

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

Wendell Foo, M.D.  
Docket No. A-18-42  
Decision No. 2904  
October 16, 2018

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

Petitioner Wendell Foo, M.D. appeals an Administrative Law Judge’s (ALJ’s) decision, on remand from the Board, sustaining the Centers for Medicare & Medicaid Services’ (CMS’s) determination to revoke Petitioner’s enrollment in the Medicare program. *Wendell Foo, M.D.*, DAB CR5003 (2018) (ALJ Decision II), *on remand from* DAB No. 2769 (2017), *vacating and remanding* DAB CR4580 (2016) (ALJ Decision I). In both decisions, the ALJ sustained the revocation on the ground that on-site reviews of the practice location listed in Petitioner’s enrollment record found that his practice was not operational as required by applicable regulations, and rejected Petitioner’s contentions that the on-site reviews were conducted at his correspondence address that he had never reported as his practice location. The Board vacated and remanded ALJ Decision I chiefly for the ALJ to address hearsay evidence to which Petitioner objected. For the reasons explained below, we sustain ALJ Decision II.

**Legal background**

To receive payment for services furnished to Medicare beneficiaries, a Medicare “supplier,” which includes physicians, must be “enrolled” in Medicare and maintain active enrollment status.<sup>1</sup> 42 C.F.R. §§ 424.500, 424.502, 424.505, 424.510, 424.516.<sup>2</sup> CMS, which administers the Medicare program, regulates the Medicare enrollment of providers and suppliers, and delegates certain program functions to private contractors. Social Security Act (Act) §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b). CMS, through its contractors, may perform on-site inspections of a supplier to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with

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<sup>1</sup> A Medicare “supplier” “means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare,” unless the context indicates otherwise. “Providers” include hospitals, nursing facilities, and comprehensive outpatient rehabilitation facilities. 42 C.F.R. § 400.202.

<sup>2</sup> We cite to and apply the regulations as in effect on June 24, 2015, the date that CMS’s contractor issued the initial revocation determination. *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016).

Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.517(a). Regulations in 42 C.F.R. Part 424, subpart P, set out the enrollment process that CMS uses to establish eligibility for submitting claims to Medicare and to terminate such eligibility. Among the various requirements are that a provider or supplier must ensure that its enrollment application contains “[c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the provider or supplier type” and must “certify to the accuracy of its enrollment information” on its application, and is therefore by law responsible for the accuracy of all information on the application. 42 C.F.R. §§ 424.510(d)(2)(i), 424.515(a)(2).

CMS may revoke a supplier’s or provider’s enrollment for any of the “reasons” in 42 C.F.R. § 424.535(a). As relevant here, section 424.535(a)(5) states:

- On-site review.* Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following:
- (i) No longer operational to furnish Medicare-covered items or services.
  - (ii) Otherwise fails to satisfy any Medicare enrollment requirement.

The term “operational” means that the provider or supplier “has a qualified **physical practice location**, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims,” and “is properly staffed, equipped, and stocked (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.” 42 C.F.R. § 424.502 (emphasis added). Physician suppliers who change practice locations must report the change to their Medicare contractor within 30 days of the change. *Id.* § 424.516(d)(1)(iii).

The Board has held that these regulations require that a supplier or provider be “operational” at the address reported as the practice location on enrollment applications. *See Jason R. Bailey, M.D., P.A.*, DAB No. 2855 (2018); 76 Fed. Reg. 5862, 5870 (Feb. 2, 2011) (“[T]he primary purpose of an unannounced and unscheduled site visit is to ensure that a provider or supplier is operational at the practice location found on the Medicare enrollment application.”). The Board has “regularly upheld revocations where site visits to a provider or supplier’s practice location of record disclosed that the provider or supplier was not operational **at that location**.” *Adora Healthcare Servs., Inc.*, DAB Ruling 2017-4, at 3 (May 18, 2017) (emphasis added), *denying reconsideration of Adora Healthcare Servs., Inc.*, DAB No. 2714 (2016) (citing *Vamet Consulting & Med. Servs.*, DAB No. 2778 (2017); *Care Pro Home Health, Inc.*, DAB No. 2723 (2016)).

The Board has further held that ALJs and the Board “are limited to determining whether CMS had a basis to revoke the provider’s or supplier’s Medicare enrollment and billing privileges. *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (stating that the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a “legal basis for its actions”); *accord Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (ALJ and Board required to uphold revocation if the record establishes that the regulatory elements for revocation are satisfied); *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009) (if CMS establishes a qualifying felony conviction as the basis for revocation, the Board must uphold revocation without regard to factors, such as the scope or seriousness of the supplier’s criminal conduct, that CMS might reasonably have weighed in determining whether to revoke), *aff’d, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed*, DAB No. 2261, at 19 (2008) (CMS is “legally entitled to revoke a supplier’s billing privileges” where the elements of subsection 424.535(a)(3) are met.), *aff’d, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Concluding that CMS had one of the bases for revocation enumerated in the regulations is all that is necessary to uphold revocation. *Donna Maneice, M.D.*, DAB No. 2826, at 8 (2017) (“CMS needs to establish only one ground for revocation”), *reopening denied*, DAB Ruling 2018-1 (Apr. 3, 2018).

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 re-enrollment bar lasts from one to three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). Revocation is usually effective 30 days after CMS or its contractor mails the notice of determination to revoke. However, where, as here, the basis for revocation is that the supplier was not operational, revocation takes effect on the date on which CMS determined non-operational status. *Id.* § 424.535(g). A provider or supplier whose Medicare enrollment has been revoked may request reconsideration by CMS or its contractor, and then appeal the reconsideration decision, to an ALJ and then to 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**<sup>3</sup>

Petitioner is an anesthesiologist who does not maintain his own office open to the public but instead practices at several ambulatory surgical centers (ASCs). ALJ Decision I, at 1; P. Ex. 17, at 2. By letter dated June 24, 2015, the CMS Medicare Administrative Contractor, Noridian Healthcare Solutions (Noridian), revoked Petitioner’s Medicare

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<sup>3</sup> We summarize here background information pertinent to this decision. The Board’s Remand Decision, DAB No. 2769, sets out a detailed explication of the factual background and the parties’ arguments that were before the ALJ before she issued ALJ Decision I.

enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5), for two years effective March 5, 2015. ALJ Decision I, at 2. Noridian conducted on-site reviews on March 5 and May 8, 2015, at the address listed as Petitioner's practice location of record (4348 Waialae Ave., #5-311, Honolulu, Hawaii (Waialae Ave.)). *Id.* The on-site reviews found that the address was not in fact a "practice location" and Noridian therefore concluded Petitioner was thus not "operational" at his practice location of record.<sup>4</sup> *Id.* at 1-2.

Petitioner requested reconsideration, arguing that Noridian had mistaken his correspondence address (Waialae Ave.), the site of a UPS Store mailbox facility, as the address of his practice location. CMS Ex. 4, at 1-2. Noridian on reconsideration upheld the revocation under 42 C.F.R. § 424.535(a)(5), on the ground that the UPS Store was not a practice location as per the March and May site visits. CMS Ex. 1, at 1. Noridian stated that its enrollment representative had called a phone number listed for the practice location on a revalidation enrollment application (form 855I) Petitioner filed online in May 2014 and spoke with a receptionist who verified that this phone number was Petitioner's primary office phone number for appointments and billing questions and verified that the practice address was Waialae Ave.<sup>5</sup> *Id.* at 1-2.

Petitioner requested an ALJ hearing, asserting that he had used Waialae Ave. only for receiving mail, had never reported it as the address of his practice location, and had entered the ASCs as his practice locations on the revalidation application filed online in May 2014. ALJ Decision I, at 3, 6. Petitioner also argued he had disclosed his actual practice locations to CMS on his claims for Medicare reimbursement, that Noridian failed to follow procedures in CMS's Medicare Program Integrity Manual (MPIM) directing contractors to attempt to resolve questions about information on enrollment applications before initiating revocation, and that Noridian failed to contact him to resolve any questions about his actual practice location. Petitioner also challenged CMS's introduction of records relating to a revalidation application Petitioner filed in 2010, on the ground that it was not a basis for the reconsidered determination being appealed. *Id.* at 6, 8-9.

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<sup>4</sup> Noridian's June 24, 2015 initial revocation letter indicated that the effective date of the revocation was also 30 days after the postmark date of the June 24, 2015 letter. CMS Ex. 5, at 2. In DAB No. 2769, we stated that March 5, 2015, the date of the first on-site review that found Petitioner not operational, would be the effective date of revocation pursuant to 42 C.F.R. § 424.535(g) if the ALJ were to uphold revocation for non-operational status on readjudication post remand. DAB No. 2769, at 15-17.

<sup>5</sup> As noted in DAB No. 2769, the term "practice location" is not defined in Part 424, subpart P and does not appear in section 424.535(a)(5). However, section 424.535(a)(5) requires that a supplier be "operational," and one element of "operational" status consistent with section 424.502 is to have a "qualified practice location." Section 424.502 must be read together with section 424.535(a)(5), the cited basis for revocation. DAB No. 2769, at 3 n.2. The Board also noted that the parties seemed to agree that a physician-supplier's "practice location" is "a physical location, as in a medical office, where the physician meets with patients and provides medical care and treatment." *Id.*

### **Summary of ALJ Decisions I and II and DAB No. 2769**

As stated earlier, CMS may revoke a supplier's enrollment in Medicare under 42 C.F.R. § 424.535(a)(5) if the supplier is not operational at the practice location reported on the Medicare enrollment application, as determined by on-site review. In both of her decisions, the ALJ determined that, at the time of the on-site reviews, the practice location Petitioner had reported on his Medicare enrollment application was Waialae Ave., a UPS Store location, where, it is not disputed, Petitioner did not practice and was thus not operational.

The Board vacated ALJ Decision I and remanded the case to the ALJ chiefly because the ALJ admitted hearsay evidence concerning the central factual dispute between the parties, i.e., how CMS's enrollment records came to have Waialae Ave. as Petitioner's practice location, without offering him an opportunity to cross-examine the hearsay declarant or affirmatively ruling on the objection to that hearsay evidence, a procedure which Petitioner argued was prejudicial.

On remand, the ALJ again found that Petitioner was not operational at his practice location of record, Waialae Ave., as of the on-site reviews on March 5 and May 8, 2015, and affirmed the revocation. In this section, we explain further the prior decisions issued in this case and the current posture of the dispute before us and proceed to our analysis.

*I. In ALJ Decision I, the ALJ found that, at the time of the on-site reviews, Waialae Ave. was Petitioner's practice location of record.*

In ALJ Decision I, the ALJ found that Petitioner had reported Waialae Ave. as his practice location on his revalidation application filed in February 2010 and had not changed or otherwise updated that address on the later revalidation application filed in May 2014, with the result that Waialae Ave. was the record address of Petitioner's practice location at the time of the on-site reviews in 2015. ALJ Decision I, at 5-7. As such, the ALJ concluded, CMS was authorized to revoke Petitioner's enrollment upon finding his practice not operational at that location. In so finding, the ALJ relied on the following evidence:

- An "Application Data Summary" from CMS's Internet-based Provider Enrollment, Chain and Ownership System (PECOS) with a fax date of February 4, 2010, containing information from a Medicare revalidation enrollment application filed for Petitioner. The application data summary shows Waialae Ave. as the "Physical Location" address, the "Special Payments" address, and the "Correspondence Address," and shows the addresses of five ASCs as the "Patient Records Storage Location." CMS Ex. 11; ALJ Decision I, at 2, 5, 6-7.

- A March 4, 2010 letter addressed to Susan L. Foo at Waialae Ave., from the prior Medicare contractor, Palmetto GBA, stating that Palmetto had received the revalidation enrollment application and had “reviewed and validated the information contained within and determined [that] changes have occurred . . . [y]our physical address has been changed to reflect” Waialae Ave. CMS Ex. 10, at 1; ALJ Decision I, at 5.
- A PECOS “Application Record Data Report,” printed May 24, 2014, indicating that Petitioner was “currently enrolled in the Medicare program” and “is revalidating Medicare enrollment information,” and displaying information from Petitioner’s May 2014 revalidation application. CMS Ex. 9, at 1; *see* ALJ Decision I, at 5-6. Most of the information categories, including “Mailing Address(s),” “Practice Location(s)/Base(s) of Operations,” and “Medical Records Storage Facility Records” (as well as, for example, “Personal Information” and “License/Certification”) state “No Current Records Exist.” CMS Ex. 9, at 1. The category “Contact Person Information” states that Petitioner was “[a]dded” as the contact person, with the Waialae Ave. address and a phone number (808-373-4007) and email address. *Id.* at 2.
- The written direct testimony of C.F., a Noridian project analyst, about the meaning of the “No Current Records Exist” entries on the May 2014 PECOS Application Record Data Report (CMS Ex. 9). C.F. stated she is “responsible for processing enrollment applications, researching enrollment submissions, administering the enrollment and appeals process for Medicare Part B providers and suppliers, auditing work performed by Provider Enrollment analyst, training new Provider Enrollment analyst and Provider Enrollment Customer Service Representatives.” CMS Ex. 13, at 2 (C.F. Decl.). C.F. further stated that she is “a subject matter expert regarding the CMS integrity manual sections pertaining to Provider Enrollment” and is “personally acquainted with the manner in which the enrollment records of providers in the J1 jurisdiction [which includes Hawaii] relating to enrollment in the Medicare Part B program are maintained and searched.” *Id.* at 2-3. C.F. also testified that, “[a]s normal operation, the ARD [Application Record Data] report shows that statement [“no current records exist”] on all sections of a revalidation enrollment application in which the provider is not changing/updating information” and that, “[i]f the provider wanted to make any changes to information currently contained in PECOS during the revalidation process, they would need to edit that section and add the new information.”<sup>6</sup> *Id.* at 4-5.

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<sup>6</sup> C.F. also testified that the 2010 Application Data Summary showing Waialae Ave. as Petitioner’s practice location was “an authentic and accurate print-out from February 2010 of the PECOS record for the Petitioner . . . showing the information he provided to CMS in February 2010 at the time he revalidated his enrollment,” and that the 2014 Application Record Data Report, showing “no current records exist” for Petitioner’s practice location, “details the information submitted on May 14, 2014 to revalidate the enrollment of Dr. Foo via the online PECOS system.” CMS Ex. 13, at 3-4.

The ALJ thus found that, “[o]n or about February 4, 2010, Petitioner submitted an electronic Form CMS-855I through PECOS in which he provided a ‘physical location’ of Waialae Ave. and ‘likewise reported his correspondence address was the same address.’” ALJ Decision I, at 5 (citing CMS Ex. 11). The ALJ further found that “[o]n May 14, 2014, Petitioner submitted another application for purposes of revalidating his enrollment,” and that “based on C.F.’s explanation of the Application Record Data Report in PECOS, Petitioner did not enter a physical practice location address in PECOS in May 2014” when he filed that application “because he did not change the physical location that was already of record[.]” *Id.* at 5, 6. Petitioner’s failure to have changed his practice location when filing the May 2014 application, the ALJ found, “is evidenced by the message ‘no current records exist’ that appears on the report.” *Id.* at 6 (citing CMS Exs. 9, at 1; 13, at 4-5); *see also id.* at 6-7 (“While Petitioner reported the addresses for the Hawaii Eye Center and the Hawaii Endoscopy Center” – two ASCs – “as records storage locations in his May 2010 application and did not revise that information in his May 2014 application, he did not report that those addresses were physical practice locations in his applications.”).

The ALJ noted but did not accept Petitioner’s contentions that his May 2014 revalidation enrollment application reported Waialae Ave. as his correspondence address and the ASC addresses as his practice locations, and the testimony of Petitioner’s son, D.W., who had “long helped Dr. Foo with the administrative aspects of his medical practice,” that he had typed in the ASCs “as physical location address” on that application. *Id.* at 6, and 5-6 n.6 (citing P. Br. at 13, 16; P. Ex. 19, at 2, 6). The ALJ also noted that Petitioner did not have a copy of the May 2014 enrollment application. *Id.* at 6 n.6.

The ALJ also found that on June 24, 2014, Noridian called the telephone number listed on the May 2014 application as Petitioner’s number and “‘verified that the phone number listed in Section 4 of the application reaches the [Waialae Ave.] address’ and that ‘it is the primary phone number used for patients to set up appointments or ask questions.’” *Id.* at 5 (quoting CMS Ex. 8). The exhibit the ALJ cited, which CMS titled a Noridian “Provider Enrollment Phone Log screen-shot dated June 24, 2014” (“phone log”), contains notes about the phone call by a Noridian employee whom CMS did not name as a witness.

The ALJ also concluded that Petitioner’s use of the ASC addresses as his “practice location” address on his claims for Medicare reimbursement (form CMS-1500) was not germane to the question of what he had reported on his enrollment applications, and that Petitioner’s arguments that Noridian had not adhered to procedures in the MPIM did not provide any basis to reverse the revocation as the ALJ’s review authority extended only to determining whether CMS had a legal basis to revoke Petitioner’s enrollment and did not extend to reviewing CMS’s discretion to take that action. ALJ Decision I, at 8-10.

*II. The Board remanded the appeal for the ALJ to address Petitioner’s objections to hearsay evidence and concerns related to the factual dispute about how CMS came to have Waialae Ave. as Petitioner’s practice location of record at the time of the on-site reviews.*

In DAB No. 2769, the Board vacated ALJ Decision I and remanded the appeal for the ALJ to address Petitioner’s objections to the ALJ to hearsay evidence – the “phone log” containing notes on the June 24, 2014 call by a Noridian employee, whom CMS did not name as a witness – and to address other questions Petitioner raised about the phone log and about the PECOS records the ALJ relied on as showing that Petitioner had not changed the designation of Waialae Ave. as his practice location in his enrollment records.

Regarding the phone log, the Noridian employee “purportedly spoke to an individual who had identified ‘herself’ as a receptionist, and, according to CMS, confirmed that Waialae Ave. was the practice location.” DAB No. 2769, at 9. The Board remanded the appeal because the ALJ did not rule on Petitioner’s objection to the exhibit as unreliable hearsay or explain “why she found it reliable or not and the weight she was according to it,” and did not provide Petitioner an opportunity to cross-examine the Noridian employee whose notes appear on the phone log, as Petitioner requested. *Id.* at 10, 9 (citing P. Br. at 4-5, 17-18). The Board also found that the phone log “raises concerns beyond” being hearsay, as it does not show that Waialae Ave. was verified as the practice location, and D.W. testified that the phone number called was an answering service at Petitioner’s home that, like Waialae Ave., would not have been represented as an office or location where Petitioner renders services. *Id.* at 13-14 (citing P. Ex. 19 at ¶¶ 2, 27, 28). The Board advised that the ALJ could develop the record by obtaining the employee’s testimony and convening a hearing for cross-examination (or, if the employee was unavailable, discuss “the bases for any reliance or weight” given the log “as evidence that Petitioner represented that Waialae Ave. was his practice location”). *Id.* at 14.

Regarding the PECOS records, the Board advised the ALJ to “address . . . as appropriate” concerns “about how PECOS retains data,” specifically, “CMS’s position, as explained through C.F.’s declaration, . . . that unless Petitioner edits existing PECOS enrollment records in the course of filing subsequent revalidation applications, the earlier information remains on his record and PECOS will show a ‘no current records exist’ message when no update is made.” *Id.* at 12-13 (italics omitted). Those concerns arose from two of Petitioner’s exhibits – a “screenshot” D.W. reported taking of an application he attempted to file on PECOS in July 2015 (P. Ex. 17) that listed ASCs as Petitioner’s practice locations, and a PECOS “Revoked Medicare Enrollment Record” he printed out in January 2016 (P. Ex. 18).<sup>7</sup>

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<sup>7</sup> Noridian returned the July 2015 application because Petitioner’s enrollment had been revoked. ALJ Decision II, at 11; CMS Ex. 16 at ¶ 8.



Both the January 2016 PECOS Revoked Medicare Enrollment Record and the July 2015 PECOS application screenshot have ASC addresses listed as “Medical Records Storage Location[s],” even though this information had supposedly been entered “much earlier” and had not been changed, as evidenced by the 2010 PECOS Application Data Summary, which shows those ASC addresses as “Patient Records Storage Location,” and the May 2014 PECOS Application Record Data Report, which shows “No Current Records Exist” for the category “Medical Record Storage Facility Records.” CMS Exs. 11, at 3-4; 9, at 1; P. Exs. 17, at 4; 18, at 3; DAB No. 2769, at 12. According to C.F.’s explanation, the “no current records exist” message on the May 2014 PECOS Application Record Data Report means that Petitioner, on the May 2014 application, made no changes to the records storage location information already in his enrollment record (the ASCs). Accepting C.F.’s explanation, the Board reasoned, “we would expect to see a similar message” (i.e., “No Data Provided”) in the January 2016 PECOS Revoked Medicare Enrollment Record for the medical records storage location category. DAB No. 2769, at 12. Yet, the Board noted, “neither the July 2015 screenshot” of the application, “nor the January 2016 PECOS records, shows such a message, and the field for the medical storage facilities remains populated with ASC addresses.” *Id.* at 13 (citing P. Exs. 17, at 4; 18, at 3).

The Board also noted that the January 2016 PECOS Revoked Medicare Enrollment Record shows the message “No Data Provided” as “practice location information” even though D.W. stated that he had entered the ASCs as practice locations on the July 2015 application. *Id.* at 12; P. Exs. 17, 18, 19 at ¶ 20.

The Board also observed that the 2010 PECOS Application Data Summary shows Waialae Ave. as Petitioner’s “correspondence address,” and Petitioner reported that this information was not later changed, meaning that, per C.F.’s explanation, “the ‘no current records exist’ message should appear in [the May 24, 2014 Application Record Data Report], but it does not.” *Id.* at 13 (citing CMS Exs. 11, at 2; 9, at 2). Instead, as Petitioner argued, “the correspondence address does appear in the 2014 report,” which “is facially inconsistent with [C.F.’s] claim about why the PECOS report . . . would state that no practice location information was available.” *Id.* (quoting P. Reply to Board at 5).

The Board thus found that the PECOS documents “raise concerns that CMS’s explanation (through C.F.’s declaration) about how PECOS retains data does not seem to address fully, and the ALJ did not address these concerns, explaining how she weighed evidence that appears to be inconsistent with, or not adequately explained by, C.F.’s declaration.” *Id.* The Board stated that on remand, “the ALJ may wish to first permit the parties an opportunity to supplement the record with additional evidence and/or briefing as appropriate to address these concerns before she readjudicates this case.” *Id.*

*III. On remand the ALJ upheld the revocation, finding that Petitioner reported Waialae Ave. as the practice location on the 2010 application, that Petitioner did not change the practice location prior to the 2015 on-site reviews, and that, as is not disputed, Petitioner was not operational at the Waialae Ave. location on the 2015 on-site review dates.*

On remand, Petitioner filed a brief and three exhibits (P. Exs. 21-23), including Petitioner's written testimony. CMS filed a brief and six exhibits (CMS Exs. 16-21), including supplemental written testimony of C.F., and written testimony of "Liza" (Noridian employee) whom we refer to hereafter by the initials L.H. Each party filed a reply brief. The ALJ accepted all exhibits, overruling Petitioner's objections to some of CMS's exhibits, and convened a hearing by telephone during which Petitioner cross-examined CMS's two witnesses. Each party filed a post-hearing brief, and Petitioner filed a post-hearing reply brief. ALJ Decision II, at 4-7.

The ALJ again affirmed CMS's revocation of Petitioner's Medicare enrollment and billing privileges on the ground that Petitioner was not operational at his practice location of record, Waialae Ave., as found by the on-site reviews on March 5 and May 8, 2015.

The ALJ found that, as of the reviews, Petitioner's "Medicare enrollment record listed a practice location" of Waialae Ave. "and no other practice location address[.]" and that "Petitioner did not report any physical practice locations, other than the Waialae Avenue address, on his [2010 and 2014] applications." ALJ Decision II, at 7 (bold italics omitted), 10 (citing CMS Exs. 9, 11). Specifically, the ALJ found that "Petitioner listed only the Waialae Avenue address as a practice location on his February 2010 application and did not change that information in his May 2014 revalidation application"; that "[n]either party has presented probative evidence of any intervening applications or attempts by Petitioner to update his practice location information between May 14, 2014, and the first site visit on March 5, 2015, or between the first site visit and the second site visit on May 8, 2015"; and that "[t]herefore, the Waialae Avenue address was the practice location of record on March 5, 2015, the effective date of Petitioner's revocation." *Id.* at 10.

The ALJ rejected Petitioner's contention that he reported the ASCs as his practice locations prior to the on-site reviews, finding that "Petitioner reported the addresses for the [ASCs] as records storage locations in his February 2010 application[,] did not revise that information in his May 2014 application, [and] did not report that these records storage locations were physical practice locations in his applications." *Id.* at 9-10 (citing CMS Exs. 9, at 1; 11, at 3-4; 13, at 4-5).

The ALJ also addressed the meaning of the “no current records exist” message on the May 2014 PECOS Application Record Data Report and the “no data provided” message on later PECOS records. The ALJ found “that PECOS records are reliable,” that C.F.’s “testimony with respect to how PECOS maintains records is probative and credible” and “consistent with the evidence of record,” and that the PECOS records from 2010 and 2014 “correctly show[] that Petitioner did not report a practice location other than the UPS Store location at any time prior to the March 5 and May 8, 2015 site visits.” *Id.* at 10, 13. The ALJ found that information seen on the screenshot of Petitioner’s 2015 application and the 2016 PECOS Revoked Medicare Enrollment Report instead of the ‘no data provided’ message in places where Petitioner claimed not to have entered new information was, in fact, not identical to the information shown on the earlier records, and that identifying information about Petitioner shown in another category on the January 2016 PECOS Revoked Medicare Enrollment Report was “static information that would not be expected to change.” *Id.* at 12. The ALJ further found that “purported discrepancies” Petitioner alleged between the May 2014 PECOS Application Record Data Report and the July 2015 application screenshot were “due to the fact that they are dissimilar documents,” and did not discredit C.F.’s explanation of the meaning of the “no current records exist” message on the May 2014 application report. *Id.* at 12-13. We discuss these ALJ findings in greater detail in our analysis below.

Regarding the Noridian phone log, Petitioner cross-examined L.H. during the hearing. The ALJ overruled Petitioner’s objection to evidence related to the phone call but did “not rely on” the phone log, or on L.H.’s testimony “in determining that CMS appropriately revoked Petitioner’s Medicare enrollment and billing privileges.” ALJ Decision II, at 6. The ALJ “agree[d] with the parties” that the phone log “is minimally relevant and is not determinative of whether Petitioner’s enrollment revocation was appropriate[.]” *Id.* (citing CMS Post-Hrg Br. at 2 (June 2014 telephone call is “not determinative of the basis for revocation”); P. Post-Hrg Reply at 4 (phone log has “limited relevance”)).

The ALJ thus found that “[a] site visit contractor was unable to conduct a site visit of Petitioner’s practice location on file (i.e., the Waialae Avenue address) on March 5 and May 8, 2015, because a UPS Store, and not a medical office, is at that location,” and concluded that “CMS had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges because he was not operational pursuant to 42 C.F.R. § 424.535(a)(5) at the practice location on file with CMS[.]” and that “Petitioner has not demonstrated that CMS or its contractor lacked the authority to revoke his Medicare enrollment and billing privileges.” ALJ Decision II, at 14, 17 (bold and italics omitted).

In doing so, the ALJ also rejected Petitioner’s argument that CMS was informed of Petitioner’s practice locations (i.e., the ASCs) via “the many hundreds of claims submitted to Medicare over the years, directly to Noridian,” which had Petitioner’s practice location(s) “clearly listed” on the claim forms. ALJ Decision II, at 17 (quoting P. Reply at 3). The ALJ pointed out that the CMS claim form “is used for the submission of a ‘claim for payment from federal funds,’ and it does not indicate, on its face or in its accompanying instructions, that it should be used for the purpose of updating enrollment information” and “does not contain any field to allow a supplier to report that he or she is updating enrollment information.” *Id.* (citing Form CMS-1500).

The ALJ also concluded she had no “equitable jurisdiction” to reverse the revocation on the “equitable concerns” Petitioner raised concerning his treatment by CMS, which, Petitioner argued, has permitted other practitioners to use Waialae Ave. as their practice location, and could have made efforts prior to revocation to determine that Petitioner was in fact operational at other locations. *Id.* at 18. The ALJ accordingly “affirm[ed] CMS’s revocation of Petitioner’s Medicare enrollment and billing privileges.” *Id.*

### **Standard of review**

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

### **Discussion**

- I. *Petitioner’s arguments about the PECOS evidence and testimony provide no basis for the Board to reverse ALJ Decision II or CMS’s revocation of his Medicare enrollment and billing privileges.*

Petitioner argues that the ALJ’s finding that Waialae Ave. was Petitioner’s practice location of record, such that CMS could exclude him for not being operational there, is “not supported by substantial evidence.” Request for Review (RR) at 5, 8 (emphasis, capitalization removed). Petitioner argues that the ALJ improperly relied on the 2010 PECOS Application Data Summary, that PECOS records subsequent to 2010 are “blank” as to Petitioner’s practice location, and that “[t]he Board’s concerns about how PECOS retains data have not been quelled” by the ALJ on remand. RR at 2, 5-6, 8, 10.

Petitioner also argues that CMS and Noridian abused their discretion and violated CMS procedures by failing to make more efforts to determine Petitioner's practice location prior to conducting on-site reviews at the UPS Store and revoking his enrollment for not being operational there, and that the revocation is inconsistent with the purpose of the regulations authorizing revocation.

A. Petitioner has shown no basis to reject the ALJ's finding that Petitioner reported Waialae Ave. as his practice location in 2010, which is supported by substantial evidence and free of legal error.

Petitioner argues that "the materials CMS introduced regarding Dr. Foo's 2010 enrollment profile [the 2010 PECOS Application Data Summary] do not amount to 'substantial' evidence of what happened in 2014" when, the ALJ found, Petitioner did not change his practice location from Waialae Ave. RR at 8-9. Petitioner further questions the ALJ's finding that Petitioner reported Waialae Ave. as his practice location on the 2010 revalidation application on the basis that "Noridian was not even the contractor in 2010, the CMS witnesses had no personal knowledge of the information contained in the 2010 correspondence and did no independent research regarding the information listed in the March 4, 2010 letter" to Petitioner from the prior contractor acknowledging receipt of a revalidation enrollment application that changed Petitioner's physical address to Waialae Ave. RR at 4 (citing Tr. at 89-90); CMS Ex. 10, at 1.

These arguments show no error in the ALJ's finding that Petitioner reported Waialae Ave. as his practice location via the 2010 application. As discussed above, the ALJ accepted C.F.'s testimony that, based on her experience with PECOS and Medicare enrollment, the 2010 PECOS Application Data Summary showing Waialae Ave. as Petitioner's practice location was "an authentic and accurate print-out from February 2010 of the PECOS record for the Petitioner . . . showing the information he provided to CMS in February 2010 at the time he revalidated his enrollment." CMS Ex. 13, at 3-4; *see* ALJ Decision II, at 10-12. The ALJ also cited the 2010 PECOS Application Data Summary, which contains information from a Medicare revalidation enrollment application reporting Waialae Ave. as the physical location address and the correspondence address. CMS Ex. 11; *see* ALJ Decision II, at 8, 11. The ALJ also cited the March 4, 2010 letter to Petitioner from the prior contractor acknowledging receipt of a revalidation application and specifically noting that Petitioner's "physical address has been changed to reflect" Waialae Ave. CMS Ex. 10, at 1; ALJ Decision II, at 2, 8.

The ALJ reasonably found, based on this evidence, that Petitioner reported Waialae Ave. as his practice location in 2010. Under "our settled precedent, absent compelling reasons for not doing so, we defer to the ALJ's assessment of the credibility of witnesses and

weighing of evidence.” *Ridgecrest Healthcare*, DAB No. 2598, at 10 (2014) (citing *Van Duyn Home & Hosp.*, DAB No. 2368, at 10-11 (2011) (citing *Koester Pavilion*, DAB No. 1750, at 21 (2000))). Petitioner has provided no compelling or otherwise persuasive reasons why the ALJ could not credit the evidence as showing that Petitioner’s February 2010 revalidation application reported Waialae Ave. as his practice location.

Petitioner questions the probative value of the documents from 2010 because they were not issued by Noridian, the current contractor, and because the Noridian analyst witness, C.F., was not involved in their creation. We find this not a sufficient basis to undercut the ALJ’s reliance on the 2010 evidence and C.F.’s testimony based on her experience with PECOS and Medicare enrollment as showing that Petitioner reported Waialae Ave. as his practice location in 2010. Petitioner in these proceedings has not denied that he or someone acting on his behalf did report or could have reported Waialae Ave. as the practice location on the 2010 revalidation application, albeit mistakenly. Petitioner’s two witnesses (Petitioner and D.W.), who testified that D.W. correctly entered the ASCs as practice locations on the revalidation application filed in 2014, did not address the 2010 revalidation application in their testimony or discuss any enrollment application prior to the one filed in 2014. Petitioner did not deny receiving the March 4, 2010 letter from the prior contractor noting the change of his “physical address” to Waialae Ave., and has not claimed to have responded to that letter to correct the information if it was incorrect. CMS Ex. 10, at 1.

Petitioner also again argues that the ALJ erred in considering the 2010 PECOS Application Data Summary because that exhibit was not considered at the reconsideration level. RR at 8 (Petitioner “continues to assert that the 2010 evidence should not have been considered at all by the ALJ, because it should not have factored into the [contractor’s] reconsideration decision concerning Dr. Foo, nor is there credible or reliable evidence that it did.”). Petitioner now also cites a provision of CMS’s Medicare Program Integrity Manual (MPIM) that, Petitioner says, as of 2018 prohibits CMS from introducing new reasons for revocation at the reconsideration stage. RR at 3-4 n.2; 3 (“CMS turned back the clock to **2010** . . . in patent violation of the Medicare Program Integrity Manual.”) (Petitioner’s emphasis).

In its remand decision, the Board “reject[ed] the implication that the presentation of evidence about the 2010 revalidation represents an unfair or improper attempt by CMS to pursue a different revocation basis before the ALJ.” DAB No. 2769, at 11. The Board concluded that “evidence related to the 2010 revalidation” is “relevant to the question of how CMS came to have Waialae Ave. as Petitioner’s practice location of record” and that “[t]he ALJ did not err or abuse her discretion in admitting evidence concerning the 2010 revalidation application.” *Id.* at 10-11 (italics omitted). Consequently we do not address this argument further.

The ALJ thus did not err in finding that Petitioner had reported Waialae Ave. as his practice location in 2010.

B. Petitioner has shown no basis to reject the ALJ's finding that Petitioner did not change his practice location in his enrollment records prior to the on-site reviews.

Petitioner disputes that Waialae Ave. was the practice location in his enrollment records at the time of the on-site reviews in March and May 2015 because “the single most important piece of evidence relating to Dr. Foo’s stated physical practice location or locations – namely, CMS Form 855-I, subsection ‘Physical Locations and ‘Special Payments’ Address’ from Section 4, ‘Practice Location Information’ – is **literally blank** in the record.” RR at 2 (Petitioner’s emphasis); *see also* at 5-6 (“[T]he required field, ‘Physical Locations and ‘Special Payments’ Address’ within CMS Form 855-I is blank, and therefore missing, within the record.”). The record does not include Petitioner’s Form 855-I at all. Petitioner is apparently referring to the January 2016 PECOS Revoked Medicare Enrollment Record printout (P. Ex. 18). That printout, consistent with Petitioner’s description, states “No Data Provided” in Section 4, “practice location information” and “physical location and ‘special payments’ address.” P. Ex. 18, at 1 (capitalization omitted). But the printout is not itself an application and is not the best evidence of the information Petitioner provided as to its practice location.

Petitioner makes the same argument about the May 2014 PECOS Application Record Data Report (CMS Ex. 9), that “[t]he 2014 PECOS records are absolutely clear that no record exists for Dr. Foo’s practice location,” and that “[a]ll evidence [CMS] has presented concerning the 2014 application is, in fact, devoid of any practice address information, which CMS’ own witness concedes.” RR at 8-9 (Petitioner’s emphasis).

Petitioner’s arguments ignore the totality of evidence supporting the ALJ’s finding that Waialae Ave. was Petitioner’s practice location of record at the time of the on-site reviews. Both printouts were adequately explained by the ALJ’s findings. The ALJ on remand again found that the absence of practice location on the May 2014 PECOS Application Record Data Report meant that Petitioner **had not entered a new practice location on his 2014 reenrollment application** and that the absence of practice location information on the January 2016 Revoked Medicare Enrollment Record was **due to Petitioner’s enrollment having been revoked** following the on-site reviews. The ALJ relied not only on C.F.’s original testimony, but also on the supplemental written testimony filed on remand and testimony at the hearing, where she was subject to cross-examination.

Regarding the May 2014 PECOS Application Record Data Report, which states “No Current Records Exist for Practice Location(s)/Base(s) of Operations,” (CMS Ex. 9, at 1), the ALJ again relied on C.F.’s testimony that “[a]s normal operation,” this report “shows that statement [i.e., that “No Current Records Exist”] on all sections of a revalidation enrollment application in which the provider is not changing/updating information” unless “the provider wanted to make any changes to information currently contained in PECOS during the revalidation process,” in which case they “would need to edit that section and add the new information,” which would be visible to the supplier completing the application. ALJ Decision II, at 8-9 (quoting CMS Ex. 13, at 4-5); 10 (citing CMS Ex. 16, at 3 (C.F. Supp. Decl.)). The ALJ also cited C.F.’s testimony, discussed earlier, that the 2010 PECOS Application Data Summary showed that Petitioner had reported Waialae Ave. as the practice location on the 2010 revalidation application. As Petitioner did not change his practice location in 2014, the ALJ again found, Waialae Ave. was the practice location in PECOS enrollment records on March 5, 2015. *Id.* at 9-10.

The ALJ gave valid reasons for crediting this evidence over Petitioner’s and D.W.’s testimony that D.W. entered the ASCs as practice locations when filing the May 2014 revalidation application. The ALJ found CMS’s “documentary evidence, along with the testimony of its witnesses, to be credible and probative,” and the testimony Petitioner presented “inconsistent with the evidence of record” and “otherwise unsupported by any other evidence of record.” *Id.* at 9. The ALJ thus found that “Petitioner has not supported his claim that he updated his practice location to an address or addresses other than the Waialae Avenue address prior to the May 2015 site visit” and “did not report any physical practice locations, other than the Waialae Avenue address, on his revalidation applications.” *Id.*

The ALJ on remand also found again that the lack of a practice location on the January 2016 PECOS Revoked Medicare Enrollment Record was due to Petitioner’s enrollment having been revoked following the on-site reviews. The ALJ cited C.F.’s testimony that “[a]s long as PECOS documents that a particular enrollment record is still in the re-enrollment bar period [due to revocation] no updates to the official PECOS record would be maintained or stored by PECOS[] [and] [a]ny attempts to update information would result in showing ‘No Data Provided.’” *Id.* at 11 (quoting CMS Ex. 16, at 5) (first alteration in original, internal quotation marks omitted); *see also* CMS Ex. 17 (corrected) at 4 (L.H. testimony that “any data that is changed once the provider is not currently enrolled will not be identified or flagged or captured in the PECOS enrollment record” and “[t]he information in the official PECOS record would remain as it looked as of the last day of the provider’s enrollment”).



Also citing C.F.'s testimony, the ALJ found that "[t]he January 2016 PECOS record is an enrollment record, which," as C.F. explained, "would be 'generated using . . . approved application data.'" ALJ Decision II, at 13 (quoting CMS Ex. 13, at 3 (C.F. Decl.)). Thus, because "as of January 2016, Petitioner's enrollment had already been revoked" effective March 5, 2015, then "[t]he absence of any practice location information in Section 4 of the January 2016 enrollment record is to be expected[ ] . . . [T]herefore, the enrollment record correctly reported that there was 'No Data Provided' for a practice location as of January 2016." *Id.* (citing P. Ex. 18, at 1). C.F. "explained that because Noridian rejected this [July 2015] application and returned it to Petitioner without updating his PECOS record," as called for by the MPIM, "Petitioner's enrollment record was not updated based on this information." *Id.* (citing Tr. at 103-04); 11; *see also* Tr. at 88-89, 92 (C.F. testimony agreeing that providers can submit information in PECOS that is not added or included in the provider's official enrollment "[u]ntil the contractor reconciles it," i.e., verifies that the information is correct); CMS Ex. 20 (Sept. 17, 2015 email from L.H. to D.W. and Petitioner stating that enrollment application filed for Petitioner on July 15, 2015 was being closed because "[r]evocation is in place").

Petitioner on appeal did not directly address this explanation for the absence of a practice location on the January 2016 PECOS Revoked Medicare Enrollment Record, or provide any reason that the ALJ erred in crediting C.F.'s testimony on this point. The lack of a practice location on the January 2016 record thus does not support Petitioner's argument that Medicare enrollment records contained no practice location at the time that Noridian performed the on-site reviews, such that CMS had no basis to revoke his enrollment for not being operational at the Waialae Ave. location.

As we discuss in the next section, the ALJ in making these determinations adequately addressed concerns "about how PECOS retains data" including the meaning of the "no current records exist" message on the May 2014 PECOS Application Record Data Report, that the Board raised in remanding the case. Petitioner repeats some of those concerns on appeal but does not address the ALJ's analyses addressing those concerns and concluding that they do not undermine the evidence that Petitioner reported Waialae Ave. as his practice location in 2010 and did not change the practice location prior to the on-site reviews and the revocation in 2015.

C. The ALJ resolved the Board's concerns about the PECOS records on remand, and we find no error in the ALJ's analysis.

In DAB No. 2769, the Board noted aspects of the PECOS records that potentially called into question CMS's explanation "that unless Petitioner edits existing PECOS enrollment records in the course of filing subsequent revalidation applications, the earlier information remains on his record and PECOS will show a 'no current records exist' message when no update is made." DAB No. 2769, at 12. That message appears on the

May 14, 2014 PECOS Application Record Data Report. CMS Ex. 9. The Board noted that the January 2016 PECOS Revoked Medicare Enrollment Report shows a similar message, “No Data Provided,” for practice location, even though the screenshot of the application Petitioner filed in July 2015 shows ASC addresses entered as practice locations. DAB No. 2769, at 12. The January 2016 Revoked Medicare Enrollment Report also shows those addresses as records storage locations instead of the “No Data Provided” message, even though, the Board observed, D.W. had reported that record storage location information “was entered much earlier (and he does not specifically say he edited this category in July 2015).” *Id.*

ALJ Decision II addresses these concerns. As discussed above, the ALJ found that the January 2016 Revoked Medicare Enrollment Report shows no practice location address because Petitioner’s billing privileges had been revoked for two years effective March 5, 2015, and Noridian had thus returned the application Petitioner filed in July 2015, which sought to add the ASCs as practice locations, without updating Petitioner’s PECOS enrollment record. ALJ Decision II, at 10-11. Petitioner continues to assert that the lack of a practice location on the 2014 and 2016 PECOS records means that there was effectively no practice location of record. Petitioner’s bald assertion is not sufficient to undermine the ALJ’s reasoning.

Petitioner questions the reliability of the PECOS records, but does not allege any specific errors in the ALJ’s discussion resolving those concerns. Petitioner argues that “CMS failed to provide a clear explanation as to why CMS Exhibit 9 [the May 2014 PECOS Application Record Data Report] looks different from Petitioner’s Exhibit 17 [the July 2015 PECOS application screenshot]” and “why CMS Exhibit 11 [the 2010 PECOS Application Data Summary] looks different from Petitioner’s Exhibit 18 [the January 2016 PECOS Revoked Medicare Enrollment Report].” RR at 9 (citing Tr. at 102-05 (C.F. testimony)). Petitioner notes that “[n]either the July 2015 screenshot, nor the January 2016 PECOS records shows a message that ‘no current record exists’ and the field for the medical records storage facilities remains populated with ASC addresses, despite no changes to that medical records storage information.” *Id.* (italics omitted).

The ALJ addressed those concerns, however. The ALJ found that “[a]ny differences between the May 2014 [PECOS Application Record Data Report] submitted by CMS (CMS Ex. 9) and the July 2015 application [screenshot] submitted by Petitioner (P. Ex. 17) are due to the fact that they are dissimilar documents; one [the former] is a *report* based on an approved application, and the other [the latter] is Petitioner’s copy of his *application*.” ALJ Decision II, at 13 (citing Tr. at 103-04) (ALJ’s italics). The ALJ cited C.F.’s testimony that “explained that a supplier filling out an electronic revalidation application in PECOS would ‘see the information that is of record’ in PECOS and would

have the option to either ‘update or [not] update that information on their record.’” *Id.* at 10 (quoting Tr. at 102). However, “while ‘the supplier may *see whatever information they input into each section*’ of the application, that application ‘information is not automatically added to the final enrollment record until after it has been verified by the applicable [Medicare administrative contractor].’” *Id.* (quoting CMS Ex. 16, at 3) (our emphasis). The ALJ found that this testimony “persuasively explained that the July 2015 application contains more detailed information” than the May 2014 PECOS Application Data Report “because Petitioner inputted all of that information into the application.” *Id.* at 12-13.

This also explains why, as Petitioner states, the July 2015 application screenshot does not show the message “no current records exist.” Petitioner’s additional concern that the January 2016 PECOS Revoked Medicare Enrollment Report does not show that message is not accurate. That document contains a similar message, “No Data Provided,” for practice location, which, the ALJ concluded, means that Petitioner did not update that category when filing his revalidation application in 2014. P. Ex. 18, at 1. Petitioner has not identified any error in the ALJ’s analyses of the PECOS documents.

The ALJ also resolved concerns about the information shown in the field for medical records storage locations. Based on the evidence discussed here and in the preceding section, the ALJ found that the January 2016 PECOS Revoked Medicare Enrollment Report showed addresses for medical record storage locations, instead of stating “No Data Provided,” because “[t]he January 2016 PECOS record is an enrollment record, which [C.F.] explained would be ‘generated using . . . approved application data[,]’” including the previously provided record storage locations, which are the same on the 2010 Application Data Summary as on the January 2016 PECOS Revoked Medicare Enrollment Report. *Id.* at 13 (citing CMS Ex. 13, at 3; *compare* CMS Ex. 11, at 3-4 with P. Ex. 18, at 3). In contrast, following the 2015 revocation for failure to be operational at the practice location of record (Waiālae Ave.), Petitioner’s approved application data included no practice location address. The ALJ’s discussion of the PECOS exhibits also moots Petitioner’s concern that on the July 2015 application screenshot and the January 2016 PECOS Revoked Medicare Enrollment Report “the field for the medical records storage facilities remains populated with ASC addresses, despite no changes to that medical records storage information.” RR at 9. Petitioner does not explain why the ALJ’s analysis of the evidence including C.F.’s testimony is wrong.

The ALJ’s analysis addressed other concerns Petitioner continues to raise about aspects of the PECOS documents Petitioner says are “inconsistent with [C.F.’s] claim about why the [2014] PECOS [Application Record Data] report would state that no practice location information was available on CMS’s PECOS record.” RR at 10. Petitioner notes that Petitioner’s “correspondence address, along with Dr. Foo’s demographic data” (his

“name, date of birth, state in which he was born, social security number, practitioner type, specialty type and so forth”) “does appear in the 2014 [PECOS Application Record Data] report” despite being “unchanged data.” RR at 10. The ALJ concluded, however, that “the ‘demographic’ information Petitioner references is static information that would not be expected to change (i.e., Social Security Number, date of birth, place of birth) with each successive enrollment application.” ALJ Decision II, at 12. We note that this information appears at the top of the 2014 Application Record Data Report, above the heading “Application Data Report,” and is repeated immediately below that heading, above the heading “Section 1,” which supports the ALJ’s finding that this basic information is static.

The ALJ also pointed to “subtle differences in the contact information” on the 2010 and 2014 PECOS reports – that the February 2010 PECOS Application Data Report “lists ‘4348 WAIALAE AVE 5-311,’ whereas the May 2014 application [record data report] lists ‘4348 Waiialae Ave *Unit* 5-311’” – as indicating that this information was indeed changed on the 2014 application. *Id.* (citing CMS Exs. 9, at 2; 11, at 4) (ALJ’s italics). Thus, the ALJ concluded, “the lack of a ‘No Current Records Exist’ message in the demographic information and contact information fields gives no reason to doubt [C.F.’s] testimony concerning the presence of that message in many other fields in the May 2014 ARD report.” *Id.*

Petitioner has identified no error of fact or law in the ALJ’s analysis of the evidence about the PECOS documents, and we in our review have found none. We consequently see no basis to disturb the ALJ’s analysis.

The other issue the ALJ was to address on remand involved Petitioner’s objections to hearsay evidence in the form of the “phone log” containing L.H.’s notes of the June 24, 2014 phone call to the phone number in Petitioner’s enrollment records. The ALJ on remand admitted L.H.’s written and oral cross-examination testimony but, ultimately, did not rely on any aspect of the phone log in upholding the revocation, finding this evidence minimally relevant, as the parties agreed, and not determinative of the basis for revocation. ALJ Decision II, at 5-6. Petitioner argues that the ALJ erred in admitting the phone log and that CMS erred in relying on it but agrees with the ALJ as to “the insignificance of the telephone log[.]” RR at 11. As the ALJ did not rely on evidence relating to the phone log and, as we conclude, properly upheld the revocation based on other evidence, we do not further address this issue.

We thus conclude that the ALJ’s determinations that Waiialae Ave. was Petitioner’s practice location in his enrollment records as of the time of the on-site review in March and May 2015 and was not changed prior to that time are supported by substantial evidence and free of legal error.

D. The ALJ correctly concluded that CMS was authorized to revoke Petitioner's enrollment because Petitioner was not operational at his practice location of record.

As we stated above, the Board has held that the enrollment regulations require that a supplier be "operational" at the address reported as the practice location on enrollment applications and has "regularly upheld revocations where site visits to a provider or supplier's practice location of record disclosed that the provider or supplier was not operational at that location." *Adora Healthcare Servs., Inc.*, DAB Ruling 2017-4, at 3 (citing *Vamet Consulting & Med. Servs.*; *Care Pro Home Health, Inc.*); see *Jason R. Bailey, M.D., P.A.* at 10-12; 76 Fed. Reg. at 5870.

In *Care Pro Home Health*, the Board "held that the Medicare provider petitioner had to be operational at the location it provided on its Medicare enrollment application." *Foot Specialists of Northridge*, DAB No. 2773, at 8-9 (2017) (citing *Care Pro Home Health* at 5-6). The Board in *Care Pro Home Health* adopted the analysis of the ALJ in that case, which pointed out that the definition of "operational" at 42 C.F.R. § 424.502 "refers to the 'qualified physical practice location' of a provider"; that section 424.510(d)(2) requires the applicant to "provide '[c]omplete, accurate and truthful responses to all information requested within each section [of the enrollment application] as applicable to the provider or supplier type,'" which may include the "practice location"; and that section 424.517(a) authorizes CMS to "perform on-site inspections to verify that the enrollment information is accurate and to determine compliance with Medicare requirements," meaning that "CMS will inspect the 'qualified physical practice location' that has been provided by the provider and is currently on file with CMS." *Care Pro Home Health* at 5. The Board thus agreed "that CMS lawfully revoked Petitioner's Medicare enrollment based on its non-operational status" at the location designated on its enrollment application as its practice location at the time of the on-site review. *Id.* at 6.

In *Jason R. Bailey, M.D., P.A.*, the Board sustained the revocation of a physician's enrollment for not being operational at his practice location of record under circumstances similar to this case. In that case the physician's billing company had, on an enrollment application, incorrectly changed his practice location to a UPS Store location where, it was not disputed, his practice was not operational. The Board held that, "[f]or purposes of revoking a physician's or physician practitioner organization's billing privileges under subsection 424.535(a)(5), the 'practice location' is the location [the UPS Store] reported to the physician's or physician practitioner organization's Medicare contractor," and that the fact that the petitioner in that case was operating a practice elsewhere did not invalidate CMS's determination that it was not operational at the location of record. *Jason R. Bailey, M.D., P.A.* at 10.

The Board also stated that, “[i]n provider/supplier revocation cases, ALJs and the Board are limited to determining whether CMS had a basis to revoke the provider’s or supplier’s Medicare enrollment and billing privileges.” *Id.* at 15 (citing *Letantia Bussell, M.D.*, DAB No. 2196, at 13, as “stating that the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a ‘legal basis for its actions’”); *see also Bussell* at 13 (“[T]he right to review of CMS’s determination by an ALJ serves to determine whether CMS had the authority to revoke [petitioner]’s Medicare billing privileges, not to substitute the ALJ’s discretion about whether to revoke.”).

We also note that in the preamble to regulations affecting the effective date of revocations, CMS stated when a provider or supplier “is no longer operating *at the practice location provided to Medicare on a paper or electronic Medicare enrollment application*” then “the revocation should be effective with the date that CMS or our contractor determines that the provider or supplier is no longer operating *at the practice location*” that was “provided to Medicare on a paper or electronic Medicare enrollment application[.]” 73 Fed. Reg. 69,726, 69,865 (Nov. 19, 2008) (italics added). As the Board stated, “[t]his language is further notice that Medicare enrollment and billing privileges may be revoked if a supplier is not operational at its practice location address on file with CMS that the supplier provided on its enrollment application.” *Foot Specialists of Northridge* at 9.

Petitioner does not dispute that his practice was not “operational” at Waialae Ave. which, the ALJ found and concluded, was Petitioner’s practice location in his enrollment records at the time of the on-site reviews in March and May 2015, authorizing CMS to revoke Petitioner’s Medicare enrollment. For the reasons stated above, we uphold the ALJ’s findings and conclusions as supported by substantial evidence and not legally erroneous.

*II. Petitioner’s other arguments provide no basis for the Board to reverse ALJ Decision II or CMS’s revocation of his Medicare enrollment and billing privileges.*

Aside from denying that Waialae Ave. was his practice location in his Medicare enrollment records (and thus that he need prove his practice was operational at that location), Petitioner presents additional arguments why the revocation should be reversed, which we address briefly in this section.

Petitioner argues that Noridian abused its discretion by not clarifying Petitioner’s actual practice locations prior to revocation, as Petitioner says is required by the MPIM. Noridian “easily could, and should, have made efforts to clarify with Dr. Foo whether 4348 Waialae Avenue was a practice location,” Petitioner says, by “actually talking to Dr. Foo or someone formally authorized to speak for him and taking note of information already in its files,” since “it is patently obvious that there is a UPS Store at that address

with no indications whatsoever that it is a physician's office." RR at 16. Petitioner cites MPIM sections it discussed in his briefing before the ALJ in ALJ Decision I that Petitioner says obliged Noridian to "make additional efforts to clarify with Dr. Foo the nature of the post office box before revoking his billing privileges." RR at 14, 16 (citing Request for Review of ALJ Decision I, at 17-22, citing MPIM §§ 15.5.4; 15.7.1.3.2; 15.7.1.4.3.C; and 15.20.1.A; Request for ALJ Hearing; Pre-Hearing Br.).

The ALJ rejected these arguments, citing Board decisions in appeals of enrollment revocations. The ALJ cited *Letantia Bussell, M.D.* at 10, as holding that an ALJ's review of CMS's discretionary determination to revoke a provider's or supplier's enrollment "is limited to deciding whether the CMS contractor had a 'legal basis' for its action," and *Abdul Razzaque Ahmed* at 19, as "stating [that] if CMS establishes that the regulatory elements necessary for revocation are satisfied, an administrative law judge may not substitute his or her 'discretion for that of CMS in determining whether revocation is appropriate under all the circumstances.'" ALJ Decision II, at 16. The ALJ also held that none of the provisions Petitioner cited in the MPIM "require the contractor to further investigate possible physical practice locations" and noted that the MPIM "states that 'the contractor shall verify that the address is a physical address' and specifies that '[p]ost office boxes and drop boxes are not acceptable.'" *Id.* at 16 n.15 (citing MPIM § 15.5.4.3.C).

We find no error in the ALJ's analyses or reliance on the cited Board decisions. The Board "has consistently held" that "neither the [ALJ] nor the Board may 'substitute [its] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances'" and that "the review of a revocation determination in this administrative appeals process is limited to deciding whether the regulatory 'elements required for revocation were present.'" *Douglas Bradley, M.D.*, DAB No. 2663, at 6 (2015) (citing *Letantia Bussell, M.D.* at 13), and at 13 (citing *Abdul Razzaque Ahmed, M.D.* at 19). Thus "if the record substantiates one or more of the grounds for revocation in [42 C.F.R. §] 424.535(a) – then the revocation must be sustained." *Id.* at 6 (citing *Letantia Bussell, M.D.* at 13).

Regarding Petitioner's contention that the MPIM required Noridian to take further steps to clarify his actual practice locations, we agree with the ALJ that the MPIM provisions Petitioner cited do not require the contractor "to further investigate possible physical practice locations," ALJ Decision II, at 16 n.15, at least not where the contractor can determine upon on-site review that the supplier or provider is not operational at the physical location designated on the enrollment application. *See, e.g.*, MPIM § 15.5.4(A) (contractor "shall verify that the practice and administrative locations listed on the application actually exist"); *Care Pro Home Health, Inc.* at 8 (instruction to seek

clarifying information “implies that section 15.5.4(A) is intended to cover the situation in which a contractor is unable to confirm the physical existence of a practice location, as distinct from being unable to verify, through onsite review, that a provider meets all the requirements for being “operational” at some location”). The manual provisions provide no basis to reverse a revocation based on legally and factually sound reasons.

We also find no error in the ALJ’s rejection of Petitioner’s position that revocation should be reversed because CMS and Noridian had notice of Petitioner’s actual practice locations from his claims for Medicare reimbursement, specifically, “the CMS 1500 claim forms he submits to Medicare for payment for services rendered at” the ASCs where he practices. RR at 17; *see* ALJ Decision II, at 17 (citing P. Reply at 3). The ALJ found “no reason for CMS or its contractors to refer to this form to seek information about a supplier’s practice location,” as it is titled “Health Insurance Claim Form,” states that it is for submitting a claim for payment from federal funds, does not state in the form or its instructions that it may be used to update enrollment information, and suppliers “may submit hundreds, or even thousands, of these claims forms each year, and it would be absurd to expect that each claim reimbursement form should be reviewed for a potential update to *enrollment* information, when a Form CMS-855 exists for that very purpose.” ALJ Decision II, at 17 (citing Form CMS-1500) (ALJ’s italics).<sup>8</sup>

The sample form CMS-855I, the enrollment application for physician and non-physician practitioners, which CMS entered into the record, states that physicians can make a change in their enrollment information in two ways, either through the paper enrollment application (e.g. form 855I) or through PECOs. CMS Ex. 14, at 2. The ALJ also cited C.F.’s testimony that “[m]ost of the analysts or representatives on the enrollment team do not have access to the claims system nor are they required under CMS enrollment regulations to look up claims” and that suppliers and providers report and verify practice locations “via their applications and their PECOS record.” *Id.* at 17 n.17 (quoting Tr. at 97-98). We agree with the conclusion that putting a different address on a claim for payment is simply not a permissible means of updating enrollment information.

Petitioner also argues that the ALJ’s conclusions that “CMS had authority and a legal basis to revoke Dr. Foo’s privileges, are erroneous because neither Congress nor the Secretary could constitutionally delegate discretionary authority of the type here to a private contractor.” RR at 13 (bold, capitalization removed). Thus, Petitioner argues, “Noridian acted without authority and in violation of the Constitution when it chose to revoke Dr. Foo’s billing and enrollment privileges.” *Id.* Petitioner did not make this argument in either of the two proceedings before the ALJ. The Board *Guidelines* state

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<sup>8</sup> Available at <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/CMS1188854.html>.



that the Board “will not consider issues not raised in the request for review, *nor issues which could have been presented to the ALJ but were not.*” *Guidelines* at “Completion Of The Review Process,” ¶ (a) (emphasis added); *see ACT for Health, Inc.*, DAB No. 1972, at 5 (2005) (*Guidelines* prohibition on raising issues not presented to ALJ “mirrors the rule applied in federal appellate courts, which generally refuse to consider issues or arguments raised for the first time on appeal”). We also note that the Act, which the Board may not ignore or declare invalid, directs the Secretary (and thus CMS) to administer the Medicare program through contracts with administrative contractors. Act §§ 1816(a), 1842(a) (“administration of this part shall be conducted through contracts with medicare administrative contractors”), 1874(a) (“Secretary may perform any of his functions under this title directly, or by contract”).

Consequently, the Board has previously “considered but rejected arguments that CMS contractors lack the authority to make determinations concerning a provider’s or supplier’s enrollment in the Medicare program.” *Douglas Bradley, M.D.* at 14. The Board there cited *Fady Fayad, M.D.*, holding that the Act authorized CMS to delegate administrative functions, and that a contractor’s exercise of discretion is lawful “because [HHS] has, in effect, retained final authority over contractor-issued revocation determinations by subjecting them to review, when challenged, by departmental ALJs and the Board,” reasoning “that was expressly affirmed by the United States District Court in *Fady Fayad v. Sebelius.*” *Id.* at 14-15 (citing *Fayad* at 19). As in *Bradley*, “Petitioner has given us no reason to question the reasoning” in *Fayad.* *Id.* at 15.

Finally, the ALJ correctly concluded she had no authority to reverse the revocation based on Petitioner’s “attempt to invoke equitable concerns,” namely that other physicians have listed Waialae Ave. address as a primary practice address without adverse consequences and that Noridian did not attempt to visit Petitioner’s practice address of record until March 2015 despite being aware of the Waialae Ave. address since 2010. ALJ Decision II, at 18; *see* RR at 18-19 (“[T]here is no allegation” that Petitioner ever “submitted claims to Medicare that included false or misleading information”; Petitioner has “been barred from submitting Medicare reimbursement claims for over two years and incurred substantial loss of income and substantial legal fees to resolve the matter and clear his name” and “has been subject to constant risk that his overall reputation as a respected medical practitioner in the community will be irreparably damaged due to his unjustified disenrollment, thereby harming his practice in ways that extend beyond just Medicare participation.”). The Board “has repeatedly confirmed that neither it nor the ALJs have authority to overturn a legally valid agency action on equitable grounds or otherwise grant equitable relief.” *Foot Specialists of Northridge* at 18 (citations omitted). As stated above, ALJs and this Board may review only whether CMS had a valid legal basis to revoke billing privileges, and, if it did, may not address whether it properly exercised its discretion to do so.

A provider or supplier must ensure that its enrollment application contains “[c]omplete, accurate, and truthful responses to all information requested within each section as applicable to the provider or supplier type” and must “certify to the accuracy of its enrollment information” on its application, and is therefore by law responsible for the accuracy of all information on the application. 42 C.F.R. §§ 424.510(d)(2)(i), 424.515(a)(2). These requirements ensure that CMS may rely on the accuracy of the information in administering the Medicare program. That reliance is vital where, as the ALJ took note, there were “well more than a half million physicians enrolled as suppliers in the Medicare program . . . subject to periodic site verification visits.” ALJ Decision II, at 16 n.16 (citing *2016 CMS Statistics*<sup>9</sup>). Thus, “the regulations hold the provider or supplier responsible for reporting, and updating, enrollment information; they do not impose on CMS or its contractors a duty to make additional inquiries to verify that information.” *Jason R. Bailey, M.D., P.A.* at 14. Accordingly, the responsibility for the provision of inaccurate information on an enrollment application, however unintentional, lies with the provider or supplier, and not with CMS.

### **Conclusion**

We sustain ALJ Decision II affirming the revocation of Petitioner’s Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5) for two years effective March 5, 2015.

/s/

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Leslie A. Sussan

/s/

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Constance B. Tobias

/s/

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Susan S. Yim  
Presiding Board Member

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<sup>9</sup> [https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/2016\\_CMS\\_Stats.pdf](https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/2016_CMS_Stats.pdf).