Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Daniel H. Kinzie, IV, M.D.
Docket No. A-10-68
Decision No. 2341
October 25, 2010

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Daniel H. Kinzie, IV, M.D. (Dr. Kinzie) requests review of the April 12, 2010 decision by Administrative Law Judge (ALJ) Steven T. Kessel. *Daniel H. Kinzie, IV, M.D.*, DAB CR2112 (2010) (ALJ Decision). The ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), upholding the determination by a Medicare contractor (TrailBlazer) to revoke Dr. Kinzie's Medicare billing privileges on the ground that he failed to report to CMS (or TrailBlazer) the October 10, 2008 revocation of his license to practice medicine in California.

As explained below, the ALJ erred in granting summary judgment for CMS. The regulation in effect at the time obligated Dr. Kinzie to report changes to information furnished on his Medicare enrollment form. CMS did not move for summary judgment on this ground or submit a copy of Dr. Kinzie's enrollment form. The information furnished on Dr. Kinzie's enrollment form is material in determining whether his California license revocation constituted a change that Dr. Kinzie was required to report. The ALJ took notice of a version of the CMS Medicare enrollment form without following proper procedures and without any assurance that enrollment form was the form actually submitted by Dr. Kinzie. Even assuming that Dr. Kinzie was required to report the revocation of his California medical license, summary judgment was improper because the record, when viewed in the light most favorable to Dr. Kinzie, as required under summary judgment standards, raises a genuine dispute of material fact about whether Dr. Kinzie timely notified CMS (or TrailBlazer) of that revocation.

For these reasons, we vacate the ALJ Decision and remand this case for further proceedings consistent with this decision.

Applicable Law

Title XVIII of the Social Security Act (the Act) establishes the Medicare program.[1] The Secretary of Health and Human Services (Secretary) administers the Medicare program through contractors (in this case TrailBlazer). 42 U.S.C. § 1395u(a). Section 1866(j) of the Act requires the Secretary to promulgate regulations for a process for the enrollment of providers and suppliers under the Medicare program, including the right to a hearing and judicial review in the event of denial or revocation of Medicare billing privileges. The implementing regulations at 42 C.F.R. Part 424, subpart P, set out the enrollment process that Medicare uses to establish eligibility to submit claims for Medicare covered items and services. To receive payment for items and services covered by Medicare, a provider or supplier must be enrolled in the Medicare program and be issued billing privileges. 42 C.F.R. § 424.505.[2] To enroll, "[p]roviders and suppliers must submit enrollment information on the applicable enrollment form. Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program." 42 C.F.R. § 424.510(a).

Pursuant to 42 C.F.R. § 424.535(a)(1), CMS or its contractor may revoke a provider or supplier's Medicare billing privileges where the provider or supplier is determined not to be in compliance with enrollment requirements applicable for its provider or supplier type *and* has not submitted a corrective action plan (CAP). Prior to January 1, 2009, one of the enrollment requirements was that physicians "must report to CMS any changes to the information furnished on the enrollment form and furnish supporting documentation within 90 calendar days of the change." 42 C.F.R. § 424.520(b). Effective January 1, 2009, the Secretary re-designated section 424.520 as 42 C.F.R. § 424.516. 73 Fed. Reg. 69,726 (Nov. 19, 2008). The Secretary then changed the reporting standard by amending section 424.516 to require physicians to report to their Medicare contractor within 30 days the occurrence of a change of ownership, any adverse legal action, or change in practice location. 42 C.F.R. § 424.516(d)(1)(ii). The regulatory definition of adverse action was intended to include the suspension or revocation of a physician's medical license "by any State licensing authority." 42 C.F.R. § 424.502.

The Secretary also amended the regulation at 42 C.F.R. § 424.535(g) governing the effective date of the revocation of a provider or supplier's Medicare billing privileges. Prior to January 1, 2009, section 424.535(g) provided that the revocation of a provider or supplier's Medicare billing privileges would be effective within 30 days "of the initial revocation notification." 42 C.F.R. § 424.535(g) (2008). The amended section 424.535(g) made the effective date of the revocation of Medicare billing privileges retroactive to the date of any adverse legal action – i.e, the date of a physician's license suspension or revocation.

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[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

[2] Unless noted otherwise, the regulations cited in this decision were in effect throughout the time period at issue.

Background[3]

Dr. Kinzie is a physician located in the Midland, Texas area who currently has a valid license to practice medicine in the State of Texas. Dr. Kinzie participates in the Medicare program and provides medical services to Medicare-eligible patients in an underserved area. On November 30, 2007, Dr. Kinzie entered into a consent order and settlement agreement (Consent Order) with the Texas Medical Board to resolve an investigation into allegations involving the quality of his professional services. CMS Ex. 1, at 15-22. Among other things, the Consent Order noted that Dr. Kinzie had voluntarily cooperated with the Texas Medical Board's investigation. *Id*. at 16. Under the terms of the Consent Order, Dr. Kinzie was required to: 1) complete successfully a medical records-keeping course; 2) have his practice monitored by a physician appointed by the Texas Medical Board who would make a retrospective, random chart review of selected medical records involving Dr. Kinzie's patients over a one-year period and make any appropriate recommendations for improvement; 3) develop a written plan to address any deficiencies identified by the monitor; 4) take and pass a Medical Jurisprudence Examination within one year; and 5) obtain 30 hours of continuing medical education. *Id*. at 16-18. The Consent Order contained additional requirements and contained prescribed penalties in the event Dr. Kinzie violated any of the terms of the Consent Order. *Id*. at 20. Dr. Kinzie successfully completed the requirements of the Consent Order, and the Texas Medical Board never suspended or revoked his license to practice medicine in Texas. P. Ex. 1, at ¶¶ 8, 10-11; CMS Ex. 1, at 2.

On June 18, 2008, a complaint was filed against Dr. Kinzie before the Medical Board of California, a state where Dr. Kinzie also held a medical license. CMS Ex. 1, at 9-13; P. Ex. 1, at ¶¶ 12-13. The complaint involved the same conduct investigated by the Texas Medical Board and sought the imposition of disciplinary action, including the revocation or suspension of Dr. Kinzie's license to practice medicine in California. CMS Ex. 1, at 12; P. Ex. 1, at ¶ 13. Dr. Kinzie proffered testimony that he did not contest the investigation for several personal reasons, including that he had not practiced medicine in California since 1962 as well as the cost of defending the investigation. P. Ex. 1, at ¶¶ 5, 13, 14, 17. After Dr. Kinzie did not respond to the complaint and a discovery order, the Medical Board of California entered a default decision and order on October 10, 2008 that revoked Dr. Kienzie's medical license in that state. CMS Ex. 1, at 4-7.

In a letter dated August 28, 2009, TrailBlazer notified Dr. Kinzie that based on his failure to notify CMS that his California medical license had been revoked and TrailBlazer's determination that he no longer had a physical business address, his Medicare billing privileges were being revoked pursuant to sections 424.516(d)(1)(ii) and 424.535(a)(1). CMS Ex. 2, at 1. TrailBlazer made the revocation of his Medicare billing privileges effective on October 10, 2008. *Id*. TrailBlazer issued a revised notice letter dated

[3] The following background information is drawn from the ALJ Decision and the record, including facts proffered in an affidavit by Dr. Kinzie that CMS either conceded or does not appear to dispute. The information is presented to provide a context for the discussion of the issues raised on appeal.

September 18, 2009 reiterating its decision to revoke Dr. Kinzie's Medicare billing privileges based on sections 424.516(d)(1)(ii) and 424.535(a)(1).[4] CMS Ex. 3, at 1. The August 28 notice letter was not addressed directly to Dr. Kinzie although it did refer to him. The August 28 and September 18 notice letters both stated that a CAP could be submitted within 30 calendar days of their postmark dates. *See* CMS Exs. 2, at 1; 3, at 1. Dr. Kinzie proffered testimony that he received the August 28 letter on September 22, 2009 and the September 18 letter on January 10, 2010. P. Ex. 1, at ¶¶ 23, 25-29. In two letters to TrailBlazer dated September 23, 2009, Dr. Kinzie offered to submit a CAP, if necessary, and sought reconsideration of the revocation decision. CMS Ex. 4; P. Ex. 1, ¶¶ 30-31. In a decision dated October 23, 2009, a hearing officer denied Dr. Kinzie's request for reconsideration. CMS Ex. 6.

ALJ Decision

Dr. Kinzie filed a timely request for a hearing before an ALJ. CMS submitted a Pre-Hearing Brief, or in the alternative, Motion for Summary Judgment (with six supporting exhibits) based on the ground that Dr. Kinzie allegedly failed to notify TrailBlazer that his California medical license had been revoked in violation of sections 424.516(d)(1)(ii) and 424.535(a)(1). Dr. Kinzie opposed the motion and submitted a supporting affidavit. P. Ex. 1. Pursuant to 42 C.F.R. § 498.56, the ALJ issued an Order to Develop the Record on March 5, 2010, in which he raised several legal issues for the parties to address, including whether sections 424.516 and 424.535(g) (2009) had been applied retroactively and whether Dr. Kinzie had an obligation under section 424.520(b) (2008) to report the revocation of his California medical license. *See* ALJ Order to Develop the Record at 1-2.

In a decision dated April 12, 2010, the ALJ granted CMS's motion for summary judgment, upholding the revocation of Dr. Kinzie's Medicare billing privileges based on section 424.520(b). The ALJ found that it was undisputed that Dr. Kinzie's California medical license had been revoked on October 10, 2008. ALJ Decision at 2, 3. The ALJ also characterized as "undisputed" the fact that Dr. Kinzie failed to notify either CMS or TrailBlazer about his license revocation. *Id*. Although the ALJ recognized that there was a question about whether section 424.516(d)(1)(ii) had been applied retroactively, the ALJ determined that he did not have to reach this issue. ALJ Decision at 5.

Instead, the ALJ concluded that CMS and/or TrailBlazer was authorized to revoke Dr. Kinzie's Medicare billing privileges under sections 424.520(b) and 424.535(a)(1) because Dr. Kinzie's "failure to report the revocation of his California license was a

[4] The revised notice letter dropped TrailBlazer's determination that Dr. Kinzie did not have a physical business address but added an allegation that Dr. Kinzie failed to meet the standard of care in his treatment of 13 patients at a minor emergency clinic based on the results of the Texas investigation that were summarized in the Consent Order. CMS Exs. 1, at 16; 3, at 1. The Consent Order included this allegation as a Board finding, but the Consent Order also included a finding that Dr. Kinzie denied this allegation. CMS Ex. 1, at 16. TrailBlazer's revised allegation regarding Dr. Kinzie's patient treatment does not appear to be a valid basis under section 424.535(a)(1) for revoking his Medicare billing privileges, and CMS did not pursue this allegation in its Motion for Summary Judgment.

failure to report a change in the information he supplied in his enrollment application." ALJ Decision at 5.

Finally, the ALJ upheld the October 10, 2008 effective date of the revocation of Dr. Kinzie's Medicare billing privileges under section 424.535(g) (2009), without addressing the issue raised in his March 5, 2010 Order. *Id*. at 2, 4-5. Dr. Kinzie timely appealed the ALJ Decision to the Board.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Andrew J. Elliott, M.D.*, DAB No. 2334, at 2 (2010); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Everett Rehabilitation and Medical Cente*r, DAB No. 1628, at 3 (1997). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 474 U.S. 574. 587 (1986) (quoting Fed. R. Civ. Pro. 56(e)). In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the nonmoving party, drawing all reasonable inferences from the evidence in that party's favor. *Madison Health Care, Inc.*, DAB No. 1927 (2004).

Analysis

On appeal, Dr. Kinzie contends that the ALJ erred in granting summary judgment in favor of CMS for the following reasons:

- The ALJ erroneously applied section 424.516(d)(1)(ii) retroactively.

- CMS had not established a necessary, material fact (i.e., whether Dr. Kinzie had failed to report a change in information furnished on his Medicare enrollment form) because the record did not contain this document, and the ALJ improperly took judicial notice of CMS form 855I without providing notice or an opportunity for Dr. Kinzie to respond.
- CMS had not established a necessary, material fact (i.e., whether Dr. Kinzie had failed to timely notify CMS or TrailBlazer that California had revoked his medical license), and the ALJ failed to view the evidence in the light most favorable to Dr. Kinzie.

- Dr. Kinzie had been denied due process because TrailBlazer did not properly notify Dr. Kinzie about its revocation decision and did not provide him with a meaningful opportunity to submit a CAP as required under section 424.535(a)(1).

- The ALJ erroneously applied the revised section 424.535(g) (2009) retroactively in upholding the effective date of revocation of Dr. Kinzie's Medicare billing privileges of October 10, 2008.

- A genuine dispute of material fact remains about whether CMS properly considered all the circumstances before revoking his Medicare billing privileges – i.e., that Dr. Kinzie has been licensed to practice medicine in Texas at all times; that Dr. Kinzie is eligible to be paid for medical services provided to Medicare-eligible beneficiaries under 42 C.F.R. § 410.20; and that the revocation of his California medical license has no bearing on his ability to practice medicine in Texas – and about whether a three-year re-enrollment bar is excessive in length given those circumstances.

We address Dr. Kinzie's arguments below to the extent necessary to support our reasons for vacating the ALJ Decision.

1. Because CMS did not move for summary judgment based on section 424.520(b) and did not provide the Medicare enrollment application actually submitted by Dr. Kinzie, summary judgment was not appropriate.

We conclude that the ALJ erred in basing his determination to grant summary judgment in favor of CMS, in part, on a ground upon which CMS did not rely in moving for summary judgment. Specifically, CMS moved for summary judgment under section 424.516(d)(1)(ii), not section 424.520(b) as granted by the ALJ. An ALJ may not grant summary judgment on a ground not alleged by the moving party without providing adequate notice and an opportunity to show that a genuine dispute of material fact exists. *See e.g., Elliott*, DAB No. 2334, at 5-6; *Venetian Gardens,* DAB No. 2286, at 8-9 (2009); *Community Home Health*, DAB No. 2134 (2007). Such action is contrary to fundamental fairness because it denies the nonmoving party an opportunity to respond to the ALJ's new basis for deciding the dispute in favor of the moving party. *Elliott*, DAB No. 2334, at 6.

The ALJ attempted to cure this problem by issuing his Order to Develop the Record, which added the issue of Dr. Kinzie's compliance with section 424.520(b) in the proceeding. *See* ALJ Order to Develop the Record at 2. The ALJ ordered the parties, among other things, to "explain whether [Dr. Kinzie] had an obligation under 42 C.F.R. § 424.520(b) to report the revocation of his California medical license." *Id*. In its response to this question, CMS took the position that under that regulation "providers are required to report changes, excluding change of location, to their enrollment application to CMS within 90 calendar days of the change." CMS's Response to ALJ's Order to Develop the Record at 2. Nowhere in its response to the ALJ's Order did CMS even assert that information regarding the status of his California license or the lack of adverse legal action was furnished by Dr. Kinzie on his enrollment application, much less provide any evidence to that effect or claim it was an undisputed fact upon which summary judgment could be granted. Dr. Kinzie's response to the ALJ's Order, on the other hand,

asserted that none of the information furnished on his enrollment application had changed in October 2008 that required him to report the revocation of his California medical license under section 424.520(b). *See* Petitioner's Response to ALJ's Order to Develop the Record at 4. Although Dr. Kinzie proffered no evidentiary support for this assertion, the ALJ's Order merely directed the parties to explain their positions, not to submit evidence supporting their position. Despite the fact that CMS had not moved for summary judgment under section 424.520(b), the ALJ nonetheless proceeded to summary judgment in CMS's favor, concluding that he did not have to reach the issue of whether section 424.516 was retroactively applied. ALJ Decision at 5.

Contrary to its position before the ALJ, CMS on appeal now repeatedly acknowledges that the applicable regulation is section 424.520(b) , not section 424.516(d)(1)(ii). CMS Br. at 4, 5, 6; CMS's Response to ALJ's Order to Develop the Record at 1. Under section 424.520(b), whether Dr. Kinzie was obligated to report his license revocation depends on what information was actually furnished on his enrollment form. However, CMS did not proffer the Medicare enrollment form actually submitted by Dr. Kinzie and, therefore, failed to establish that the license revocation constituted a change to information furnished on his enrollment form that he was obligated to report.

Apparently in recognition of CMS's failure to make a prima facie case that Dr. Kinzie's California license revocation was a change in information furnished on the enrollment form that he was required to report, the ALJ said that he was taking "notice that the Medicare application form for physicians, CMS [enrollment form] 855I, requires the physician applicant to provide CMS with information as to his or her medical licensure." ALJ Decision at 5. The ALJ did not identify the version of the enrollment form on which he was relying, identify the source of the form, or provide Dr. Kinzie an opportunity to comment on whether taking notice of the form was appropriate. This was error. First, taking judicial notice without providing Dr. Kinzie an opportunity for comment raises serious questions of procedural fairness. *See, e.g.*, Fed. R. Ev. 201(e) (requiring district court to give a party an opportunity to be heard if judicial notice is taken); *Lussier v. Runyon,* 50 F.3d 1103, 1114 (1st Cir.) (holding that district court erred when it took judicial notice without giving parties an opportunity to be heard). Second, even assuming the ALJ properly took notice of the CMS enrollment form, the ALJ cites no basis for inferring that the version of the enrollment form on which he relied is the same as the form actually submitted by Dr. Kinzie.

CMS argues nonetheless that the ALJ properly took notice of the CMS 855I form. CMS cites several *Federal Register* documents that it argues show the CMS 855I form had been used since 1996 and that the form required Dr. Kinzie to report any adverse legal action, including revocation of a license to provide health care by any state licensing authority. CMS's reliance on these documents is misplaced. The April 25, 2003 publication includes, as an appendix, a version of the form that refers to and defines "adverse legal actions." However, this is merely a proposed rule. The preamble to that proposed rule explains:

> In new § 424.510 (Form CMS 855), we propose that a provider or supplier must submit to us the appropriate completed form CMS 855 — Provider/Supplier Enrollment Application based on the type of provider or supplier enrolling. As part of our continuing efforts to improve the enrollment process, the series of CMS 855 enrollment forms with proposed revisions are being submitted with this proposed rule, to be published in the Federal Register concurrently for review and public comment.

68 Fed. Reg. 22,064, 22,067. The September 29, 2006 *Federal Register* document simply lists what collection of information requirements have Office of Management and Budget (OMB) approval, without specifying anything about the content of those forms. 71 Fed. Reg. 57,604. The changes to the enrollment requirements were published as a final rule on April 21, 2006. 77 Fed. Reg. 20,754. The preamble indicates that the fully revised enrollment applications were published in July 2005, but that OMB had not yet approved changes to the November 2001 version of the applications. *Id.* at 20,764. The preamble also indicates that CMS expected its contractors would request enrollment applications from providers and suppliers that were already enrolled in Medicare in fiscal years 2006 to 2007 and begin a process of revalidating applications that were five years old in fiscal year 2008. Absent evidence that Dr. Kinzie submitted the revised form 855I , the mere fact that the revised form required information about adverse legal actions is insufficient to establish that Dr. Kinzie was required to report the revocation of his California medical license within 90 days of October 10, 2008.

Thus, the ALJ erred in granting summary judgment in favor of CMS. Accordingly, we remand this case to the ALJ to further develop the record to determine whether the California license revocation constituted a change to the information Dr. Kinzie furnished on his Medicare enrollment application that he was required to report.

2. The record, when viewed in the light most favorable to Dr. Kinzie, as required under summary judgment standards, raises a genuine dispute of material fact.

Even if the revocation of Dr. Kinzie's California medical license constituted a change in information furnished on his Medicare enrollment application that he was required to report, the ALJ erred in granting summary judgment in favor of CMS because he failed to view the entire record in the light most favorable to Dr. Kinzie, as required under the summary judgment standard. When viewed under the proper summary judgment standard, the record raises a genuine dispute of material fact about whether Dr. Kinzie failed to report to CMS or TrailBlazer that California had revoked his medical license. The ALJ concluded that "it is undisputed that [Dr. Kinzie] failed to notify either CMS or TrailBlazer that California license revocation." ALJ Decision at 3. The ALJ further concluded that these undisputed "facts plainly give CMS and/or TrailBlazer the authority to revoke Dr. Kinzie's Medicare billing privileges." *Id.*

In moving for summary judgment, CMS listed a total of 18 "undisputed facts." *See* CMS Pre-Hearing Brief or the Alternative, Motion for Summary Judgment at 2-4. However, none of the "undisputed facts" listed in that section proffered that Dr. Kinzie had failed to notify either CMS or TrailBlazer that California had revoked his medical license, effective October 10, 2008. *Id.* Only in the argument section of its motion for summary judgment did CMS summarily state that "there are no material facts in dispute with respect to Dr. Kinzie's medical license being revoked and his failure to notify CMS of that adverse legal action." *Id*. at 7-8. However, as we recently stated in another decision, "[a]rgument does not constitute evidence, except perhaps when it forms a party admission." *See Victor Valley*, DAB No. 2240, at 14 (2010). Therefore, statements in a brief cannot in themselves be the source of evidence supporting a motion for summary judgment. *Id*. CMS did not proffer any evidence in support of its motion, such as a declaration from a CMS or TrailBlazer official stating that TrailBlazer's telephone or mail logs had been reviewed and there was no record of Dr. Kinzie reporting his license revocation.

In contrast, Dr. Kinzie submitted an affidavit in which he stated, under oath, that "[a]fter being informed of the California Board decision, I made numerous attempts to contact Medicare by telephone to ask what, if anything, needed to be done." P. Ex. 1, at ¶ 18. Dr. Kinzie further stated in his affidavit that "[a]fter several months, I was finally told that I would have to file a form CMS 855I, 855R, and 855B. Later I was told that these forms were not needed and that they had all the information they need." *Id*. at ¶ 20. CMS did not contest or otherwise dispute the accuracy of Dr. Kinzie's sworn statement. Although Dr. Kinzie's statement does not indicate *when* he contacted Medicare representatives, it clearly indicates that Dr. Kinzie may have timely reported the revocation of his California medical license and been told that he did not need to submit supporting documentation. Such an inference is consistent with his *undisputed* testimony that he timely contacted TrailBlazer in two letters on September 23, 2009, only one day after he alleged receiving the notice letter dated August 28, 2009. *See* P. Ex. 1 at ¶¶ 23, 25-26, 30-31; CMS Ex. 4; CMS Pre-Hearing Brief or in the Alternative, Motion for Summary Judgment at 4.

At the summary judgment stage, the ALJ is required to view the evidence in the record in the light most favorable to the non-moving party, i.e., Dr. Kinzie. Here, our review of the record indicates that CMS did not proffer any evidence demonstrating that Dr. Kinzie failed to report the revocation of his California medical license or rebutting Dr. Kinzie's sworn statement indicating that he did contact Medicare representatives. Thus, viewing the record in the light most favorable to Dr. Kinzie, a rational trier of fact could reasonably conclude that Dr. Kinzie did in fact timely report the revocation of his California medical license to CMS or TrailBlazer. Moreover, the evidence Dr. Kinzie proffered indicates he reasonably believed that it was not necessary to provide CMS or TrailBlazer with supporting documentation because he was told that Medicare "had all the information they need." P. Ex. 1 at ¶ 19.

Therefore, we additionally conclude, with respect to the issue of whether Dr. Kinzie actually reported the revocation of his medical license, that the ALJ failed to view the record in the light most favorable to Dr. Kinzie. Accordingly, we vacate the ALJ Decision and remand this matter for further proceedings consistent with this decision. On remand, the ALJ shall further develop the record as he deems necessary in order to determine whether Dr. Kinzie timely reported his license revocation in compliance with the requirements of the applicable regulation, section 424.520(b).

3. Although we do not need to resolve them now, there are other potential issues that may need to be addressed on remand.

There are several other issues raised by Dr. Kinzie that may need to be addressed on remand. These issues would be moot if the ALJ or CMS determines that Dr. Kinzie timely reported the revocation of his California medical license or that he was not required to do so. Thus, we do not need address them at this time.

First, Dr. Kinzie argues that TrailBlazer improperly applied the revised section 424.535(g) in sustaining an effective revocation date of October 10, 2008. Although the issue of whether TrailBlazer retroactively applied the 2009 revisions of section 424.535(g) was included in the proceedings before the ALJ, the ALJ considered the issue of retroactivity only as it related to the revised reporting requirement. *See* ALJ Decision at 4-5. CMS has conceded before us that the earlier version of the reporting requirement, section 424.520(b), applies, not the later version set forth at section 424.516(d)(1)(ii). However, an issue remains regarding whether TrailBlazer also erroneously applied a change in the effective date provision under section 424.535(g) retroactively, making the revocation effective on October 10, 2008, rather than 30 days from its September 18, 2009 revised notice letter (i.e., October 18, 2009), as required by the applicable version of section 424.535(g). *Compare* § 424.535(g) (2008) *with* § 424.535(g) (2009).

Second, Dr. Kinzie argues that in setting the three-year re-enrollment bar, CMS failed to consider the circumstances surrounding California's revocation of his medical license, including that he is currently still eligible to receive payment for medical services provided to Medicare beneficiaries under section 420.10 because the Texas Board of Medicine did not revoke or suspend his medical license and that he has not practiced medicine in California since 1962. The regulation at 42 C.F.R. § 424.535(c) provides that the "re-enrollment bar is minimum of 1 year, but not greater than 3 years *depending on the severity of the basis for revocation.*" (Emphasis added.) Here, TrailBlazer set a re-enrollment bar at the maximum three years. Moreover, TrailBlazer initially based its revocation on two grounds, one of which was dropped in the revised notice letter of September 18, 2009. That revised notice also was based on two grounds, one of which CMS did not pursue in its Motion for Summary Judgment. Yet, it does not appear that either TrailBlazer or CMS reconsidered the length of the bar in light of the fact that they were relying only on Dr. Kinzie's alleged failure to report the revocation of his California medical license.

Finally, Dr. Kinzie claims that he was denied due process and a meaningful opportunity to submit a CAP as required by section 424.535(a)(1). In resolving this claim, the ALJ did not consider whether Dr. Kinzie was prejudiced by the fact that TrailBlazer erroneously cited an inapplicable regulation as the basis for revoking his Medicare billing privileges (i.e., section 424.516(d)(1)(ii)) and that TrailBlazer had sent two notice letters identifying different additional grounds for the revocation. *See* CMS Exs. 2 and 3. The ALJ had authority to add the issue of compliance with section 424.520(b), as in effect on October 10, 2008. *See* 42 C.F.R. § 498.56. Adding that issue at that stage of the proceeding, however, did not cure any deficiency in TrailBlazer's notices that may have deprived Dr. Kinzie of an opportunity to correct any noncompliance with an enrollment requirement before revocation. Section 424.535(a)(1) states: "All providers and suppliers are granted an opportunity to correct the deficient compliance requirement *before* a final determination to revoke billing privileges," with certain exceptions not relevant here. (Emphasis added.)

Conclusion

For the reasons stated above, we reverse and remand this appeal to the ALJ for further proceedings consistent with this decision.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member