

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

Meindert Niemeyer, M.D.
Docket No. A-17-93
Decision No. 2865
April 4, 2018

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

Meindert Niemeyer, M.D. (Petitioner), appeals a May 11, 2017, decision by an administrative law judge (ALJ), *Meindert Niemeyer, M.D.*, DAB CR4846 (2017) (ALJ Decision). The ALJ sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(1) based on the suspension of Petitioner's license to practice medicine in North Carolina but found no legal basis for CMS's determination that it was also authorized to revoke Petitioner's billing privileges pursuant to 42 C.F.R. § 424.535(a)(13)(i). The ALJ also established the effective date of revocation as September 1, 2015.

For the reasons set out below, we affirm the ALJ Decision pursuant to 42 C.F.R. § 424.535(a)(1).

Legal Background

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act) §§ 1811, 1833.¹ The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Act §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

¹ The current version of the Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

A supplier must be enrolled in the Medicare program and maintain active enrollment status in order to receive payment for items and services covered by Medicare. 42 C.F.R. §§ 424.500, 424.502, 424.505, 424.510, 424.516.² CMS may revoke a supplier's Medicare enrollment for any of the "reasons" specified in paragraphs 1 through 14 of 42 C.F.R. § 424.535(a). Section 424.535(a)(1) permits revocation if a supplier is determined to not be in compliance with the enrollment requirements, and has not submitted a corrective action plan (CAP).³ These "enrollment requirements" include the requirements in section 424.516, which requires, in relevant part, that a supplier comply with "Federal and State licensure, certification, and regulatory requirements, as required, based on the type of services or supplies the . . . supplier type will furnish and bill Medicare." *Id.* § 424.516(a)(2). Part 410 lists the types of services for which a provider or supplier may bill Medicare. Relevant here is section 410.20, which provides that "physicians' services" must be provided by a practitioner "legally authorized to practice by the State in which he or she performs the functions or actions, and who is acting within the scope of his or her license." *Id.* § 410.20(b).

Revocation effectively terminates any provider agreement and bars the provider or supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. 42 C.F.R. § 424.535(b), (c). The effective date for revocation based on a license suspension is set as the date that the suspension becomes effective. *Id.* § 424.535(g). The re-enrollment bar is set for between one year and three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). A provider or supplier whose Medicare enrollment has been revoked may request reconsideration by CMS or its contractor and appeal a reconsideration determination with which it disagrees to an ALJ and the Board in accordance with the procedures at 42 C.F.R. Part 498. *Id.* §§ 424.545(a), 498.3(b)(17), 498.5(l)(1)-(3), 498.22(a).

Case Background

Petitioner is a family physician practicing in North Carolina. CMS Ex. 6, at 1. On July 17, 2009, Petitioner entered into a Consent Order with the North Carolina Medical Board (NCMB), in which he relinquished his authority to prescribe Schedule I, II, IIN, III, and IIIN controlled substances. *Id.* at 8. On December 15, 2013, Petitioner entered into another Consent Order with the NCMB, in which he agreed that the NCMB would conduct a review to determine whether he was prescribing Schedule IV and V controlled

² We cite to, and apply, the version of section 42 C.F.R. Part 424 that was in effect on May 11, 2016, 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).

³ CMS issued a final rule on December 5, 2014, promulgating the regulation at 42 C.F.R. § 405.809(a)(1) that limits the ability for a provider or supplier to submit a CAP to situations in which the provider or supplier was revoked based on noncompliance under section 424.535(a)(1). *See* 79 Fed. Reg. 72,500, 72,523 (Dec. 5, 2014).

substances within the standard of care. *Id.* In September 2014, Petitioner's patient died from a drug overdose attributed to medications prescribed by Petitioner. *Id.* at 12. In 2015, the NCMB opened an investigation into allegations of Petitioner's professional misconduct in regard to this patient. *Id.* On July 1, 2015, Petitioner entered into another Consent Order with the NCMB, stipulating that:

[Petitioner's] license to practice medicine and surgery in North Carolina is hereby suspended for a period of one (1) year from the date of this Consent Order. The suspension is hereby immediately stayed, except for sixty (60) days beginning on September 1, 2015 and ending on October 31, 2015, whereby Dr. Niemeyer must serve an active suspension.

Id. at 14 (emphasis removed). The Consent Order also stipulated that Petitioner would surrender all Drug Enforcement Administration (DEA) privileges and pay a \$10,000 fine. *Id.* at 14-15. Petitioner surrendered his DEA Certificate of Registration according to the terms of the Consent Order on August 1, 2015. P. Ex. 1, at 1; CMS Ex. 6, at 22.

By letter dated May 11, 2016, Palmetto GBA (Palmetto), a CMS contractor, notified Petitioner that his Medicare billing privileges were being revoked under 42 C.F.R. §§ 424.535(a)(1) and 424.535(a)(13). CMS Ex. 3. The May 11, 2016, revocation letter states in relevant part:

42 CFR § 424.535(a)(1) Non-compliance – Not Licensed

Pursuant to 42 CFR 424.535(a)(1), CMS may revoke a currently enrolled provider or supplier[']s Medicare billing privileges and any corresponding provider agreement or supplier agreement when the provider or supplier is determined not to be in compliance with the enrollment requirements. Based on the North Carolina state licensing board, Meindert Niemeyer is no longer licensed. The license [was] suspended effective September 1, 2015.

(42 CFR § 424.535(a)(13)) - DEA Certificate / State Prescribing Authority Suspension or Revocation

The Drug Enforcement Administration (DEA) Certificate of Registration was voluntarily surrendered effective 08/15/2015 for 5 years.

Id. at 1. Palmetto also imposed a three-year reenrollment bar. *Id.* at 2.

Petitioner submitted a request for reconsideration and a CAP to Palmetto in a letter dated May 17, 2016. CMS Ex. 2. Petitioner's counsel submitted a second CAP on June 3, 2016, and a second Request for Reconsideration by letter dated June 3, 2016. CMS Ex. 4. Palmetto denied the motion for reconsideration on May 27, 2016, stating in relevant part:

Revocation reasons: 42 CFR § 424.535(a)(1)-Non-compliance-Not Licensed and 42 CFR § 424.535(a)(13)) - DEA Certificate/State Prescribing Authority Suspension or Revocation

Specifically, based on the North Carolina state licensing board your license was suspended effective 9/1/2015 and your DEA registration was voluntarily surrendered effective 8/15/2015 for 5 years.

Reconsideration Determination at 1.

Petitioner timely requested a hearing before an ALJ (RFH). In his hearing request, Petitioner argued that he was licensed to practice medicine on the date of the revocation determination because suspension of his medical license was removed by the NCMB, according to the terms of the Consent Order, as of November 1, 2015. RFH at 3. Petitioner also argued that his DEA Certificate of Registration was voluntarily surrendered, rather than suspended or revoked, and therefore did not constitute a basis for revoking his enrollment under 42 C.F.R. § 424.535(a)(13). *Id.*

CMS filed a motion for summary judgment on December 9, 2016, asserting that there were no disputes of material fact and that the revocation was lawful under sections 424.535(a)(1) and 424.535(a)(13)(i) and (ii). On January 6, 2017, Petitioner filed his brief in opposition and a cross-motion for summary judgment (P. Br.). Petitioner reiterated his arguments made in the Request for Hearing. Petitioner also argued that the contractor "failed to render a decision as to Petitioner's CAP," and that the enrollment analyst who issued the initial determination was impermissibly involved in the reconsideration process. P. Br. at 12-13. CMS filed a reply brief in opposition to Petitioner's motion for summary judgment on January 19, 2017.

ALJ Decision

On May 11, 2017, the ALJ issued a decision granting partial summary judgment for both parties. The ALJ concluded that summary judgment in favor of CMS was appropriate regarding revocation under 42 C.F.R. § 424.535(a)(1), and that summary judgment in favor of Petitioner was appropriate regarding revocation under 42 C.F.R. § 424.535(a)(13)(i).

The ALJ first addressed Petitioner's argument that the contractor did not issue a decision on the CAP. The ALJ stated that "Petitioner does not deny that he was orally advised that the CAP was denied." ALJ Decision at 9. The ALJ concluded that he could "afford Petitioner no relief on this issue" because the "refusal of CMS or its contractor to accept Petitioner's CAP is not an initial determination subject to [his] review." *Id.* at 9-10.

Next, the ALJ addressed Petitioner's argument that Petitioner's license to practice medicine in North Carolina was restored at the time of the revocation. The ALJ made the undisputed finding of fact that, "except for eight months in 2009 and two months from September 1 to October 31, 2015, Petitioner has maintained an active license in North Carolina since 2006." ALJ Decision at 10. The ALJ also found that when both the initial and reconsidered determinations were issued, "Petitioner's license to practice medicine in North Carolina was in an active status" and "he was authorized to practice medicine in North Carolina." *Id.*

The ALJ concluded, however, that CMS still had the authority to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(1), writing in relevant part:

[T]he authority to revoke granted CMS by 42 C.F.R. § 424.535(a)(1) contains no temporal limitation. Petitioner was not authorized to practice medicine in North Carolina when his suspension became effective on September 1, 2015. Therefore, on September 1, 2015, Petitioner did not meet the Medicare enrollment requirement to have a license to practice medicine and CMS and the MAC had authority to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1). Petitioner points to no limitation imposed by law that prevents CMS from revoking Medicare enrollment based on suspension of a medical license, even though by virtue of the end of the suspension, Petitioner may have again met the enrollment requirement to have an active license to practice medicine in North Carolina.

ALJ Decision at 10-11.

The ALJ next addressed Petitioner's argument that CMS did not have a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(13). First, the ALJ determined that "42 C.F.R. § 424.535(a)(13)(ii) is not at issue in this case" because "[t]he reconsidered determination did not find or conclude that the NCMB suspended or revoked Petitioner's ability to prescribe drugs." ALJ Decision at 11. Next, the ALJ concluded that "a voluntary surrender of a DEA Certificate of Registration for cause under the

Administrator’s regulations is not the same as a suspension or revocation of such a certificate” and is thus “not an authorized basis for revocation pursuant to 42 C.F.R. § 424.535(a)(13)(i).” ALJ Decision at 14.⁴ The ALJ then reestablished the effective date of revocation in accordance with the date that Petitioner’s license was suspended, September 1, 2015.

Standard of Review

The ALJ decided this case by granting partial summary judgment for both parties. Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. *1866ICPayday.com* at 2, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program (Guidelines)* at <http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment>.

Discussion

- I. *The ALJ did not err in finding that CMS had the authority to revoke Petitioner’s Medicare billing privileges under 42 C.F.R. § 424.535(a)(1).*

In his Request for Review (RR), Petitioner argues that the ALJ erred as a matter of law by finding that CMS properly revoked Petitioner’s Medicare billing privileges under 42 C.F.R. § 424.535(a)(1). The regulation at section 424.535(a)(1) permits revocation if:

The provider or supplier is determined to not be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.

42 C.F.R. § 424.535(a)(1). The enrollment requirements include regulations that require a physician to have a valid medical license in the state in which the physician practices. 42 C.F.R. §§ 424.516(a)(2) and 410.20(b). The Board has previously held that CMS has the authority to revoke the billing privileges of a physician whose license to practice

⁴ While we might not agree with the ALJ’s determination that the reconsidered revocation notice did not state a finding of alleged noncompliance with section 424.535(a)(13)(ii), CMS did not appeal this ALJ determination or the ALJ’s further determination that CMS had no basis to revoke under section 424.535(a)(13)(i). Accordingly, these ALJ determinations are not properly before us for review, and we will not address them.

medicine is temporarily suspended. *Akram A. Ismail, M.D.*, DAB No. 2429 (2011). In *Ismail*, Dr. Ismail's license to practice medicine in New Jersey was suspended after the Florida Department of Health entered an Order of Emergency Suspension against his license to practice in Florida. The suspension would not be lifted until Dr. Ismail could demonstrate that he was fit to practice medicine in New Jersey, and also had an active license to practice medicine in Florida. CMS revoked Dr. Ismail's billing privileges based on the "temporary" suspension of his New Jersey medical license, which was still suspended at the time of the revocation. The Board affirmed the ALJ's decision upholding CMS's revocation of Dr. Ismail's billing privileges. The Board cited to the preamble of the 2006 final rule adopting section 424.535, which said that a "supplier's enrollment and billing privileges may be revoked if, *at any time*, it is determined to be out of compliance with the Medicare enrollment requirements in subpart P" *Ismail* at 6, citing 71 Fed. Reg. 20,761 (Apr. 21, 2006) (emphasis in original).

CMS argues that the Board's conclusions in *Ismail* support its argument that CMS had the authority to revoke Petitioner's billing privileges after Petitioner's medical license returned to active status. CMS Brief at 5. Petitioner counters that CMS's reliance on *Ismail* is misguided. Petitioner notes that there are differences in the underlying facts between the two cases. Petitioner's Reply (Reply) at 4. For example, the suspension period remained in effect at the time of CMS's initial determination to suspend Dr. Ismail's medical license. *Id.* In contrast, Petitioner's license to practice medicine in North Carolina was suspended for a period of one year, but the suspension was stayed for all but a sixty-day period beginning September 1, 2015. CMS Ex. 6, at 14. The suspension of Petitioner's medical license therefore began on September 1, 2015, and ended on October 31, 2015. ALJ Decision at 10. Petitioner states that he was properly licensed to practice medicine in North Carolina on the effective date of revocation set by Palmetto, August 15, 2015, and the date of the initial determination, May 11, 2016. RR at 5.

Petitioner offers two inconsistent arguments regarding which date CMS must use as the basis for the authority to revoke under 42 C.F.R. § 424.535(a)(1). Petitioner first argues that, in order for CMS to revoke, the record must reflect that the supplier was not in compliance with the enrollment requirements "as of the effective date of the revocation." RR at 5; Reply at 2. The ALJ determined that the proper effective date for the revocation of Petitioner's Medicare billing privileges under section 424.535(a)(1) is September 1, 2015, a date on which Petitioner concedes his license was suspended. ALJ Decision at 14. Hence, this argument offers no support for Petitioner's challenge to the revocation.

Petitioner's second argument is that, in light of rulemaking changes made by CMS in 2014, the regulation at 42 C.F.R. § 424.535(a)(1) must "be considered with temporal limitations." Reply at 2.⁵ We construe Petitioner to be implying that CMS may only revoke a supplier under section 424.535(a)(1) if the record reflects that the supplier was not in compliance with the enrollment requirements as of the date of the initial determination, rather than the revocation effective date.

The issue of whether noncompliance must continue to exist at the time of the revocation action turns on the interpretation of the phrase "[t]he provider or supplier **is determined to not be in compliance** with the enrollment requirements" 42 C.F.R.

§ 424.535(a)(1) (emphasis added). The regulation uses the present tense for the phrasing of both "is determined" and "to not be in compliance." Petitioner has not explained its reasoning, but we recognize that the use of present tense arguably could be read to mean that the provider must be in noncompliance at the exact time CMS makes its revocation determination. We do not view this phrasing as clear on its face, however, as to the timing of noncompliance. Petitioner has identified nothing in the regulatory history that would imply that CMS was required to ensure that providers who have fallen out of compliance maintain that noncompliance throughout the process of investigation, issuance of a revocation determination, and even perhaps the reconsideration process. The present tense may alternatively be read merely to refer to the contractor taking the determination step of finding noncompliance without implying when that noncompliance began or ended.

At most, although Petitioner does not make this argument, the use of present tense in the regulation arguably creates some ambiguity as to the relationship between a supplier's noncompliance and the timing of CMS's determination to revoke for that noncompliance. Assuming arguendo that such ambiguity exists, we consider whether deference to the agency's interpretation – that CMS may revoke for noncompliance regardless of whether the noncompliance continues to exist at the time of the revocation – is appropriate. When the language of a statute or regulation is ambiguous, the Board generally defers to the agency's interpretation of the text if it is reasonable and the nonfederal party had timely and adequate notice of that interpretation or did not rely to its detriment on another reasonable interpretation. *Blackfeet Tribe*, DAB No. 2675, at 11 (2016), citing *Missouri Dep't of Soc. Servs.*, DAB No. 2184, at 2 (2008); *The Orthotic Ctr., Inc.*, DAB No. 2531, at 18-19 (2013); *Dist. Mem'l Hosp. of Southwestern N.C., Inc. v. Thompson*, 364 F.3d 513, 518 (4th Cir. 2004).

⁵ Petitioner also asserts that CMS removed the phrase "at any time" from 42 C.F.R. § 424.535(a)(1) in 2014. We conclude below that Petitioner's assertion is not supported by the rulemaking history.

We conclude that CMS's interpretation of its authority under 42 C.F.R. § 424.535(a)(1) to revoke for noncompliance that existed, regardless of whether the noncompliance continues to exist, is reasonable and consistent with CMS's policy goals and the rulemaking history. The preamble to the 2006 final rule implementing the enrollment regulations, including the regulations for revocations, summarized the purpose of the final rule as follows:

[T]his final rule implements provisions in the statute that require us to ensure that all Medicare providers and suppliers are qualified to provide the appropriate health care services. These statutory provisions include requirements meant to protect beneficiaries and the Medicare Trust Funds by preventing unqualified, fraudulent, or excluded providers and suppliers from providing items or services to Medicare beneficiaries or billing the Medicare program or its beneficiaries.

71 Fed. Reg. 20,754 (Apr. 21, 2006). If we accept Petitioner's interpretation, CMS would not have the authority to revoke a supplier under 42 C.F.R. § 424.535(a)(1) for any period of noncompliance (regardless of length or seriousness) that ends prior to the issuance of an initial determination. The time constraint imposed on a CMS contractor to identify the noncompliance, develop a case, and issue an initial determination would undoubtedly lead to instances such as the current case where CMS would be barred from seeking revocation action under section 424.535(a)(1). It would place an undue burden on the contractor, and disincentivize a supplier from reporting short-term license suspensions before the period of noncompliance ends.⁶ In effect, the regulation would be rendered unworkable in instances of short-term periods of noncompliance. Given the absence of explicit language binding CMS's authority to noncompliance at the time of the revocation action, CMS's interpretation of the regulation is reasonable and aligns with the stated goal of protecting the Medicare Trust Funds and beneficiaries, including from suppliers that do not comply with the enrollment requirements for short-term periods.

Petitioner argues that the rulemaking history, specifically the removal of the phrase "at any time" from the regulatory text of 42 C.F.R. § 424.535(a)(1) in 2014, indicates that the drafters intended CMS's authority to revoke under the regulation to be constrained. Reply at 2. Petitioner's assertions regarding the phrase "at any time," however, are not supported by the rulemaking history. The final rule promulgating section 424.535 on April 21, 2006, did not include the phrase "at any time" in the regulatory text, and at no

⁶ CMS may revoke a supplier under 42 C.F.R. § 424.535(a)(9) for failure to report an adverse legal action within 30 days pursuant to 42 C.F.R. § 424.516(d)(1)(ii). Here, Petitioner was obligated to notify Palmetto about his license suspension no later than July 31, 2015, and, at Palmetto's discretion, Petitioner's Medicare billing privileges could have been revoked pursuant to section 424.535(a)(9) for failure to do so.

point prior to 2014 was the phrase included in the text. 71 Fed. Reg. 20,754 (Apr. 21, 2006). The phrase “at any time” was included in the regulatory text of 42 C.F.R. § 424.535(a)(1) in the proposed rule. 68 Fed. Reg. 22,064, 22,084 (Apr. 25, 2003) (“The provider or supplier, at any time is determined not to be in compliance with the enrollment requirements...”). The 2006 final rule, however, removed “at any time” from the proposed regulatory language, but did not provide a reason in the preamble for its removal. 71 Fed. Reg. 20,754, 20,778 (Apr. 21, 2006). Even if the proposed language had been finalized, the ambiguity inherent in the positioning of the proposed phrase “at any time” would preclude a determination that the regulation explicitly authorized CMS to revoke for noncompliance that ended prior to the issuance of an initial determination. For example, the phrase “at any time” could have referred to the timing of CMS’s determination, or the timing of the noncompliance. We find it unreasonable, therefore, to conclude that the drafters intended by removal of this phrase from the final regulatory text to impose a restriction on CMS’s authority to revoke for noncompliance that existed but no longer existed at the time of the revocation.

We are equally unpersuaded by Petitioner’s argument that the ability of CMS to revoke a supplier that has already come back into compliance “effectively creates a new Medicare enrollment requirement for physicians such that even a temporary interruption in a physician’s eligibility to practice medicine places him or her at risk for revocation by CMS.” RR at 6. CMS’s interpretation of the regulations does not create a “new” Medicare enrollment requirement. To be eligible to receive Medicare payments, physicians are already required to be continuously licensed by the state in which they practice. 42 C.F.R. § 410.20(b). A medical license suspension at any point in time that the physician is enrolled in the Medicare program is grounds for revocation. Furthermore, providers and suppliers are required to maintain compliance with Medicare enrollment requirements if they choose to continue billing Medicare. 42 C.F.R. § 424.500. Thus, our conclusion about CMS’s authority is entirely consistent with the existing regulations.

II. The ALJ and the Board may review only whether CMS was authorized to revoke Petitioner’s Medicare billing privileges.

Petitioner argues that the ALJ “ignored the spirit and intent of the regulatory provisions” by concluding that CMS had the authority to revoke Petitioner’s Medicare billing privileges under 42 C.F.R. § 424.535(a)(1) because the record contains no evidence that improper Medicare payments were made to Petitioner for services rendered during the two-month suspension of his medical license. Reply at 3-5. Petitioner also argues that his due process rights were violated because the same Palmetto employee performed the initial and reconsideration determinations. RR at 6-8; Reply at 7-9. Petitioner provides

no statutory or regulatory support for his arguments. The only appealable issue before the ALJ and the Board in this proceeding is whether CMS had the authority to revoke Petitioner's Medicare billing privileges. *See, e.g., Saeed A. Bajwa, M.D.*, DAB No. 2799, at 15 (2017) (if "CMS has shown that one of the regulatory bases for enrollment exists," then the ALJ and the Board "must uphold the revocation"); *Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (the ALJ and the Board are required to uphold revocation if the record establishes that the regulatory elements for revocation are satisfied); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (the only issue before the ALJ and the Board is whether CMS has established a "legal basis for its actions"). Neither the ALJ nor the Board may "substitute [their] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances." *Ahmed*, DAB No. 2261, at 19 (2009). We have concluded that the ALJ properly concluded that CMS had the authority to revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(1). We do not have the authority to address Petitioner's additional arguments.

Petitioner also asserts that Palmetto "failed to consider and issue a decision on the Petitioner's CAP" and, therefore, was in violation of applicable Medicare Program Integrity Manual provisions. Reply at 6. The governing regulations grant appeal rights only for the "initial determinations" specified in 42 C.F.R. § 498.3(b). Moreover, a determination to deny or revoke a provider or supplier's Medicare enrollment, addressed as an "initial determination" in section 493.3(b)(17), is appealable to an ALJ and the Board only if the provider or supplier first seeks reconsideration of the initial determination and the reconsideration decision upholds the denial or revocation of enrollment, in which case the appeal lies from the reconsideration decision. 42 C.F.R. § 498.5(l). Section 498.3(b) does not list the acceptance of a CAP as an appealable initial determination. Moreover, 42 C.F.R. § 405.809(b)(2), explicitly states that "[a] CMS contractor's refusal to reinstate a supplier's billing privileges based on a corrective action plan is not an initial determination under part 498 of this chapter." Accordingly, providers and suppliers do not have the right to appeal CMS's refusal to accept a supplier's CAP. *Conchita Jackson, M.D.*, DAB No. 2495, at 1 (2013) ("[N]either the Act nor regulations provide for appeal of CMS's (or the CMS contractor's) denial of a CAP."). Petitioner argues that Palmetto simply *ignored* Petitioner's CAP, rather than *refused* or *denied* the CAP, and therefore section 405.809(b)(2) does not apply. RR at 9. Regardless, there is nothing in the regulations that grants the Board the authority to review CMS's administrative disposition of a CAP.

Conclusion

For the reasons stated above, we affirm the ALJ's conclusion that CMS had the authority to revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(1). We also affirm the ALJ's conclusion that under 42 C.F.R. § 424.535(g), the effective date of the revocation is September 1, 2015, the date the suspension of Petitioner's license took effect.

/s/

Christopher S. Randolph

/s/

Leslie A. Sussan

*/s/*Sheila Ann Hegy
Presiding Board Member