

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

Neil Niren, M.D. and Neil Niren, M.D., P.C.  
Docket No. A-17-120  
Decision No. 2856  
March 12, 2018

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

Neil Niren, M.D. and Neil Niren, M.D., P.C. (Petitioners) appeal a July 13, 2017 decision by an administrative law judge (ALJ), *Neil Niren, M.D., and Neil Niren, M.D., P.C.*, DAB CR4892 (ALJ Decision). The ALJ sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3), based on Dr. Niren's felony conviction. For the reasons set out below, we affirm the ALJ Decision.

**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.<sup>1</sup> 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).

A supplier of Medicare services (which includes physicians and physician practitioner organizations) 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.

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<sup>1</sup> The current version of the Act can be found at [https://www.ssa.gov/OP\\_Home/ssact/ssact-toc.htm](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](https://www.ssa.gov/OP_Home/comp2/G-APP-H.html).

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)(3) provides that CMS may revoke a supplier's Medicare billing privileges if the supplier or any owner of 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."<sup>2</sup> 42 C.F.R. § 424.535(a)(3)(i); 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The regulation lists qualifying offenses that are "include[d]" among but do not limit "in scope or severity" the "felony offense[s] that CMS determines [are] detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.535(a)(3)(i), (ii). Those felony offenses include "financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions." 42 C.F.R. § 424.535(a)(3)(ii)(B).

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(c). The re-enrollment bar is for a minimum of one year but no more than three years. *Id.*

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(I)(1), 498.22. If dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ. *Id.* § 498.40.

### **Case Background**<sup>3</sup>

Neil Niren, M.D. is a physician and sole owner of Neil Niren, M.D., P.C., his medical practice. CMS Ex. 1, at 9. On November 8, 2013, Dr. Niren pleaded guilty in the United States Court for the Western District of Pennsylvania to one count of filing a false tax return, a felony offense in violation of 28 U.S.C. § 7206(1). CMS Ex. 1, at 11, 17, 141. The court accepted Dr. Niren's guilty plea, entered a judgment of conviction, and

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<sup>2</sup> The ALJ correctly applied the regulations as amended effective February 3, 2015, which were in effect at the time of the initial determination to revoke Petitioners' billing privileges. *See* 79 Fed. Reg. 72,500 (Dec. 5, 2014). The regulations in effect on the date of the initial determination to revoke apply. *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016) (applying the regulations in effect at the time of the revocation).

<sup>3</sup> The factual information in this section is drawn from the ALJ Decision and undisputed facts in the record, and it is presented to provide context for the discussion of the issues raised on appeal.

sentenced Dr. Niren to probation for a period of five years, subject to specified conditions. *Id.* at 11, 18-19, 142-143. The court also ordered Dr. Niren to pay restitution in the amount of \$452,001 to the Internal Revenue Service (IRS), as well as a \$40,000 fine and \$100 assessment. *Id.* at 11, 20-22, 144-145.

By letter dated June 14, 2016, Novitas Solutions (Novitas), a CMS contractor, notified Dr. Niren that his Medicare billing privileges were being revoked, under 42 C.F.R. § 424.535(a)(3) and (4), effective November 8, 2013. CMS Ex. 1, at 72-74. Novitas' June 14, 2016 revocation letter states in relevant part:

**42 CFR §424.535(a)(3) - Felonies**

The Centers for Medicare & Medicaid Services (CMS) has been made aware of your November 8, 2013 felony conviction for filing a false tax return in violation of 26 U.S. Code § 7206(1) in the United States District Court, Western District of Pennsylvania.

**42 CFR §424.535(a)(4) - False or Misleading Information**

On your Centers for Medicare & Medicaid Services (CMS) 855 enrollment application approved on October 29, 2014 you left section three of the application blank. Section three requires disclosure of any adverse legal history. You were convicted of a felony for filing a false tax return on November 8, 2013. A felony conviction is a final adverse action, as defined by 42 CFR §424.502. You were required to report your felony conviction in Section three of the application and you failed to report it.

*Id.* at 72. Novitas imposed a three-year re-enrollment bar. *Id.* at 73.

By letter dated June 21, 2016, Novitas notified Dr. Niren's medical practice that its Medicare billing privileges were being revoked under 42 C.F.R. § 424.535(a)(3), effective March 10, 2014. CMS Ex. 1, at 70-71. Novitas' June 21, 2016 revocation letter states in relevant part:

**42 CFR §424.535(a)(3) – Felonies**

The Centers for Medicare & Medicaid Services (CMS) has been made aware of Neil Niren's November 8, 2013, felony conviction for filing a false tax return in violation of 26 U.S. Code § 7206(1) in the United States District Court, Western District of Pennsylvania. Neil Niren is listed as the sole owner on Neil Niren, MD, PC's Medicare 855 enrollment record.

Please note, per 42 CFR §424.535(g), that a revocation based on a felony will have an effective date of when the provider or supplier was adjudged guilty of that felony. However, the date of Neil Niren's felony conviction precedes Neil Niren, MD PC's enrollment date into the Medicare program. Therefore, the Centers for Medicare & Medicaid Services will revoke Neil Niren, MD PC's enrollment back to the date of first enrollment.

*Id.* at 70. Novitas also imposed a three-year re-enrollment bar. *Id.*

In a letter to Novitas dated August 9, 2016, Petitioners requested reconsideration, arguing that, although CMS had a legal basis to revoke based on Dr. Niren's felony conviction, their continued enrollment would not be "detrimental to the best interests of the Medicare program or its beneficiaries." CMS Ex. 1, at 9-16.

By determination dated October 25, 2016, CMS denied the reconsideration request, stating in relevant part:

There is no dispute that Dr. Niren was convicted of a financial crime for filing a false tax return on November 8, 2013. There is also no dispute that Dr. Niren failed to report this final adverse action on the individual enrollment application approved on October 29, 2014. Section 3 of this application requiring the disclosure of final adverse actions, including felony convictions for financial crimes, was left blank. In fact, the reconsideration request acknowledges this failure. These facts, in spite of all of Dr. Niren's other arguments, allow CMS to exercise its authority to revoke his billing privileges. Additionally, though the issue of harm to beneficiaries was raised, none of the information provided conclusively established this contention as true.

Alternatively, in the unlikely event that Dr. Niren's conviction for filing a false tax return is not considered a financial crime, it is one that CMS finds detrimental to the program and its beneficiaries. The criminal information to which Dr. Niren plead guilty indicates that, under the penalty of perjury, he filed a tax return that he did not believe to be true. Payment in the Medicare program is made for claims submitted in a manner that relies on the trustworthiness of our Medicare providers. Given the facts underlying Dr. Niren's financial crime conviction, Trust Funds may be at risk if he continues to participate in the program. It necessarily follows that placing Trust Funds at risk is a detriment to beneficiaries.

CMS Ex. 1, at 4.

On December 21, 2016, Petitioners timely requested a hearing before an ALJ. Request for Hearing. In the hearing request, Petitioners argued that CMS based its reconsidered determination “on a mechanical application of the descriptor ‘financial crimes’ and blank Section 3 of Dr. Niren’s 2013 CMS8[5]5.” *Id.* at 1.

CMS filed a pre-hearing brief and motion for summary judgment,<sup>4</sup> asserting that there were no disputes of material fact and that the revocation was lawful under sections 424.535(a)(3) and (4). Petitioners filed their pre-hearing brief (P. Br.), opposing CMS’s motion, but did not submit exhibits. Petitioners asserted that CMS “substitut[ed] a broad categorical determination in place of the nuanced exercise of discretion required by statute and regulation.” P. Br. at 1. Petitioners also argued that CMS had not taken into account that, while Dr. Niren’s felony conviction was related to a 2005 tax return in which Dr. Niren allegedly “understated his income,” his work with an IRS Advocate resulted in a “refund on his 2005 taxes, indicating that his income had, in fact, been overstated.” P. Br. at 8, citing CMS Ex. 1, at 30.

### **ALJ Decision**

The ALJ noted that Novitas cited 42 C.F.R. § 424.535(a)(3) and (a)(4) as bases for revoking Dr. Niren’s enrollment and billing privileges, whereas Novitas cited 42 C.F.R. § 424.535(a)(3) as the basis for revoking the practice’s enrollment and billing privileges. ALJ Decision at 7-8. The ALJ said, “A single basis for revocation is sufficient and I consider only 42 C.F.R. § 424.535(a)(3) as it is common to both Petitioners.” *Id.* at 8. The ALJ concluded that “[t]here are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) that requires a hearing in this case” and “summary judgment is appropriate.” *Id.* at 5.

The ALJ rejected Petitioners’ argument, in essence, that Dr. Niren’s conviction for filing a false tax return is not equivalent to a conviction for “tax evasion” – a crime expressly identified in section 424.535(a)(3)(ii)(B) as a financial crime – and thus does not constitute a proper basis for revocation under section 42 C.F.R. § 424.535(a)(3). The ALJ stated that the list of financial crimes in section 424.535(a)(3)(ii)(B) “is clearly not exhaustive but specifically permits revocation for detrimental felonies similar to the crimes listed.” *Id.* at 9, citing *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 10 (2009), *aff’d*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). The ALJ then concluded that the felony offense for which “Dr. Niren was convicted is a financial crime with a direct correlation to income tax liability and is similar in many respects to income

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<sup>4</sup> CMS submitted two exhibits, marked CMS Exhibits 1 and 2, with its pre-hearing brief. The ALJ admitted both exhibits. ALJ Decision at 2.

tax evasion.” *Id.* The ALJ also concluded that, “like tax evasion, filing a false tax return is detrimental to the best interests of the Medicare program and its beneficiaries” and noted that “[t]he Board has previously found that a petitioner’s crime was detrimental to the Medicare program if it evidenced a lack of trustworthiness in dealings with the federal government.” *Id.*, citing *Fady Fayad, M.D.*, DAB No. 2266, at 17 (2009), *aff’d*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

The ALJ next addressed Petitioners’ argument that CMS failed to exercise its discretion and engage “in a substantive inquiry of the pertinent information, namely the criminal statute under which Dr. Niren was convicted and the post-conviction refunds, and ... instead rested its decision on an entirely opaque similarity analysis.” P. Br. at 6. The ALJ determined that he did not have the authority to review this issue, concluding that, “[h]aving found that there is a basis for revocation, I have no authority to review the exercise of discretion by CMS to revoke Petitioners’ Medicare enrollment and billing privileges.” ALJ Decision at 9, citing *Dinesh Patel, M.D.*, DAB No. 2551, at 10 (2013); *Fayad* at 16; *Ahmed* at 16-17, 19.

Finally, the ALJ determined that, by operation of 42 C.F.R. § 424.535(g), November 8, 2013, the date of Dr. Niren’s conviction, is the effective date of revocation of Dr. Niren’s enrollment and billing privileges. *Id.* at 9-10. Noting that Novitas assigned March 10, 2014, the date on which Neil Niren, M.D., P.C. enrolled, as the effective date of revocation of the practice’s enrollment and billing privileges, the ALJ “conclude[d], based on the undisputed facts, that the conviction occurred prior to but within ten years of the practice group’s enrollment and that revocation as of the practice’s effective date of enrollment is authorized and appropriate.” *Id.* at 10.<sup>5</sup>

Petitioners timely filed a Request for Review (RR) of the ALJ Decision.

### **Standard of Review**

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>.

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<sup>5</sup> Petitioners raise no argument concerning the effective dates of revocation.

## Discussion

In their Request for Review, Petitioners contend that the ALJ erroneously determined that filing a false tax return is a financial crime indistinguishable from tax evasion. RR at 2-3. Petitioners also complain that CMS “repeatedly ignored” the distinction between two tax crimes – income tax evasion under 18 U.S.C. § 7201 and filing a false tax return under 18 U.S.C. § 7206. *Id.* at 3-4. Petitioners assert that “neither the CMS contractor nor the ALJ has engaged in a substantive inquiry of the pertinent information, namely the criminal statute under which [Dr. Niren] was convicted and the post-conviction refunds, and have instead rested their decisions on an entirely opaque similarity analysis.” *Id.* at 4. As we explain below, we find no merit in these arguments and conclude that the ALJ correctly determined that CMS had a basis to revoke Petitioners’ Medicare enrollment and billing privileges.

- I. *The ALJ correctly concluded that Dr. Niren’s felony conviction for filing a false tax return establishes a basis for revocation of Petitioners’ Medicare billing privileges under 42 C.F.R. § 424.535(a)(3).*

The regulation at 42 C.F.R. § 424.535(a)(3)(i) provides that CMS may revoke a supplier’s Medicare billing privileges if, within the preceding 10 years, the supplier or the owner of the supplier was convicted of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries. The regulation lists certain felony offenses that are detrimental to the program and its beneficiaries, including “[f]inancial crimes, such as . . . income tax evasion . . . and other similar crimes for which the individual was convicted, including guilty pleas . . . .” 42 C.F.R. § 424.535(a)(3)(ii)(B). The regulation explicitly states, however, that felony offenses which CMS determines are detrimental to the best interests of the Medicare program and its beneficiaries “are not limited in scope or severity to” the enumerated offenses. 42 C.F.R. § 424.535(a)(3)(ii).

The Amended Judgment of Dr. Niren’s felony conviction, dated November 14, 2013, reflects his guilty plea to one count of “filing a false tax return” in violation of 26 U.S.C. § 7206(1). CMS Ex. 1, at 17, 141. Dr. Niren admitted that the offense “stemmed from [his] 1040 personal tax return for 2005....” CMS Ex. 1, at 11. The record provides no additional evidence regarding the circumstances of his guilty plea, or the facts on which the offense is predicated. The criminal statute under which he was convicted provides as follows:

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

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shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1). CMS stated that “[t]here is no dispute that Dr. Niren was convicted of a financial crime for filing a false tax return on November 8, 2013.” CMS Ex. 1, at 4. The ALJ concluded that Dr. Niren’s felony offense “is a financial crime with a direct correlation to income tax liability and is similar in many respects to income tax evasion” and “that, like tax evasion, filing a false tax return is detrimental to the best interests of the Medicare program and its beneficiaries.” ALJ Decision at 9.

Petitioners argue that CMS and the ALJ used a “broad, categorical application of the term ‘financial crime’ to [their] case without consideration of the specifics.” RR at 2. Petitioners assert that CMS and the ALJ failed to distinguish between filing a false tax return, the felony tax offense for which Dr. Niren was convicted, and income tax evasion, the felony offense identified in section 424.535(a)(3)(ii)(B). *Id.* at 3-4. Petitioners assert that filing a false tax return is “covered in a different section of the criminal code and requir[es] entirely different elements to prove.” *Id.* at 2. They contend that the government must prove intent for a conviction of income tax evasion under 26 U.S.C. § 7201, but not for a conviction of filing a false tax return under 26 U.S.C. § 7206(1).<sup>6</sup> *Id.* at 3.

Petitioners’ arguments are unavailing. The ALJ did not conclude, as Petitioners contend, that filing a false tax return is “indistinguishable from tax evasion.” RR at 2. Rather, the ALJ concluded that filing a false tax return “is a financial crime with a direct correlation to income tax liability and is similar in many respects to income tax evasion.” ALJ Decision at 9. The ALJ did not err where, in his analysis, he considered the similarity

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<sup>6</sup> Petitioners quote the IRS’s Tax Crimes Handbook, which states that one element of an offense under 26 U.S.C. § 7206(1) is that “[t]he maker falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.” RR at 3, quoting Tax Crimes Handbook at 64 (2009). Contrary to Petitioners’ argument, this indicates that the IRS views specific intent as an element of both filing a false tax return and tax evasion.



between filing a false tax return and tax evasion. The Board has held that the list of financial crimes in section 424.535(a)(3) is not meant to be an exhaustive list of the financial crimes that qualify for revocation under the regulation, and that financial crimes similar to those identified in the regulation could also qualify. *See, e.g., Stanley Beekman, D.P.M.*, DAB No. 2650, at 7 (2015) (CMS may revoke under section 424.535(a)(3) “based on any financial crime, regardless of whether the supplier’s particular financial crime is specified in the regulation’s illustrative list of financial crimes”); *Francis J. Cinelli, Sr., D.O.*, DAB No. 2834, at 8-9 (2017) (same); *Ahmed*, DAB No. 2261, at 7 (2009) (an offense is a financial crime if it is one of the enumerated crimes “or it is ‘similar’ to one or more of the named crimes”). CMS explicitly stated as much when it made two amendments to the language of the regulation effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). First, CMS revised the language of section 424.535(a)(3)(i) from “CMS has determined to be detrimental” to “CMS determines is detrimental.” The drafters explained this change in the preamble of the final rule, stating in relevant part:

The phrase “has determined” incorrectly implies that the only felonies that may serve as a basis for denial or revocation are those specifically listed in §§ 424.530(a)(3) and 424.535(a)(3). We believe that the term “determines” makes clearer that the lists of felonies in these two provisions are not exhaustive and include other felonies that CMS may deem as meeting the “detrimental” standard based on the particular facts of the case.

*Id.* at 72,511, 72,512. Second, CMS added the phrase “but are not limited in scope or severity” within the provision “to further emphasize CMS’ discretion to use felonies other than those specified in... 424.535(a)(3) as grounds for denial or revocation...” *Id.* at 72,512.

The ALJ did not err in his conclusion that Dr. Niren’s felony offense is a financial crime. Dr. Niren “admitted to willfully filing a false income tax return under penalty of perjury.” ALJ Decision at 9. We agree with the ALJ that the offense has “a direct correlation to income tax liability.” *Id.* This correlation is a compelling indication that the offense is financial in nature. The Board has held that “[t]he plain meaning of the regulation is that providers and suppliers guilty of such financial crimes are subject to revocation.” *Cinelli*, DAB No. 2834, at 9. Here, Petitioner’s felony offense was a financial crime and, therefore, established a sufficient basis for revocation of his Medicare billing privileges under section 424.535(a)(3)(ii)(B).

Moreover, we agree with the ALJ's decision to uphold CMS' determination that Dr. Niren's felony offense is detrimental to the Medicare program and beneficiaries because it demonstrates a lack of trustworthiness in his dealings with the government. In the preamble to the 2006 final rule that promulgated the revocation regulations, the drafters summarized the agency's position regarding providers or suppliers that commit financial crimes, stating in relevant part:

We believe it is reasonable for the Medicare program to question the honesty and integrity of the individual or entity with such a history in providing services and claiming payment under the Medicare program.

71 Fed. Reg. 20,754, 20,760 (2006); CMS Response at 12 n.1. More broadly, the drafters of the preamble to the proposed 2015 amendments to the regulation stated:

Any felony conviction, regardless of the type, raises real questions as to whether the provider or supplier can be relied upon to be a trustworthy partner in the Medicare program, and it is important to do everything possible to prevent unnecessary risks to Medicare beneficiaries and the Medicare Trust Fund.

78 Fed. Reg. 25,013, 25,021 (2013). Likewise, the Board has determined that “the central purpose of the enrollment provisions’ is to protect Medicare beneficiaries and Trust Funds from fraudulent, untrustworthy and abusive providers and suppliers.” *Dennis McGinty, PT*, DAB No. 2838, at 10 (2017), quoting *Kimberly Shipper, P.A.*, DAB No. 2804, at 8 (2017), *appeal docketed*, No. 6:17-cv-00253-RP-JCM (W.D. Tex. Sept. 22, 2017), citing 71 Fed. Reg. 20,754, 20,773 (Apr. 21, 2006).

It is within this framework that CMS determined that Dr. Niren's felony offense is detrimental to the Medicare program and its beneficiaries, stating:

The criminal information to which Dr. Niren plead[ed] guilty indicates that, under the penalty of perjury, he filed a tax return that he did not believe to be true. Payment in the Medicare program is made for claims submitted in a manner that relies on the trustworthiness of our Medicare providers. Given the facts underlying Dr. Niren's financial crime conviction, Trust Funds may be at risk if he continues to participate in the program. It necessarily follows that placing Trust Funds at risk is a detriment to beneficiaries.

CMS Ex. 1, at 4. As the ALJ noted, the Board has held that a felony offense is detrimental to the Medicare program and its beneficiaries if it evidenced a lack of trustworthiness in dealings with the federal government. ALJ Decision at 9, citing *Fayad*, at 17 (Petitioner’s felony conviction for assisting with the submission of fraudulent immigration forms was detrimental to Medicare because it evidenced a lack of trustworthiness in his dealings with the federal government). Here, Dr. Niren “admitted to willfully filing a false income tax return under penalty for perjury.” ALJ Decision at 9. Here, in exercising its discretion, CMS determined that Dr. Niren’s criminal offense raised concerns about his trustworthiness that could pose a risk to the integrity of the Medicare program and its beneficiaries.

II. *The ALJ correctly concluded that he was without authority to review CMS’s exercise of its discretion to revoke, and that the issue before him was whether CMS had established the existence of a qualifying felony conviction for revocation under 42 C.F.R. § 424.535(a)(3).*

The ALJ stated that he had “no authority to review the exercise of discretion by CMS to revoke Petitioners’ Medicare enrollment and billing privileges” once he had “found that there is a basis for revocation.” ALJ Decision at 9. Petitioners take issue with this statement in the ALJ Decision, asserting that the ALJ reached his conclusion “without consideration of the specifics,” including the “post-conviction refunds” that Dr. Niren received from the IRS. RR at 4. They argue that “[t]he ALJ cannot simultaneously exercise discretion to find an unenumerated felony falls within the category while begging off discretion to determine that it does not.” *Id.* at 2-3. In effect, Petitioners are arguing that the ALJ should have considered the fact that Dr. Niren later received refunds from the IRS to determine whether CMS correctly determined that Dr. Niren’s felony offense qualified as a basis for revocation under section 424.535(a)(3).

CMS has the “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); *see also Norman Johnson, M.D.*, DAB No. 2779, at 17-18 (2017) (CMS may consider on reconsideration additional information submitted by the revoked supplier, but is not required to consider such information). Neither the ALJ nor the Board, however, 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). Rather, the sole issue before the ALJ and the Board is whether CMS has 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”); *Beekman*, DAB No. 2650, at 10 (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”). In this case, having properly concluded that a basis for revocation existed, the ALJ was required to affirm the revocation, and so is the Board.

### **Conclusion**

For the reasons stated above, we affirm the ALJ’s July 13, 2017 decision.

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Susan S. Yim

\_\_\_\_\_/s/  
Christopher S. Randolph  
Presiding Board Member