Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michael Scott Edwards, OD, and M. Scott Edwards, OD, PA
Docket No. A-18-85
Decision No. 2975
October 31, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Michael Scott Edwards, OD, and M. Scott Edwards, OD, PA appeal the April 19, 2018 decision of an administrative law judge (ALJ), *Michael Scott Edwards, OD, and M. Scott Edwards, OD, PA*, DAB CR5074 (ALJ Decision). The ALJ upheld a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke the enrollment and billing privileges of Dr. Edwards and his practice under 42 C.F.R. § 424.535(a)(3) based on Dr. Edwards's conviction for felony obstruction of justice under state law, effective February 6, 2007, the date of the conviction. For the reasons and bases set out below, we affirm the ALJ Decision.

Legal background

To receive Medicare payment, a physician or other "supplier" of Medicare services must be enrolled in the Medicare program. 42 C.F.R. §§ 400.202 (defining "Supplier"), 424.505.[1] Enrollment confers on a supplier "billing privileges," i.e., the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502 (defining "Enroll/Enrollment"), 424.505. CMS, which administers the Medicare program, regulates the enrollment of suppliers into the program and delegates certain program functions to private contractors. Social Security Act (Act)[2] §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5.

[1] We apply the regulations in 42 C.F.R. Part 424 that were in effect at the time of CMS's or its contractor's determination to revoke. *See Meindert Niemeyer, M.D.*, DAB No. 2865, at 2 n.2 (2018) (citing *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016)).

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

The Secretary of Health and Human Services may refuse to enter into an agreement with a supplier, or may terminate or refuse to renew such agreement, in the event the supplier has been convicted of a felony under federal or state law for an offense the Secretary determines is detrimental to the best interests of the program or program beneficiaries. Act § 1842(h)(8).

CMS "may" revoke a supplier's enrollment and billing privileges for any of the "reasons" in 42 C.F.R. § 424.535(a). Section 424.535(a)(3) authorizes CMS to revoke a supplier's billing privileges and participation agreement if –

> [t]he . . . supplier, or any owner or managing employee of the . . . supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

42 C.F.R. § 424.535(a)(3)(i). "Offenses include, but are not limited in scope or severity to . . . [f]inancial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted . . . ." *Id.* § 424.535(a)(3)(ii)(B).

The term "convicted" is defined in 42 C.F.R. § 1001.2 as:

> (a) A judgment of conviction has been entered against an individual or entity by a Federal, State or local court, regardless of whether:
> (1) There is a post-trial motion or an appeal pending, or
> (2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;
> (b) A Federal, State or local court has made a finding of guilt against an individual or entity;
> (c) A Federal, State or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity; or
> (d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

Revocation effectively terminates any provider agreement and bars the supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. *Id.* § 424.535(b), (c). CMS may impose a re-enrollment bar that lasts a minimum of one year, but not greater than 3 years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). In accordance with 42 C.F.R. § 424.535(g), revocation

takes effect 30 days after CMS or its contractor mails the notice of determination to revoke, unless, as relevant here, the revocation is based on a felony conviction, in which case revocation takes effect on the date of the conviction. This regulation, which took effect on January 1, 2009 (73 Fed. Reg. 69,726, 69,940-41 (Nov. 19, 2008)), remains in effect.

A supplier may seek reconsideration of an initial (or revised initial) determination to revoke. *Id.* §§ 498.3(b)(17), 498.5(*l*)(1), 498.22(a). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. *Id.* §§ 498.5(*l*)(2), 498.40.[3]

Case background[4]

Michael Scott Edwards, OD, is an optometrist. He is the sole owner and managing employee of his optometry practice, M. Scott Edwards, OD, PA. ALJ Decision at 1; CMS Exhibits (Exs.) 8, at 22 and 10, at 13, 15. Until the revocation from which this appeal arose, Dr. Edwards and his practice were enrolled in Medicare as a supplier of services and of durable medical equipment, prosthetics and orthotics (DMEPOS), as a single entity. ALJ Decision at 1 n.1, 2; CMS Exs. 2, 8, 9. We, like the ALJ, refer to Dr. Edwards and his practice as "Petitioner" except as appropriate to distinguish Dr. Edwards from his practice, for factual clarity. ALJ Decision at 1 n.1.

On February 6, 2007, Dr. Edwards waived indictment and was charged by information with felony obstruction of justice, in violation of the common law, in Wake County, North Carolina. CMS Ex. 5, at 1. The information charged that, from on or about January 2002 through January 2003, Dr. Edwards "unlawfully, willfully and feloniously did in secret and with malice obstruct public justice in his role as a campaign treasurer of the North Carolina Optometric Society Political Action Committee by soliciting and collecting campaign contributions in the form of checks that had blank payee lines and causing those checks to be distributed to political candidates without making proper

[3] Section 1866(j)(8) of the Act does not specifically refer to hearing rights for suppliers whose billing privileges are revoked. However, CMS has interpreted it as providing hearing rights in revocation cases. *Conchita Jackson, M.D.*, DAB No. 2495, at 2 (2013) (citing, *e.g.*, 42 C.F.R. § 498.1(g); 72 Fed. Reg. 9479 (Mar. 2, 2007)).

[4] Unless otherwise indicated, the background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

disclosures of those contributions and expenditures to the State Board of Elections." *Id*. On February 6, 2007, Dr. Edwards "pled guilty to" felony obstruction of justice.[5] *Id.* at 2-3. The court accepted the plea and sentenced Dr. Edwards to 6-8 months of incarceration, which was suspended, and 24 months of supervised probation, one condition of which was that Dr. Edwards could not serve as "treasurer or caretaker of any money in any political or any other organization." *Id.* (capitalization removed). The sentencing judge also ordered Dr. Edwards to pay restitution of $10,000 to an unspecified party. *Id*. at 2.

In 2008 and 2013, Petitioner reported Dr. Edwards's conviction in applications for revalidation of enrollment in Medicare. CMS Exs. 6; 8, at 22, 28; 9, at 2; 10, at 11, 15.

By letters dated August 4, 5, and 8, 2016, Palmetto GBA, a CMS Medicare Administrative Contractor, notified Petitioner (and Dr. Edwards) that it was revoking Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) because Dr. Edwards, the owner and managing employee of his optometry practice, was convicted of a felony offense within the preceding ten years. CMS Ex. 2, at 1, 4, 7. Citing 42 C.F.R. § 424.535(c), Palmetto also established a re-enrollment bar for a period of three years. *Id.* at 1, 4, 8.

On October 12, 2016, CMS issued a reconsidered determination upholding the revocation based on Dr. Edwards's felony conviction. CMS Ex. 4.[6] CMS determined that the February 6, 2007 felony offense was "a financial crime given that it arises out of facts related to inappropriate behavior concerning campaign finances." *Id.* at 5 (also noting that, as a condition of probation, Dr. Edwards was prohibited from being the caretaker or

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[5] Dr. Edwards states that he "pled pursuant to *North Carolina vs. Alford* to one count of obstruction of justice" and that an *Alford* plea "in North Carolina allows a person to plead guilty while stating on the record that the person believes himself to be not guilty and is only pleading guilty because he believes it is in his best interest to do so." CMS Ex. 6, at 1. A plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), is "an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest." *U.S. v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011). "A defendant enters into an *Alford* plea when he proclaims he is innocent, but 'intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.'" *State v. Chery*, 691 S.E.2d 40, 44 (N.C. Ct. App. 2010) (quoting *Alford*, 400 U.S. at 37). Dr. Edwards nonetheless does not dispute that he pleaded guilty and was convicted for purposes of revocation under section 424.535(a)(3). *See* CMS Ex. 5, at 2.

[6] Palmetto's August 4 and August 5, 2016 letters, which were addressed to Dr. Edwards's practice, also cited a violation of DMEPOS supplier standard 10, set out in 42 C.F.R. § 424.57(c)(10), which requires DMEPOS suppliers to carry and maintain comprehensive liability insurance. CMS Ex. 2, at 1, 4. Based upon alleged failure to show compliance with the standard, Palmetto also cited 42 C.F.R. § 424.535(a)(1) as another basis for revocation. *See* CMS Ex. 2, at 1, 4; Ex. 3, at 1 (August, 4, 5, and 25, 2016 letters). As of October 12, 2016, CMS determined that Petitioner submitted satisfactory proof of comprehensive liability coverage, thereby establishing compliance with the standard and, on that basis, "overturned" section 424.535(a)(1) as a revocation basis, but nevertheless upheld the revocation under section 424.535(a)(3) based on Dr. Edwards's felony conviction. CMS Ex. 4, at 4-5.

treasurer of any money in any organization). CMS stated, "This conviction is detrimental to the [Medicare] program and beneficiaries because it involves the provider's capacity to be truthful concerning money. Enrollment in the Medicare program allows a provider to bill and be paid without prior review. Given the facts underlying Edwards' financial crime conviction, [Medicare] Trust Funds may be at risk if he continues to participate in the program. It necessarily follows that placing Trust Funds at risk is a detriment to beneficiaries." *Id.* at 5.

Petitioner requested a hearing before an ALJ. On CMS's motion (unopposed), an ALJ remanded the appeal (Civil Remedies Division docket number C-17-221) by order issued February 17, 2017. ALJ Decision at 3 (citing P. Ex. 4, ALJ's remand order).

On May 3, 2017, CMS reopened the case, and issued a revised reconsidered determination upholding the revocation under section 424.535(a)(3) as it had in its October 12, 2016 determination. CMS Ex. 1, at 1 (citing 42 C.F.R. §§ 498.30, 498.32), 5-6. CMS wrote that Dr. Edwards's felony offense "is similar to the enumerated financial crimes under 42 C.F.R. § 424.530(a)(3)(i)(B),[[7]] which CMS has found to be *per se* detrimental to the Medicare program and its beneficiaries" and, "[e]ven if not deemed similar to the enumerated financial crimes," the offense "is related to [Dr. Edwards's] willful failure to disclose his organization's role in collecting and distributing political contributions" and "calls into question [his] veracity and trustworthiness." *Id.* at 5.

Petitioner again requested a hearing. The Civil Remedies Division docketed the appeal under number C-17-927. Each party filed a motion for summary judgment in its favor; Petitioner opposed CMS's motion. ALJ Decision at 4. The ALJ proceeded to decision based on the written record since neither party proffered the written direct testimony of any witness who the opposing party could have chosen to cross-examine at hearing. *Id.*; *id.* n.9 ("As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address the parties' motions for summary disposition.").[8]

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[7] The citation to "42 C.F.R. § 424.530(a)(3)(i)(B)" (CMS Ex. 1, at 5) appears to have been in error. This regulation sets out felony financial crimes on which denial of enrollment may be based. Presumably CMS intended to cite 42 C.F.R. § 424.535(a)(3)(ii)(B), which sets out felony financial crimes on which revocation may be based. In any case, the regulations are worded similarly.

[8] CMS appears to read the ALJ's decision to mean that the ALJ granted summary judgment in CMS's favor. CMS's Response Br. at 1, 3, 9. The ALJ did not decide the appeal on summary judgment. The ALJ decided the appeal for CMS, based on the written record, without holding a hearing.

The ALJ affirmed the revocation, finding and concluding as follows:

1. Dr. Edwards is the sole owner and managing employee of his medical practice.
2. On February 6, 2007, the State of North Carolina charged, via information, that Dr. Edwards committed the offense of obstruction of justice "in his role as campaign treasurer of the North Carolina State Optometric Society Political Action Committee by soliciting and collecting campaign contributions in the form of checks that had blank payee lines and causing those checks to be distributed to political candidates without making proper disclosures of those contributions and expenditures to the State Board of Elections."
3. Dr. Edwards entered a guilty plea to the offense of felony obstruction of justice on February 6, 2007, at which time the sentencing judge ordered, inter alia, that Dr. Edwards pay $10,000 in restitution and that, while in probation status, he not serve as treasurer or caretaker of any money in any political or any other organization.
4. Dr. Edwards's conviction is for a felony offense that was a financial crime pursuant to 42 C.F.R. § 424.535(a)(3).
5. An offense listed in 42 C.F.R. § 424.535(a)(3) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.
6. CMS and Palmetto had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.

ALJ Decision at 5-6 (bolding and italics in ALJ's findings and conclusions removed).

As rationale for her determination that "Dr. Edwards's conviction is for a financial crime," the ALJ noted that, "while serving as the campaign treasurer of a political action committee," Dr. Edwards "'willfully and feloniously did in secret and with malice' solicit and collect 'campaign contributions in the forms of checks that had blank payee lines and causing those checks to be distributed to political candidates without making proper disclosures of those contributions and expenditures to the State Board of Elections.'" *Id.* at 7 (quoting CMS Ex. 5 at 1). The ALJ stated that, "at its core," the offense involved "financial impropriety, as evidenced by the terms of his sentence." *Id.* at 6 (citing CMS Ex. 5, at 3). Dr. Edwards's offense, the ALJ stated, "need not be one of the representative crimes listed in section 424.535(a)(3)(ii)(B)" (*id.*, citing *Stanley Beekman, D.P.M.*, DAB No. 2650, at 7 (2015)), but, nevertheless, "certainly" is a financial crime for purposes of revocation under 42 C.F.R. § 424.535(a)(3) "because willfully providing blank checks as campaign contributions, in an effort to subvert campaign finance and reporting requirements, *is* a financial crime." *Id.* at 7 (ALJ's emphasis).

Concerning the effective date of revocation, Petitioner asserted that the effective date of revocation – February 6, 2007, the date of the conviction – was impermissibly retroactive as it was based on the regulation that went into effect after the date of the conviction. ALJ Decision at 7-8. According to Petitioner, the earliest date on which the revocation could have taken effect was September 7, 2016, thirty days after the August 8, 2016 notice of revocation (CMS Ex. 2, at 7-8), based on section 424.535(f) (2007) that was in effect on the date of the conviction (ALJ Decision at 7, 7 n.12 (citing 71 Fed. Reg. 20,754, 20,780 (Apr. 21, 2006))) and which provided that "[r]evocation becomes effective within 30 days of the initial revocation notification." 42 C.F.R. § 424.535(f) (2007). Although the ALJ considered this argument and Petitioner's complaint that CMS could have revoked, but did not revoke since Dr. Edwards had reported his conviction in applications dating back to January 2008 (ALJ Decision at 8, 8-9 n.13),[9] the ALJ concluded that, applying 42 C.F.R. § 424.535(g) that was in effect at the time of the revocation, "a revocation based on a felony conviction is effective on the date of conviction." *Id.* at 9 (quoting *Norman Johnson, M.D.*, DAB No. 2779, at 19-20 (2017)). The ALJ also noted that "[t]he Board has consistently held that the regulations *in effect on the date of the initial determination to revoke* a supplier's enrollment apply in an appeal of a Medicare enrollment case." *Id.* (quoting *Dennis McGinty, PT*, DAB No. 2838, at 6 n.7 (2017) (ALJ's emphasis)), *aff'd, McGinty v. Azar*, No. 3:18-cv-359-S, 2019 WL 3034596 (N.D. Tex. July 11, 2019)).

Lastly, the ALJ determined that the three-year re-enrollment bar was not reviewable. *Id.* (citing *Vijendra Dave, M.D.*, DAB No. 2672, at 11 (2016)).

Standard of review

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

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[9] The ALJ commented that "Palmetto's inexcusable delay, and Petitioner's understandable detrimental reliance on the 2008 and 2013 approvals of its enrollment applications that disclosed Dr. Edwards's felony conviction, resulted in enormous financial liability for an eight and a half year period." ALJ Decision at 9 n.13. The ALJ stated, however, that she was "not empowered to rectify this situation in Petitioner's favor." *Id.* (citing *US Ultrasound*, DAB No. 2302, at 8 (2010) ("Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.")).

Discussion

Petitioner's chief arguments on appeal are that (1) the felony obstruction of justice of which Dr. Edwards was convicted is not a qualifying offense for purposes of revocation under section 424.535(a)(3); (2) revocation of enrollment in 2016 based on the 2007 felony conviction is barred by res judicata since CMS revalidated Petitioner's enrollment in 2008 and 2013 even though Petitioner had disclosed the conviction in the 2008 and 2013 revalidation applications; and (3) applying section 424.535(g) that went into effect in 2009, to make the revocation take effect on February 6, 2007, the date of the conviction, has impermissibly retroactive effect.[10] For the reasons set out below, we affirm the ALJ's decision.[11]

1. CMS had a legal basis to revoke Petitioner's enrollment and billing privileges in 2016 based on Dr. Edwards's 2007 felony conviction.

Section 424.535(a)(3)(i) authorizes CMS to revoke a supplier's billing privileges and participation agreement if "[t]he . . . supplier, or any owner or managing employee of the . . . supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries." Section 424.535(a)(3)(ii) states that "[o]ffenses include, but are not limited in scope or severity to"; then sets out four categories of such offenses, the second of which (under (B)) is "[f]inancial crimes"; and under (B), identifies examples of such crimes, but does not by its terms limit that category only to the named crimes ("such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes . . .").

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[10] Petitioner submitted an 11-page notice of appeal (NA), a brief in support of notice of appeal (P. Br.), and a reply brief (P. Reply Br.) accompanied by two documents. The document marked Exhibit A (a February 8, 2007 letter of the North Carolina State Optometric Society, Inc. addressed to "Colleague") appears to be new evidence not previously offered for admission as an exhibit during the ALJ proceedings. By regulation, the Board decides appeals involving enrollment (and revocation) on the evidentiary record on which the ALJ decided the case. *See* 42 C.F.R. § 498.86(a) ("Except for provider or supplier enrollment appeals, the Board may admit evidence into the record . . . ."); *Michael Turano, M.D.*, DAB No. 2922, at 16 (2019); *Guidelines*, "Development of the Record on Appeal," ¶ (f). The document marked Exhibit A will remain a part of the administrative record, but is not admitted; we do not consider it to decide this appeal and, in any case, even assuming it were included in the evidentiary record, it would not affect our analysis or decision. The document marked Exhibit B appears to be a duplicate of CMS exhibit 2, pages 1-3. There is no need to submit to the Board copies of documents already in evidence.

[11] Petitioner requested an opportunity to present oral argument. NA at 9; P. Br. at 16. The *Guidelines*, a copy of which was provided with the ALJ Decision, instructed the parties to "state the purpose" of any request for oral argument. *See Guidelines*, "Development of the Record on Appeal," ¶ (g). By ruling issued August 7, 2018, the Presiding Board Member denied the request because: (1) Petitioner did not state in his reply brief the purpose of the oral argument or respond to CMS's objection to the request for oral argument (CMS's Response Br. at 9); and (2) oral argument would not aid the Board's decision-making.

There is no dispute here as to certain material facts: on February 6, 2007, Dr. Edwards was convicted within the meaning of 42 C.F.R. § 1001.2, of felony obstruction of justice in violation of the common law, in Wake County, North Carolina; he at all times relevant to this appeal was the sole owner and managing employee of his practice; and, in 2016, within 10 years from the date of the conviction, CMS revoked Petitioner's enrollment and billing privileges under section 424.535(a)(3), based on the conviction.

Petitioner's dispute concerns the issue of whether the crime of which Dr. Edwards was convicted – felony obstruction of justice – is a qualifying offense for revocation under section 424.535(a)(3). Petitioner disagrees with the ALJ's statement that Dr. Edwards does not dispute that he was convicted of a "financial crime" (ALJ Decision at 6) and takes exception to the ALJ's determination that obstruction of justice is "similar to" the financial crimes listed in 42 C.F.R. § 424.535(a)(3)(ii)(B). NA at 1-2, 5-6; P. Br. at 5-6, 13. He asserts that "[n]one of the listed crimes have any relationship whatsoever to obstruction of justice of election laws" and that the listed crimes "could not be fairly said to be similar in terms of motivation, financial gain, or in what is sought to be prevented by the State of North Carolina in legislating the election law requirements." P. Br. at 5-6. According to Petitioner, felony obstruction of justice of which Dr. Edwards was convicted is "peculiar to election law" as it involves "full disclosure of both the contributing party and the receiving candidate" and the act of putting a date and amount on a check and signing it without writing the name of the payee or specific amount on it is not an unusual practice "in regular life" or in the context of business, banking, and commerce. *Id.* at 6. The crime, Petitioner argues, is thus not similar to the crimes of the type identified in the regulation, "which are all crimes of greed, theft and characterized by criminal gain of money or other financial gain." *Id.* at 13. Dr. Edwards, Petitioner says, was not "operating for financial gain, nor was he accused of such." *Id.* at 6.

The Board has interpreted section 424.535(a)(3) as meaning that the categories of offenses such as "financial crimes" are those that CMS has determined by rulemaking to be detrimental to the Medicare program as a matter of law. *Letantia Bussell*, DAB No. 2196, at 9-10 (2008) (holding that the crimes listed in section 424.535(a)(3) are "detrimental per se to the program and its beneficiaries"). The Board has also determined that CMS has the authority to determine on a case-by-case basis whether a felony crime that is not identified in the regulations is detrimental to the best interests of the Medicare program. The Board stated: Section 424.535(a)(3) "does not limit the reach of CMS's revocation authority to crimes that CMS has determined via rulemaking to be detrimental to Medicare" and "does not preclude CMS from making a case-specific, or adjudicative, determination that a crime or category of crime not specified in the regulation is detrimental to the best interests of Medicare." *Fady Fayad, M.D.*, DAB No. 2266, at 8 (2009) (emphasis removed), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

Moreover, the Board has stated, in the context of section 424.535(a)(3), that the "words 'include' or 'including' are not terms of limitation or exhaustion" and, "[w]hen followed by a list of items, those words are reasonably read as signifying that the list contains merely illustrative examples of a general proposition or category that precedes the word and is not intended to preclude unmentioned items from being considered supportive or part of the general proposition or category." *Fayad* at 8. Accordingly, with respect to section 424.535(a)(3)(ii)(B)'s "financial crimes," the qualifying conviction for a financial crime need not necessarily be one of the crimes expressly identified in the regulation as a financial crime (extortion, embezzlement, income tax evasion, insurance fraud). Rather, these named crimes are illustrative examples of financial crimes. "[O]ther similar crimes" (42 C.F.R. § 424.535(a)(3)(ii)(B)) also could be qualifying crimes for revocation under section 424.535(a)(3).[12] The Board has also stated that, "even if [p]etitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 10 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Thus, the felony conviction in question need not be one that neatly fits into the category of "financial crimes" or one in which, as Petitioner says, involves greed, theft, or a motive for financial gain. P. Br. at 6, 13. It need not be ipso facto "financial" in nature (as, for example, income tax evasion is) for it to be a qualifying conviction for purposes of revocation. It is irrelevant for purposes of revocation that Dr. Edwards at no time believed he had committed or was pleading guilty to a "financial" crime motivated by a desire for monetary gain. *Id.* at 6. The essential question here is whether CMS has determined that felony obstruction of justice of which Dr. Edwards was convicted poses a risk to the best interests of the Medicare program.

CMS has in fact made such a determination here. It determined that the conviction for felony obstruction of justice is a financial crime since "it arises out of facts related to inappropriate behavior concerning campaign finances" and noted in particular that, as a condition of probation, the court prohibited Dr. Edwards from "being the caretaker or treasurer of any money in any organization." CMS Ex. 4, at 5. Importantly, in so

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[12] *Bussell* and *Fayad* were decided before section 424.535 (revocation) and section 424.530 (denial of enrollment), which largely parallels section 424.535, were revised effective February 3, 2015. 79 Fed. Reg. 72,500, 72,531-33 (Dec. 5, 2014). The Board affirmed its rationale in *Bussell* and *Fayad* more recently in cases involving CMS actions based on the revised regulations. *See, e.g.*, *Cornelius M. Donohue, DPM*, DAB No. 2888, at 4-5 and 5 n.3 (2018) (essentially reaffirming *Bussell*'s "per se" rationale in stating that "the former and current versions of [section 424.535(a)(3)] describe the presumptively detrimental offenses or offense categories in identical terms"); *Stephen White, M.D.*, DAB No. 2912, at 15 (2018) ("[T]he Board has repeatedly held that if the conviction is for a crime other than one of the felonies enumerated in the regulations, CMS may make the determination, on a case-by-case basis, whether the felony conviction at issue is detrimental to the Medicare program and its beneficiaries."), *appeal docketed*, No. 2:19-cv-00037-SAB (E.D. Wa. Jan. 24, 2019); *John A. Hartman, D.O.*, DAB No. 2911, at 14-17 (2018) (discussing the regulatory revisions and stating that the rationale in *Bussell* is "still a valid statement of law").

determining, CMS explained why the offense is detrimental to the Medicare program and its beneficiaries (42 C.F.R. § 424.535(a)(3)(i)) – the nature of the offense raises a concern about Dr. Edwards's "capacity to be truthful concerning money" and thus also raises a concern about the risk to Medicare funds if Dr. Edwards were to be permitted to continue to "bill [Medicare] and be paid without prior review." *Id.*

Accordingly, CMS has established, as the record supports, that the owner and managing employee of the supplier was convicted, within 10 years preceding the 2016 revocation, of a felony offense that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries. If, as here, CMS has established a lawful basis for revocation, the Board and the ALJ must uphold the revocation. *See, e.g., Donohue*, DAB No. 2888, at 10; *Saeed A. Bajwa, M.D.,* DAB No. 2799, at 15 (2017) (stating that the ALJ and the Board are required to uphold a revocation if CMS proves the existence of a regulatory basis for such action), *appeal dismissed per stipulation*, No. 3:17-cv-00792-GTS-DEP (N.D.N.Y. Dec. 28, 2017); *Beekman*, DAB No. 2650, at 10 (the ALJ and the Board are required to uphold revocation if the record establishes that the regulatory elements for revocation are satisfied); *Bussell*, DAB No. 2196, at 13 (the only issue before the ALJ and the Board is whether CMS has established a "legal basis for its actions"). CMS is "legally entitled to revoke" if the regulatory elements are met, and neither the ALJ nor the Board may "substitute [their] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances." *Ahmed*, DAB No. 2261, at 19.

Accordingly, we determine that the ALJ correctly determined that CMS was authorized to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3).

2. *Res judicata does not apply; CMS had authority to revoke Petitioner's enrollment in 2016 based on a qualifying 2007 felony conviction despite not having taken such action earlier.*

Throughout its notice of appeal and supporting brief, Petitioner points to CMS's acceptance of Petitioner's revalidation applications in 2008 and 2013, in which Dr. Edwards's felony conviction was reported, and asserts that in the absence of any new or undisclosed information relevant to enrollment or revocation that was not previously considered or known as of 2008 or 2013, res judicata attached to the 2008 and 2013 revalidation determinations. Petitioner asserts that in 2008 and 2013 CMS determined that despite the 2007 conviction Petitioner met the requirements to remain enrolled and to continue billing Medicare and was therefore precluded from taking a revocation action in 2016. *See, e.g.*, P. Br. at 3-4.

Under the res judicata doctrine, commonly referred to as "claim preclusion," "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Accordingly, where there has been a final judgment on the merits, res judicata "foreclos[es] successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). The purpose of the doctrine is to "avoid multiple suits on identical entitlements or obligations between the same parties." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402 (3d ed. Aug. 2019 update). Res judicata is an affirmative defense. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); Fed. R. Civ. Pro. 8(c). As such, "[o]rdinarily, it is incumbent on the defendant to plead and prove such a defense[.]" *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

The Board has addressed preclusion doctrines – res judicata and collateral estoppel (or "issue preclusion") – in the context of an appeal involving the Inspector General's exclusion of a physician from participation in federal health care programs pursuant to section 1128(a)(1) of the Act. *Gregory J. Salko, M.D.*, DAB No. 2437 (2012), *aff'd*, *Salko v. Sebelius*, No. 3:12cv515, 2013 WL 618779 (M.D. Pa. Feb. 19, 2013). In rejecting the physician's argument that his section 1128(a)(1) exclusion by the Inspector General was barred by an earlier determination by CMS to revoke his billing privileges, *see id.* at 5-7, the Board stated:

> Collateral estoppel, also termed "issue preclusion," is defined as "[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based" and "[a] doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one." Black's Law Dictionary (9th ed. 2009) . . . Res judicata, or "claim preclusion," is "[a]n issue that has been definitively settled by judicial decision" and "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim" with "three essential elements" comprising "(1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties." *Id.*

Id. at 6 (emphases in Board's decision removed). To accord preclusive effect to an unreviewed agency determination, the Board also recognized, three conditions must be met: (1) the administrative agency acted in a judicial capacity; (2) the agency resolved

disputed issues of fact properly before it; and (3) the parties had an adequate opportunity to litigate the claim. *See id.* (citing *Miller v. Cnty. of Santa Cruz*, 39 F.3d 1030, at 1032-33 (9th Cir. 1994), citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

Even assuming for the moment that we (or the ALJ) could overturn CMS's 2016 determination to revoke based on a preclusion doctrine, we would decline to do so because the preclusion doctrine does not apply here.[13] CMS does not dispute that the felony conviction was disclosed in earlier applications (which, based on the evidence in the record, indicates were for revalidation) or that Petitioner was permitted to remain enrolled after the submittal of 2008 and 2013 applications that reported the conviction. We do not know why CMS or its contractor revalidated Petitioner's enrollment in 2008 and 2013 when it evidently could have proceeded to revocation based on the 2007 felony conviction before 2016 but did not do so until 2016. What is important is that revalidating an enrolled supplier's billing privileges and revoking existing billing privileges are two different determinations under different regulations within 42 C.F.R. Part 424, subpart P, and, with obviously very different consequences. Revalidation permits a supplier to retain billing privileges. Revocation, however, is a determination that a supplier no longer has billing privileges. *Compare* 42 C.F.R. § 424.515 and 42 C.F.R. § 424.535; *see also* 42 C.F.R. §§ 424.502 (defining "Enroll/Enrollment" and "Revoke/Revocation"), 424.505, 424.510, 424.516, 424.530. Thus, the earlier revalidations (which presumably were favorable to Petitioner and thus not the subject of subsequent dispute by Petitioner, until Palmetto decided to revoke) do not have preclusive effect on the revocation that came later.

Furthermore, putting aside for the moment the distinctions between revalidation and revocation, the basic question raised under these circumstances is whether Medicare should continue to permit a supplier who has been convicted of a felony of the type at issue here to remain in the program and be eligible to receive Medicare funds. Despite Dr. Edwards's apparent belief and Petitioner's repeated arguments to the contrary in service of Dr. Edwards's preclusion theory (*see, e.g.*, NA at 2), in revalidating billing privileges in 2008 and 2013, CMS did not actually make an affirmative determination in 2008 or 2013 on whether the 2007 felony conviction is detrimental to the best interests of

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[13] Petitioner cites *Ronald Paul Belin, DPM*, DAB No. 2629 (2015) as authority for its assertion that the Board may "use" res judicata here. P. Br. at 7. *Belin* involved the ALJ's *dismissal of a request for hearing* under the procedural regulations in 42 C.F.R. Part 498, which includes a regulation, 42 C.F.R. § 498.70(a), expressly permitting an ALJ to dismiss based on res judicata. Petitioner's reliance on *Belin* here is misplaced. In any event, as we explain in the text, CMS was not precluded from proceeding with revocation.

the Medicare program and its beneficiaries or is a qualifying offense for purposes of revocation under section 424.535(a)(3). Based on the record before us, that determination was not made until 2016. And the decision to revoke based on that determination was lawful.[14]

Petitioner's arguments do, however, raise two issues – the *timing* of revocation once CMS or its contractor determines that there is a basis to revoke; and CMS's authority to proceed with revocation without regard to any prior action or, more to the point here, *inaction* on enrollment status – the Board has previously addressed. The Board stated:

> [T]he Medicare statute and regulations do not require CMS to take action within a specified time frame after discovering information about a Medicare enrollee's conviction. CMS may revoke at any time based on a conviction if the regulatory elements in section 424.535(a)(3) are satisfied. The only legally mandated time limit is the requirement in section 424.535(a)(3) that *the conviction* occur within 10 years preceding enrollment or revalidation of enrollment. Also absent from the statute and regulations is any limitation on CMS's authority to issue a revocation based on prior action or inaction by the Medicare program with respect to the supplier's enrollment status. *Cf. Central Kansas Cancer Institute*, DAB No. 2749, at 10 (2016) (finding that section 424.535(a) authorized CMS to exercise its revocation authority under section 424.535(a)(3) "regardless of any prior decision by itself or its contractor not to exercise it")[, *appeal dismissed*, No. 2:17-cv-02012 (D. Kan. June 2, 2017)].

Horace Bledsoe, M.D. & Bledsoe Family Med., DAB No. 2753, at 9 (2016)[15]; *see also Donohue*, DAB No. 2888, at 9 (quoting language from *Bledsoe*). Accordingly, CMS's or its contractor's inaction before 2016 in not revoking Petitioner's enrollment did not preclude CMS or its contractor from proceeding with revocation in 2016, within 10 years after the qualifying 2007 felony conviction.

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[14] We note, moreover, that Petitioner has not produced any evidence that, in revalidating its enrollment before the 2016 revocation action, CMS or its contractor affirmatively determined on revalidation that the 2007 felony conviction would *not* pose any impediment to Petitioner's continuing to retain billing privileges.

[15] On related points, the Board has also rejected the argument that laches and equitable estoppel should apply to bar CMS from revoking enrollment in 2016 under section 424.535(a)(3) based on a 2012 felony conviction for attempted tax evasion and making fraudulent and false statements in a tax return, which petitioner reported to a CMS contractor in 2012, and upheld the ALJ's decision affirming revocation effective the date of the conviction. *Donna Maneice, M.D.*, DAB No. 2826 (2017), *recon. denied*, DAB Ruling 2018-1 (April 3, 2018). The Board also has stated that the regulations "contain no limitations as to the timing of a revocation pursuant to [42 C.F.R. §§] 424.535(a)(5) or 424.535(a)(9)." *Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 19 (2018).

3. The effective date of revocation is February 6, 2007, the date of the felony conviction.

Petitioner takes exception to the ALJ's determination that the effective date of revocation is February 6, 2007, the date of the felony conviction. According to Petitioner, the ALJ erred in "overturn[ing] the 2008 decision based upon the same facts and same law considered in 2008 and, therefore, [the ALJ's determination on the effective date of revocation] violates *res judicata*." P. Br. at 14-15. Petitioner also asserts that applying the effective date regulation, 42 C.F.R. § 424.535(g), which went into effect on January 1, 2009, is impermissibly retroactive, and that the adverse financial consequences Petitioner expects to incur as a result amount to punishment for the conviction. NA at 3, 7; P. Br. at 10-12.

An effective date of revocation can only be determined once a determination to revoke is made. As we have addressed above, CMS did not revoke Petitioner's billing privileges until 2016. CMS had authority revoke in 2016, which was within 10 years from the date of the qualifying felony conviction. *See* Act § 1842(h)(8); 42 C.F.R. § 424.535(a)(3). No determination on the effective date of revocation was made earlier because, as it is not disputed, the 2008 and 2013 actions were determinations permitting Petitioner to retain billing privileges, not revoking them based on a qualifying felony conviction that CMS determined poses a risk of harm to the program.

The ALJ did not err in applying 42 C.F.R. § 424.535(g) that was in effect at the time of revocation, and which provides in relevant part that the effective date of revocation based on a felony conviction is the date of the conviction. ALJ Decision at 7-9; 73 Fed. Reg. at 69,940-41. It is worth noting that, in the preamble to the final rule revising the effective date regulation to provide that the effective date of revocation based on a felony conviction is the date of the conviction, CMS explained that the revision was made to "ensure that Medicare is not making or continuing to make payments to providers and suppliers who are no longer eligible to receive payments." 73 Fed. Reg. at 69,865; *see also id.* at 69,866 (similar language).[16]

The Board applies the effective date regulation in place at the time of revocation. *See Norman Johnson, M.D.*, DAB No. 2779 (2017) (upholding a 2015 revocation based on a November 3, 2008 no-contest plea to felony failure to file income tax returns and reversing an ALJ's failure to apply section 424.535(g) in effect at the time of revocation when determining the effective date of revocation, November 3, 2008); *Mark A. Kabat, D.O.*, DAB No. 2875, at 10-11 (2018) (citing *Johnson* and stating that "ALJs and the

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[16] Similarly, the effective date of revocation based on federal exclusion or debarment, license suspension or revocation, or non-operational status of the practice location is the date of the federal exclusion or debarment, the date of the license suspension or revocation, or the date when the practice location is determined not to be operational. 42 C.F.R. § 424.535(g); 73 Fed. Reg. at 69,865.

Board apply the effective date regulation in effect at the time of the initial determination to revoke," which was in 2015, adhering to "the basic principle that the law in effect at the time a decision is rendered is to be applied"; and holding that the effective date of revocation is October 24, 2007, the date of the felony conviction), *appeal dismissed per stipulation*, No. 1:18:cv-01969-WYD (D. Colo. Nov. 29, 2018); *Russell L. Reitz, M.D.*, DAB No. 2748, at 8 (2016) (rejecting the argument that a 2016 revocation for failure to report a felony conviction is retroactive to the date of the felony conviction in April 2009, and stating that petitioner "is free to make his ultra vires argument to a court, but [the Board] may not invalidate or refuse to apply a regulation"), *appeal dismissed sub nom. Cent. Kan. Cancer Inst., P.A. v. Dep't of Health & Human Servs.*, No. 2:17-cv-02012 (D. Kan. June 2, 2017); and *Cent. Kan. Cancer Inst.*, DAB No. 2749, at 10 (similar reasoning). Applying 42 C.F.R. § 424.535(g) here, as we must, because "we may not invalidate or refuse to apply a regulation" (*Reitz* at 8; *see also Cent. Kan. Cancer Inst.*, DAB No. 2749, at 10), we, like the ALJ, conclude that the effective date of revocation is February 6, 2007.

The Board has also considered and rejected the argument that CMS's exercise of its revocation authority as conferred to CMS by the regulations amounts to "punishment" of an enrolled provider or supplier. "Revocation is a remedial measure whose purpose is not to punish the program participant for past misconduct but to protect the program and its beneficiaries from fraud, abuse, and other harm that might arise in the future." *Robert F. Tzeng, M.D.*, DAB No. 2169, at 14 (2008). Thus, as the Board also stated in *Tzeng*, while the decision to revoke Dr. Tzeng's billing privileges was a consequence of his felony conviction, CMS did not exact punishment in the form of revocation for the crime; rather, CMS acted to protect the Medicare program and its beneficiaries from a supplier that CMS determined posed a risk to the program. *Id.*

4. *Petitioner's remaining arguments have no merit; or, they raise issues the Board has no authority to address or concern relief the Board has no authority to grant.*

Petitioner takes issue with the following language in footnote 13 in page 9 of the ALJ's decision: "[I]n this forum, I am not empowered to rectify the situation in Petitioner's favor." P. Br. at 15. Petitioner asserts that the ALJ's statement is an "incorrect legal conclusion and equity is not required to rectify the case" because the Board is "entitled" to determine that res judicata "legally prohibits" revocation after earlier determinations permitting Petitioner to remain enrolled and remedy the ALJ's error by reversing the ALJ Decision and restoring Petitioner's billing privileges. *Id.* at 15-16.

We have already rejected the arguments asserting the applicability of res judicata. To the extent Petitioner's statements may be understood as an argument that equity concerns weigh in its favor, we restate what the ALJ correctly determined: if CMS has established a basis for revocation as it has here under 42 C.F.R. § 424.535(a)(3), then the ALJ must

uphold the revocation. ALJ Decision at 6-7. Just as the ALJ was bound to uphold the revocation under these circumstances and could not grant equitable relief, neither can the Board. *See, e.g., US Ultrasound,* DAB No. 2302, at 8 (cited in ALJ Decision at 9 n.13); *Cent. Kan. Cancer Inst.*, DAB No. 2749, at 10 ("The Board . . . is bound by the regulations, and may not choose to overturn the agency's lawful use of its regulatory authority based on principles of equity.") (and cited cases); *Orthopaedic Surgery Assocs.*, DAB No. 2594, at 7 (2014) (Board "lacks the authority to restore . . . billing privileges on equitable grounds"); *Neb Grp. of Ariz., LLC*, DAB No. 2573, at 6 (2014) (Board "has consistently held that it (and the ALJs) lack the authority to restore a supplier's billing privileges on equitable grounds"); *supra* note 15.

Petitioner also raises constitutional challenges throughout its briefs. Petitioner asserts in particular that the 2016 revocation that it says is a "reversal" of the 2008 and 2013 determinations permitting Petitioner to remain enrolled violates "the due process protections for Dr. Edwards under the United States Constitution for vagueness, uncertainty, and the failure to follow required procedure . . . ." NA at 5; *id.* at 6, 7, 9 (similar arguments; also asserting a violation of the Fourteenth Amendment to the U.S. Constitution). Petitioner also appears to be asserting that it has a protected property interest in maintaining its billing privileges. P. Reply Br. at 8 ("The ALJ Decision deprives Petitioners of property interest they have earned in a contractual agreement with the Government and deprives the Petitioners of that property without due process.").

The Board and the ALJ must follow the applicable enrollment law and regulations and have no authority to refuse to apply those authorities based on constitutional challenges. *See Donohue*, DAB No. 2888, at 8-9 (the Board cannot overturn a lawful revocation on constitutional grounds); *Louis J. Gaefke, D.P.M.*, DAB No. 2554, at 11 n.10 (2013) ("Nothing in the regulations authorizes the ALJ to reverse a revocation to sanction CMS for alleged due process violations where CMS had a basis for the revocation under section 424.535(a)."), *appeal dismissed*, *Gaefke v. Sebelius*, No. 2:14-cv-02085 (D. Kan. Aug. 8, 2014); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (ALJ was bound to apply the revocation regulations and may not invalidate the law or regulations on constitutional grounds); *Bledsoe*, DAB No. 2753, at 10-11 (declining to rule on equitable estoppel claim, as well as abuse-of-discretion and constitutional claims, in upholding revocation under section 424.535(a)(3)); *see also Mission Home Health, et al.*, DAB No. 2310, at 8-9 (2011) (alleged violation of constitutional rights "provides no basis to reverse a denial of enrollment that is fully supported by the applicable laws and regulations"), *appeal dismissed sub nom. Garcia v. Sebelius*, No. 5:10-cv-00456 (W.D. Tex. Apr. 6, 2011).

The Board has also rejected the argument that a supplier has a vested right in remaining eligible for participation in Medicare following a criminal conviction, noting that the "[c]ourts . . . have almost without exception concluded that a physician or other health care practitioner or entity does not have a protected interest in continuing eligibility for Medicare participation or reimbursement." *Tzeng*, DAB No. 2169, at 13-14 n.16 (citing cases). The Board has addressed a similar argument – that revocation was an unconstitutional abridgment of property rights – more recently, stating that the "ALJs and the Board are bound by the regulations and may not declare them unconstitutional or decline to follow them on that basis." *Mohammad Nawaz, M.D., & Mohammad Zaim, M.D., PA*, DAB No. 2687, at 15 (2016) and *Zille Shah, M.D., & Zille Huma Zaim, M.D., PA*, DAB No. 2688, at 16 (2016). The U.S. District Court for the Eastern District of Texas affirmed the Board's decision. *Mohammad Nawaz, M.D. & Mohammad Zaim, M.D., P.A. v. Price* and *Zille Shah, M.D. & Zille Huma Zaim, M.D., P.A. v. Price*, Nos. 4:16cv386 and 4:16cv387, 2017 WL 2798230 (E.D. Tex. June 28, 2017). On further appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed, stating that the court joins its "four other sister circuits that have determined participation in the federal Medicare reimbursement program is not a property interest." *Shah v. Azar*, 920 F.3d 987, at 998 (5th Cir. 2019).

Conclusion

The Board affirms the ALJ Decision.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member