatory requirements and was "being returned."[4] The letter then advised Petitioner to review the requirements in 42 C.F.R. §§ 424.545 and 498.22, including the requirement that a reconsideration request be submitted within 60 days from receipt of the initial revocation determination. *Id.*

Petitioner's request for hearing and CMS's motion to dismiss

On November 17, 2017, Petitioner requested a hearing before the ALJ.[5] CMS responded with a motion to dismiss the hearing request or, alternatively, for summary judgment. In support of the motion to dismiss, CMS argued that Petitioner was not entitled to a hearing because she did not timely request reconsideration of the initial revocation determination, rendering that determination "administratively final and binding." CMS Motion to Dismiss at 4, 5.

[4] The September 18, 2017 letter also stated that Petitioner was "only allowed to submit one CAP." CMS Ex. 1, at 1.

[5] Petitioner attached Noridian's July 13 and September 18, 2017 letters to her November 7, 2017 hearing request.

In response to the motion to dismiss, Petitioner alleged that, after her first CAP was rejected (in mid-July 2017), she did not file a written reconsideration request (or ask for an extension of the deadline to file such a request) because "she was under the assumption" that Noridian was reconsidering the revocation as a result of a verbal "appeal" initiated on July 25, 2017. Pet.'s Opp. to Motion to Dismiss at 2-3, 7-12. In addition, Petitioner suggested that Noridian made a reconsidered determination on September 28, 2017 when it advised her on the telephone that "there was no appeal" and "to send a request form for the Administrative Law Judge (ALJ) hearing or review." *Id.* at 3, 9, 10-11 (asserting that the denial of her verbal appeal "should qualify as a reconsideration decision").

Petitioner also suggested that Noridian somehow provided incomplete information about her options. Thus, she alleged that, shortly after receiving the initial determination (in May 2017), and having "no idea what to do, she asked a Noridian employee if she should file a CAP or a reconsideration request, and the employee responded that she should file a CAP but did not also say that she could file *both* a CAP and reconsideration request. *Id.* at 5.

Finally, Petitioner asked the ALJ to reduce the re-enrollment bar and reinstate her billing privileges, asserting that her first CAP (filed in May 2017) had been improperly denied and that a three-year re-enrollment bar was excessive given the seriousness of her noncompliance with Medicare enrollment requirements. *Id.* at 2.

Petitioner submitted no documentary or testimonial evidence in response to CMS's motion to dismiss.

The ALJ's decision to dismiss the hearing request

Citing 42 C.F.R. § 498.5(*l*)(2), the ALJ held that Petitioner was not entitled to a hearing because CMS had not issued a reconsidered determination regarding the revocation. ALJ Decision at 3. He found that no reconsidered determination had been made "[b]ecause Noridian rejected the second CAP as a reconsideration request and returned it to Petitioner." *Id.*

The ALJ noted that Petitioner's allegation that Noridian had reconsidered the initial determination based on a "verbal" appeal could be construed as a claim for equitable estoppel. *Id.* at 4. However, the ALJ held that the federal government may not be estopped absent a showing that it engaged in "affirmative misconduct" (such as fraud), and that there was no evidence of such misconduct by Noridian or CMS in Petitioner's case. *Id.* The ALJ also noted that he had no authority to grant any other type of "equitable relief." *Id.*

Finally, in a footnote, the ALJ observed that Noridian's initial revocation determination incorrectly stated that the 60-day period for filing a reconsideration request was measured from the initial determination's postmark date, rather than from the date of receipt of that determination (as the Part 498 regulations provide), but that Petitioner suffered "no prejudice . . . due to the erroneous advice." *Id.* at 2 n.3.

Based on these findings and conclusions, the ALJ dismissed Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b). *Id.* at 4. Petitioner then filed a timely request for review of the ALJ's decision.

Standard of Review

The standard of review for a disputed issue of fact is whether the ALJ ruling is supported by substantial evidence on the record as a whole. The standard of review for a disputed issues of law is whether the ALJ ruling is erroneous. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*) at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html.

Analysis

A health care supplier has the right to appeal decisions by CMS that affect its enrollment in Medicare under 42 C.F.R. Part 498. *Vijendra Dave, M.D.*, DAB No. 2672, at 10 (2016). However, a supplier's appeal rights under Part 498 are not absolute – they do not apply to all CMS decisions or actions – and those rights may be exercised only in accordance with regulatory requirements and limitations.

Section 498.5(*l*) states that a supplier "dissatisfied with an initial determination . . . related to the . . . revocation of Medicare billing privileges" may request reconsideration, and further states that a supplier dissatisfied with a "reconsidered determination" is "entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(*l*). Based on that regulation, the Board has held that a supplier whose Medicare billing privileges have been revoked is entitled to a hearing before an ALJ only if CMS has issued an adverse reconsidered determination – that is, a determination which affirms the initial revocation determination. *Capital District Behavioral Health Psychologists, PLLC,* DAB No. 2866, at 4 (2018); *Hiva Vakil, M.D.,* DAB No. 2460, at 5 (2012). After the time for requesting reconsideration has expired, an initial revocation determination that is not "[r]econsidered in accordance with § 498.24" – that is, an initial determination that is not affirmed or modified based on a reconsideration of its merits and the available evidence – becomes "binding" and final under the administrative appeal process. 42 C.F.R. § 498.20(b); *Rollington Ferguson, M.D.*, DAB No. 2949, at 3 (2019) (holding that an initial revocation

determination was "binding and administratively final" after CMS's contractor "dismissed" the supplier's reconsideration request rather than issue a reconsidered determination); *Hiva Vakil, M.D.* at 5 (holding that "[w]ithout a reconsidered determination" by CMS's contractor, the initial determination issued to the supplier was "'binding' and, therefore, administratively final"); *Haissan Elzaim, M.D., et al.*, DAB No. 2501, at 4-5 (2013) (stating that an initial determination to revoke a supplier's billing privileges becomes binding "[w]ithout a reconsidered determination to provide a basis for further review").

Here, the ALJ found, and the record confirms, that Petitioner did not receive an adverse reconsidered determination. Petitioner admitted that, after receiving the initial revocation determination, she did not file a written reconsideration request (a condition for obtaining reconsideration). *See* Pet.'s Opp. to Motion to Dismiss at 3-4, 7-8. Instead, she filed a CAP, which Noridian denied on July 13, 2017. Although Noridian evidently treated Petitioner's second CAP, filed on September 5, 2017, as a reconsideration request, Noridian notified her in its September 18, 2017 letter that it was returning the September 5, 2017 submission because it did not meet the requirements of sections 424.545 and 498.22, the latter of which requires a supplier to submit any reconsideration request in writing within 60 days after receiving notice of the initial determination. The September 18, 2017 letter did not even mention the initial revocation determination or the findings upon which it was based, much less reconsider that determination. The letter merely advised Petitioner that her September 5, 2017 submission was being "return[ed]" as procedurally defective. There is no documentation of any other action by Noridian or CMS constituting a reconsidered determination. The ALJ therefore properly concluded that Petitioner was not entitled to a hearing concerning the revocation of her Medicare billing privileges.

Petitioner makes various arguments in its appeal briefs, but none shows that the ALJ erred in dismissing her hearing request. First, Petitioner contends that she is entitled to a hearing because she received "erroneous" or insufficient information about her right to request reconsideration. More specifically, she contends (as she did before the ALJ) that Noridian did not tell her, either in the May 15, 2017 initial revocation determination or in later telephone calls, that she could have filed a reconsideration request and a CAP simultaneously, or that she could have filed a written reconsideration request after her CAP was denied on July 13, 2017. RR at 2, 7-8, 14; Reply at 9, 12. Petitioner also emphasizes that the May 15, 2017 initial determination incorrectly states that she had 60 days from the letter's "postmark" to file a request for reconsideration, when in fact she had 60 days from "receipt" of the initial determination, plus the benefit of regulatory presumption that such receipt occurred on May 20, 2017 (making the presumptive filing deadline July 20, 2017). *See* RR at 2, 8, 14-15. Petitioner says that, as a result of Noridian's omissions and errors, she was unaware that it was possible to file a timely

request for reconsideration – either before receiving the July 13, 2017 decision denying her first CAP or during the one week following that decision – and she therefore deserves a hearing or at least an opportunity to file a written reconsideration request with CMS and obtain a reconsidered determination. *Id*. at 7-8.

We reject this line of argument for two reasons.[6] First, it implicitly challenges a decision that we cannot review – namely, Noridian's September 18, 2017 decision *not to reconsider* the initial determination. In effect Petitioner asks us overturn that decision on the ground that she received incomplete or erroneous information about her right to reconsideration. However, the Board has held that the rejection or dismissal of an attempted request for reconsideration is unreviewable, meaning that a supplier may not claim entitlement to a hearing on the ground that the rejection or dismissal was wrong or invalid. *Rollington Ferguson, M.D.* at 4 (holding that the supplier was "not entitled to appeal" the contractor's failure or refusal to consider his first reconsideration request or its decision to dismiss his second request as untimely); *Capital District Behavioral Health Psychologists* at 4 (affirming an ALJ's holding that a contractor's decision to dismiss the reconsideration request was "non-reviewable"); *Haissam Elzaim, M.D.* at 4 (holding that the supplier had no right to ALJ review of his claim that the reconsideration request had been improperly dismissed as untimely because the initial determination notice was mailed to an old address); *Better Health Ambulance*, DAB No. 2475, at 1, 4 (2012) (holding that the ALJ erred in reviewing whether the supplier's reconsideration request had been improperly dismissed as untimely and noting that if "a supplier does not request and receive reconsideration of an initial determination, then the initial determination is 'binding'"); *Karthik Ramaswamy, M.D.*, DAB No. 2563, at 7-8 (2014) (noting that the "propriety of [the contractor's] dismissal" of a reconsideration request "is not subject to review" and hence the "factual allegations proffered by [the supplier] regarding his interactions and communications with [the contractor] in regard to each [of those allegations] are not material facts as to any issue properly subject to [Board] review"), *aff'd, Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015).

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[6] To the extent Petitioner is trying to assert a claim of equitable estoppel based on the information contained in the initial revocation determination or received during telephone calls with Noridian employees, the ALJ correctly noted that the claim fails because Petitioner has not proved that Noridian engaged in "affirmative misconduct," which is something more than failing to provide accurate information or negligently dispensing erroneous advice. *See Wash. State Dept. of Social and Health Servs.*, DAB No. 1561, at 10 (1996); *Hartford HealthCare at Home, Inc.*, DAB No. 2787, at 9-10 (2017). Moreover, estoppel against the government cannot be asserted on the basis of *oral* advice. *Wash. State Dept. of Social and Health Servs.* at 10 (citing *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 65 (1984)). The merits of any estoppel claim by Petitioner are ultimately immaterial because, as we note later, the Board is not empowered to grant relief based on equitable doctrines, theories, or reasons. *Michael Turano, M.D.*, DAB No. 2922, at 11-14 (2019).

Second, Petitioner proffered no evidence, or even a credible argument, that Noridian's alleged errors – the mistake in the initial determination letter about when the 60-day period for requesting reconsideration began, and the alleged failure by Noridian employees to tell Petitioner that she could file both a CAP and reconsideration request – were prejudicial. *Cf. Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008) (holding that a due process claim cannot succeed absent a showing that the non-federal party was prejudiced by the alleged due process violation). The documentary record of Petitioner's interactions with Noridian does not record any effort by Petitioner to contest the merits of the revocation determination. *See* CMS Ex. 1. That record shows that her focus between May and November 2017 was on obtaining relief under the CAP process on the grounds that she had remedied the licensing problem and become compliant with Medicare enrollment requirements. While Petitioner says that Noridian's employees failed to tell her that she could have filed both a CAP and reconsideration request, she does not allege that she *asked* an employee about that possibility, or that any employee told her that she could not file both.

Moreover, Petitioner does not assert that she was prepared in July 2017 to present a case that might have supported revising the revocation determination. Her own brief to the ALJ implied just the opposite: she conceded in that submission that the suspension of her license in March 2017 gave CMS a valid basis to revoke her billing privileges. *See* Pet.'s Opp. to Motion to Dismiss at 2 (stating that CMS "was authorized to revoke" her billing privileges based on the fact that her license was suspended in March 2017). Indeed, the Board has made clear that CMS may revoke a supplier's Medicare billing privileges under section 424.535(a)(1) based on the suspension of the supplier's practitioner license, even if the period of the practitioner's license suspension ended before the initial determination, which was not the case here. *Angela R. Styles M.D.*, DAB No. 2882, at 5-8 (2018).

Next, Petitioner reiterates her apparent claim that Noridian actually reconsidered the initial revocation determination based on an "appeal" that she initiated on the telephone. In support of that claim, Petitioner alleges that:

- During a July 25, 2017 telephone call with an unnamed Noridian employee, she was told that she "could place a verbal appeal";
- From that date forward she understood that an appeal of the initial determination was pending or "in process"; and
- Another unnamed Noridian employee "verbally" notified her on September 28, 2018 that the appeal of the initial determination was not pending and advised her to request a hearing before an administrative law judge.

See RR at 2, 8 (referring to a "presumed active appeal in process"); Reply at 3-5, 9, 10-11. According to Petitioner, Noridian's alleged oral statements to her on September 28, 2017 "creat[ed] the reconsidered determination and granted her the right to have her case reviewed by the ALJ." Reply at 10-11.

Petitioner submitted no evidence to substantiate her allegations. The record also reveals a substantial unexplained inconsistency in Petitioner's account of her dealings with Noridian. While her reply brief to the Board implies that the verbal "appeal" she allegedly "initiated" on July 25, 2017 sought to challenge the initial revocation determination (*see* Reply at 3-4, 9, 19), Petitioner told the ALJ something different – namely, that the July 25th appeal concerned the "unfavorable decision of the CAP," not the initial revocation determination (*see* Jan. 1, 2018 Pet.'s Opp. to Motion to Dismiss at 2, 7). More importantly, Petitioner's allegations do not on their face indicate that Noridian issued a reconsidered determination on September 28, 2017. A reconsidered determination either affirms or modifies the initial determination and the findings upon which that determination is based. 42 C.F.R. § 498.24. Petitioner does not allege that Noridian communicated such a determination on September 28, 2017. Petitioner alleges only that she was told to request a hearing (not that she had a right to one). Reply at 3-4, 10.

Petitioner also invokes the law of contract and agency to support her contention that a reconsideration occurred.[7] According to Petitioner, she and Noridian formed an "oral contract" under which the latter agreed to process an unwritten appeal of the initial determination, and Noridian had "apparent authority" to bind CMS to that agreement. Reply at 5, 8-11. Neither contract nor agency law applies to the issue before us – i.e., whether Petitioner is entitled to a hearing. The resolution of that issue is governed by the regulations in 42 C.F.R. Part 498. Under those regulations, Petitioner is entitled to a hearing only if Noridian (or CMS) *actually issued* a reconsidered determination, regardless of whether it undertook some purportedly contractual obligation to do so (a claim as to which Petitioner presented no evidence in any case). As we said, no reconsidered determination was issued regarding the revocation.

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[7] The appellate review *Guidelines* state (in the section titled "Completion of the Review Process") that the Board "will not consider issues . . . which could have been presented to the ALJ but were not." Citing that guideline, CMS contends that the Board should not consider Petitioner's contention that she and CMS formed a contract entitling her to reconsideration of the revocation determination, or Petitioner's contention that Noridian issued a reconsidered determination on September 28, 2017, because she did not make either contention before the ALJ. Sur-reply at 2-4. CMS is mistaken about the latter contention, which Petitioner presented to the ALJ in her response to CMS's motion to dismiss. See Pet. Opp. to Motion to Dismiss at 2, 8-10. Although Petitioner did not make a contract-law argument to the ALJ, her brief in opposition to CMS's dismissal motion articulated much of the argument's factual underpinnings. In addition, CMS has addressed the argument's merits in its sur-reply. For these reasons, and in the interest of ensuring that Petitioner receives a fair review of her allegations regarding the post-revocation appeal process, we address the contract-law argument despite her failure to fully develop it before the ALJ.

Petitioner's remaining arguments merit only brief discussion. Petitioner contends that Noridian improperly denied her first CAP and should have reinstated her billing privileges based on that submission. RR at 4, 5-7, 9; Reply at 2-3, 7-9. Petitioner also complains that Noridian's July 13, 2018 letter did not state why the CAP had been rejected. RR at 9; Reply at 3. However, we, like the ALJ, have no authority to review or overturn Noridian's decision regarding Petitioner's CAP. Applicable regulations state that a CMS contractor's refusal to reinstate Medicare billing privileges based on a CAP is not an appealable "initial determination" under 42 C.F.R. Part 498 and is thus not subject to review by an ALJ or the Board. 42 C.F.R. § 405.809(b)(2); *see also Michael Turano, M.D.*, DAB No. 2922, at 2 n.3 (2019); *Meindert Niemeyer, M.D.*, DAB No. 2865, at 11 (2018).

Petitioner also objects to the length of the re-enrollment bar. She notes (accurately) that the initial revocation determination does not say why Noridian imposed the maximum three-year bar. RR at 12. Petitioner further contends that a three-year bar is "excessive" because she remedied the noncompliance identified in the initial determination (by reactivating her physician assistant license) and reimbursed insurers and patients for payments relating to services she provided while her license was suspended. *Id.* at 3, 9, 11-12; Reply at 3, 5-6, 17-18.

These points are also beyond the scope of ALJ and Board review. A decision by CMS or its contractor about how long to bar a revoked supplier from re-enrolling in Medicare, unlike the determination to revoke the supplier's billing privileges, is not an appealable "initial determination" under 42 C.F.R. Part 498. *Blossomwood Medical, P.C., et al.*, DAB No. 2914, at 11 (2018); *Vijendra Dave, M.D.* at 8-11 (stating that the authority of an ALJ or the Board in a revocation appeal "does not extend to reviewing the length of the reenrollment bar imposed by CMS"). We therefore cannot consider or act upon Petitioner's contention that the three-year re-enrollment bar was excessive in her circumstances.

Petitioner requests that her case be remanded to Noridian to reconsider the length of the re-enrollment bar. RR at 16. However, because the decision about the re-enrollment bar's length is unreviewable, we have no authority to remand Petitioner's case to CMS or Noridian to reconsider that decision. *Vijendra Dave, M.D.* at 11-12 (holding that the ALJ properly rejected the physician's request to remand his case to CMS to reconsider the length of the re-enrollment bar).

Finally, Petitioner asserts that Noridian's alleged "errors and inconsistencies" collectively warrant "equitable relief," by which she means a lifting of the re-enrollment bar and her immediate re-enrollment in Medicare. Reply at 4, 11-13; *see also* RR at 12-13 (suggesting that CMS should be "held accountable" for the allegedly "false, misleading,

and confusing" information provided by Noridian). However, we have no authority to order such relief and must follow applicable statutes and regulations, including the administrative appeal regulations in 42 C.F.R. Part 498. *Vijendra Dave, M.D.* at 8. Under those regulations, even when the affected supplier has received a reconsidered determination and is entitled to a hearing, the scope of ALJ and Board review is narrow – confined to deciding whether CMS has established the existence of the legal basis for revocation cited in the reconsidered determination. In this case, Petitioner is not entitled to a hearing, and the initial revocation determination is "binding." 42 C.F.R. § 498.20(b); *Haissam Elzaim, M.D.* at 4-5. Neither CMS's enrollment regulations (in 42 C.F.R. Part 424) nor the administrative appeal regulations (in 42 C.F.R. Part 498) authorize an administrative law judge or the Board to mitigate the consequences of a valid and binding revocation determination.

Conclusion

Because the facts and law support the ALJ's conclusion that Petitioner is not entitled to a hearing before the ALJ concerning the revocation of her Medicare billing privileges (or any other matter), we affirm his decision to dismiss her hearing request under 42 C.F.R. § 498.70(b).

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member