Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Mark A. Kabat, D.O.
Docket No. A-18-16
Decision No. 2875
June 4, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Mark A. Kabat, D.O. appeals the October 5, 2017 decision of an administrative law judge (ALJ), *Mark A. Kabat, D.O.*, DAB CR4949 (ALJ Decision). The ALJ sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) based on a qualifying felony conviction. The ALJ also determined that the effective date of Petitioner's revocation is October 9, 2016, 30 days after the date of the CMS contractor's reopened and revised initial determination to revoke, rather than October 24, 2007, the date of Petitioner's felony conviction.

We uphold the ALJ's determination that Petitioner's Medicare enrollment and billing privileges were lawfully revoked, but reverse the ALJ's determination on the effective date of revocation and conclude that the effective date of revocation is October 24, 2007. We also address Petitioner's arguments concerning reopening and that CMS unlawfully imposed a re-enrollment bar longer than three years.

Legal Background

To receive payment under Medicare, a "supplier" of Medicare services must be enrolled in the program. 42 C.F.R. § 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.

[1] The term "supplier" refers to "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

CMS may revoke a supplier's Medicare billing privileges for any of the reasons stated in 42 C.F.R. § 424.535(a). Relevant here, subsection 424.535(a)(3)[2] authorizes CMS to revoke a supplier's billing privileges and participation agreement if the supplier –

> was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2)[3] of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

Id. § 424.535(a)(3)(i). Felony offenses detrimental to the best interests of the Medicare program and its beneficiaries "include, but are not limited in scope or severity to . . . [f]elony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions." *Id.* § 424.535(a)(3)(i), (ii)(A).

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). The re-enrollment bar lasts between one year and three 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 to the supplier, unless, as relevant here, the revocation is based on a felony conviction, in which case revocation takes effect on the date of the conviction. Section 424.535(g), which went into effect on January 1, 2009 (73 Fed. Reg. 69,726, 69,940 (Nov. 19, 2008)), still 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.

---

[2] We apply 42 C.F.R. § 424.535(a)(3) as revised effective February 3, 2015 (79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014)) and in effect when Petitioner's enrollment and billing privileges were revoked. *See, e.g., John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016); *John M. Shimko, D.P.M.*, DAB No. 2689, at 1 n.1 (2016) (noting the revision of section 424.535 and stating that the version of the regulations in effect on the date of the initial determination to revoke applies).

[3] An individual is "convicted" when, as relevant here, "[a] Federal, State or local court has accepted a plea of guilty or *nolo contendere*" by that individual. 42 C.F.R. § 1001.2 (defining "Convicted").

Background[4]

On October 24, 2007, before the Circuit Court of the Twelth Judicial Circuit for Sarasota County, Florida, Petitioner pleaded *nolo contendere* to a third-degree felony offense of obscene communication and the use of computer services to seduce, in violation of Florida Statute § 847.0135(3). CMS Ex. 1, at 177.[5] The statute states:

> (3) Certain Uses of Computer Services or Devices Prohibited.
> - Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
> (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
>
> ***
>
> commits a felony of the third degree . . . .

On October 24, 2007, the court accepted Petitioner's plea, entered a judgment of conviction, and sentenced Petitioner to 60 days in jail, followed by a three-year probation. CMS Ex. 1, at 179.

By initial determination dated December 3, 2015, Novitas Solutions, Inc. (Novitas), a CMS Medicare Administrative Contractor, notified Petitioner that his Medicare enrollment and billing privileges were revoked, effective October 24, 2007, under 42 C.F.R. § 424.535(a)(3) and (a)(9),[6] and that he would be barred from re-enrolling in Medicare for three years pursuant to 42 C.F.R. § 424.535(c), beginning 30 days from the postmark date of the notice of revocation. CMS Ex. 1, at 48-49. Petitioner, by his attorneys, requested reconsideration of the initial determination. CMS Ex. 1, at 50-56. By reconsidered determination dated June 2, 2016, Novitas informed Petitioner that his enrollment and billing privileges were revoked based on his October 24, 2007 felony

---

[4] The background information is drawn from the ALJ Decision and the record of the ALJ proceedings. The facts as set forth herein are undisputed unless otherwise indicated.

[5] CMS submitted all of its evidence together as one exhibit, marked CMS Exhibit 1, pages 1 through 182. Included within the exhibit are multiple copies of certain items. We need not cite to all of the copies.

[6] Under 42 C.F.R. § 424.535(a)(9), CMS may revoke a supplier's enrollment and billing privileges for failing to comply with the reporting requirements of 42 C.F.R. § 424.516(d)(1)(ii), which requires the supplier to report "[a]ny adverse legal action" to the Medicare contractor "[w]ithin 30 days." A "final adverse action" is defined to include a "conviction of a Federal or State felony offense . . . within the last 10 years preceding enrollment, revalidation, or re-enrollment." 42 C.F.R. § 424.502.

conviction pursuant to 42 C.F.R. § 424.535(a)(3), but that it would "remove[]" from Petitioner's "Medicare enrollment file" the previously cited revocation basis of 42 C.F.R. § 424.535(a)(9), acknowledging that Petitioner had reported his conviction to TrailBlazer, the prior CMS contractor. CMS Ex. 1, at 21-25.

On July 29, 2016, Petitioner filed a request for hearing before an ALJ. The Civil Remedies Division of the Departmental Appeals Board docketed the appeal under number C-16-780. On September 6, 2016, CMS filed a motion asking the ALJ to whom the appeal had been assigned to remand the case to CMS pursuant to 42 C.F.R. § 498.78 and stay the ALJ proceedings because it intended to "reopen and revise" its December 3, 2015 initial determination pursuant to 42 C.F.R. § 498.30 and issue a revised initial determination that would "supersede" the initial determination and render "moot" the June 2, 2016 reconsidered determination. In a September 8, 2016 supplemental filing, CMS informed the ALJ that Petitioner had indicated his intention to file a written opposition to CMS's motion.

On September 9, 2016, Novitas issued a revised initial determination, again informing Petitioner that his enrollment and billing privileges were revoked under 42 C.F.R. § 424.535(a)(3) based on his felony conviction, effective October 24, 2007. CMS Ex. 1, at 181 (citing the reopening regulations at 42 C.F.R. §§ 498.30 and 498.32). Novitas also informed Petitioner that the three-year re-enrollment bar would begin 30 days after the postmark date of the revised initial determination. *Id.* at 182.

On September 15, 2016, CMS moved to withdraw its motion for remand and stay of ALJ proceedings, but also moved to dismiss the request for hearing, arguing that the "effect of its revised initial determination is that the December 3, 2015 initial determination and the subsequent June 2, 2016, determination on reconsideration, which Petitioner's current appeal is predicated on, is now moot." In its motion to dismiss, CMS represented to the ALJ that Petitioner does not oppose the motion and does not intend to file a written opposition. By order dated September 15, 2016, the ALJ dismissed Petitioner's request for hearing docketed under number C-16-780, pursuant to 42 C.F.R. § 498.70(b).

Petitioner requested reconsideration of the September 9, 2016 revised initial determination. CMS Ex. 1, at 7-19. By reconsidered determination dated February 3, 2017, CMS's Center for Program Integrity, Provider Enrollment & Oversight Group, informed Petitioner that his enrollment and billing privileges were revoked, effective October 24, 2007, pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 1, at 1-6.

On March 16, 2017, Petitioner requested a hearing before an ALJ on the February 3, 2017 reconsidered determination. The Civil Remedies Division docketed the appeal under number C-17-453 and assigned the case to a different ALJ, who issued a decision upholding the revocation. The ALJ also determined that the effective date of revocation is October 9, 2016, 30 days after the date of the revised initial determination, rather than

October 24, 2007, the date of conviction. The ALJ also addressed various arguments Petitioner made concerning the reopening and revision, and the re-enrollment bar.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009) (citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004)). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. *1866ICPayday.com* at 2 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). The 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 standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. Also, applying the relevant review standards, the Board "[m]ay modify, affirm or reverse the ALJ's decision." 42 C.F.R. § 498.88(f)(1)(iii); *see also Spring Meadows Health Care Ctr.*, DAB No. 1966, at 15 n.6 (2005) (The Board may modify an ALJ decision.).

Discussion

I. The ALJ correctly determined that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) based on a qualifying felony conviction established by undisputed facts.

It is undisputed that, on October 24, 2007, Petitioner pleaded no contest to a third-degree felony offense of obscene communication and the use of computer services to seduce in violation of Florida law, and that the state court accepted that plea, entering a judgment of conviction that day. ALJ Decision at 7 & 7 n.3 (quoting Fla. Stat. § 847.0135(3) (2007)) (citing CMS Ex. 1, at 177-80). The ALJ stated that, of the four "types of presumptively detrimental offenses listed in 42 C.F.R. § 424.535(a)(3)(ii)," "only 42 C.F.R. § 424.535(a)(3)(ii)(A)" (i.e., felony crimes against persons) "is potentially applicable." *Id.* at 9. The ALJ then stated that Petitioner's felony crime was "clearly a crime against a person, albeit an unspecified person." *Id.* at 10. The ALJ observed, "Although not murder or rape, the offense was clearly similar to an assault, more specifically, sexual assault or similar conduct that ended without consummation but rather amounted to an attempt to engage in unlawful sexual conduct with a child or one believed to be a child." *Id.* Petitioner, the ALJ also said, did not dispute that the conviction "occurred within the ten years preceding" the 2015 initial determination or the 2016 revised initial determination. *Id.* The ALJ concluded that the "elements" of 42 C.F.R. § 424.535(a)(3) were "satisfied" and that CMS, in exercising its discretion,

lawfully revoked Petitioner's enrollment and billing privileges. *Id.* (citing *Dinesh Patel, M.D.*, DAB No. 2551, at 10 (2013) and other cases).

Quoting a part of the ALJ's analysis in which the ALJ stated that Petitioner's crime was "clearly a crime against a person" and "clearly similar to an assault" (ALJ Decision at 10), Petitioner asserts that his conduct and plea involved only conversations with an undercover police officer posing as a minor, "but no minor ever existed," and, "[w]ithout a minor or any other potential victim" who could have had "a reasonable apprehension of imminent harm or offensive contact," there is no assault or attempted assault and that his conduct is not similar to assault. Petitioner's brief in support of request for review (RR) at 13 (quoting *Black's Law Dictionary* definition of "assault") (internal quotation marks omitted), 14.[7]

Since the undisputed facts establish that Petitioner was convicted of a felony offense within the meaning of the term "convicted" in 42 C.F.R. § 1001.2, within ten years preceding the revocation, the remaining question is whether Petitioner's felony offense is one that is "detrimental to the best interests of the Medicare program and its beneficiaries" which, for purposes of revocation under 42 C.F.R. § 424.535(a)(3), "*include*, but are not limited in scope or severity to . . . [f]elony crimes against persons, *such as* murder, rape, assault, and other similar crimes for which the individual was convicted . . . ." 42 C.F.R. § 424.535(a)(3)(i), (ii)(A) (emphases added).

Petitioner takes issue with the ALJ's likening his felony crime to assault. The core, fundamental question here, however, is whether Petitioner's crime is a crime against a person.

> The words 'include' or 'including' are not terms of limitation or exhaustion. When 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. . . . Hence, section 424.535(a)(3)(i) is reasonably read as setting out a non-exhaustive list of crimes that may constitute a basis for revocation.

[7] Elsewhere in his briefs, Petitioner refers specifically to that part of the ALJ's analysis in which the ALJ stated that, of the categories of offenses in 42 C.F.R. § 424.535(a)(3)(ii), the category in 42 C.F.R. § 424.535(a)(3)(ii)(A) is "potentially applicable" (ALJ Decision at 9). RR at 13; P. Reply to the Board at 5. To the extent Petitioner is implying that the ALJ did not specifically find that his felony crime is a crime against a person, we disagree. The ALJ's language ("potentially applicable"), read in context, indicates that the ALJ did so find. In page 10 of his decision, the ALJ stated that Petitioner's crime is "clearly a crime against a person, albeit an unspecified person" and then compared the crime to assault, which the regulation identifies as an example of crimes against persons.

Fady Fayad, M.D., DAB No. 2266, at 8 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).[8] Likewise, the words "such as" within 42 C.F.R. § 424.535(a)(3)(ii)(A) that precede the list of crimes that includes assault signify that assault is but one example of crimes against persons. Accordingly, whether or not Petitioner's felony crime is assault, or is similar to assault or even attempted assault (RR at 13-14), is, ultimately, immaterial here. CMS may revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) if he was convicted of a felony crime against a person. He was.

Petitioner's crime, put simply, was soliciting, online, a person Petitioner believed was a minor. The plain language of Florida Statute section 847.0135(3) contemplates that, whether the perpetrator is seducing, soliciting, luring, or enticing, or attempting to do any of these things, the target of that action is a person who is a child or who the perpetrator believes is a child. In short, the crime is, by its nature, one in which the victim or intended victim is a person. For this reason it is irrelevant that Petitioner communicated online with an undercover police officer posing as a minor rather than someone who actually is a minor (RR at 13, stating that "no minor ever existed"). He admits that he communicated with a person, and he pleaded no contest to a charge of having done so to seduce believing that that person was a minor. RR at 13; CMS Ex. 1, at 167-69, 177.

Moreover, CMS and its contractor determined that Petitioner's crime is detrimental to the best interests of the Medicare program and its beneficiaries – something the Board has held that CMS has authority to do. *Fayad* at 8 ("[S]ection 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."). In its September 9, 2016 revised initial determination, Novitas wrote:

> Between February 15, 2006 and September 18, 2006, you unlawfully and knowingly utilized a computer on-line service or local bulletin board to seduce, solicit, entice or attempt to seduce, solicit, or entice a child or another person believed to be a child, to engage in sexual activity and/or lewd or lascivious molestation, contrary to Florida Statu[t]es §§ 847.0135(9), 800.09(1)(a), 800.04(4) and 800.04(5).[9] This type of felony is detrimental to the best interests of the Medicare program and its

[8] Subsection 424.535(a)(3) was revised in 2014, effective February 3, 2015, after the Board issued its decision in *Fayad*. 79 Fed. Reg. at 72,532. The regulatory revision does not affect our analysis on this point.

[9] Petitioner complains about erroneous citations to a statute section that did not and does not exist (Fla. Stat § 847.0135(9)) and to statute sections he did not plead to and was not convicted of violating. Request for hearing (RFH) at 2; P. Br. at 17; RR at 6, 7; P. Reply to the Board at 6. But the undisputed evidence establishes a felony conviction for a violation of Florida Statute section 847.0135(3). Petitioner admits that he was so convicted and acknowledges that revocation may be based on that conviction. RR at 2; P. Reply to the Board at 5.

> beneficiaries, as it demonstrates your moral turpitude, lack of good judgment, and disregard for the welfare of others.

CMS Ex. 1, at 181. The February 3, 2017 reconsidered determination, issued by CMS, echoed Novitas's rationale, stating as follows:

> The act of enticing or attempting to entice a child or an individual believed to be a child places the Medicare program and its beneficiaries at risk, as the safety and security of Medicare beneficiaries relies, in part, on whether or not suppliers may safely be in close proximity with Medicare beneficiaries, with little to no supervision. [Petitioner's] participation as a supplier is detrimental to the Medicare program and its beneficiaries, as his behavior leading to the State felony conviction calls into question his good judgment and moral turpitude.

Id. at 4. CMS has thus determined that Petitioner's crime raises concerns about his trustworthiness and judgment that pose a risk to the Medicare program and its beneficiaries.

Petitioner himself quoted portions of the Board's decision in *Fayad*, indicating his awareness of the Board's holding that CMS has discretionary authority to decide whether a particular crime is detrimental to the best interests of Medicare and its beneficiaries.[10] RR at 9, 12. He also acknowledges that CMS argued below that it had made such a case-specific determination here. P. Reply to the Board at 2. However, he asserts that (1) CMS has not shown that its case-specific determination "was not improperly influenced by" the erroneous citations to statute provisions under which he was not charged or convicted; (2) the ALJ "clearly" found CMS's argument that it had made a case-specific determination unpersuasive and instead "adopt[ed]" a "'clearly a crime against a person'/'clearly similar to an assault' theory"; and (3) since the ALJ "discarded" CMS's case-specific determination "theory" on de novo review, but CMS failed to "appeal the ALJ's dismissal of that same theory" to the Board, CMS effectively "waived" its right to now reassert its case-specific determination as a basis for revocation. *Id.* at 2, 6-7.

[10] Petitioner nevertheless relies on language in *Barry Ray, M.D.*, DAB CR3655, at 11-13 (2015), in which the ALJ discussed three levels of deference due, depending on whether the crime that is the basis for revocation is expressly identified in the regulation (highest deference); the crime is "similar to" a crime identified in the regulation (mid-level deference); or CMS made a case-specific determination that a crime is a qualifying crime (lowest deference). RR at 10-11. ALJ decisions are not binding or precedential. *Hartford HealthCare at Home, Inc.*, DAB No. 2787, at 11 (2017) (and cases cited therein). Moreover, to the extent Petitioner suggests that CMS's case-specific determination on his crime is somehow less authoritative a basis for revocation, we reject that suggestion. The issue is whether CMS has established a legal basis for revocation under 42 C.F.R. § 424.535(a)(3). It has. Not only is Petitioner's crime a crime against a person, CMS, in its exercise of its discretion, determined that that crime is detrimental to the best interests of the Medicare program and its beneficiaries.

Petitioner attempts to capitalize on Novitas's erroneous reference to Florida Statute section 847.0135(9) rather than section 847.0135(3). CMS Ex. 1, at 181. However, he disregards the language within the same paragraph in Novitas's determination discussing Petitioner's "unlawful[] and knowing[]" use of "a computer on-line service or local bulletin board to seduce, solicit, entice or attempt to seduce, solicit, or entice a child or another person believed to be a child, to engage in sexual activity and/or lewd or lascivious molestation," *id.*, which is quite similar to the language in section 847.0135(3). In any event, the citations to various statute sections, even if not fully accurate or not at issue here, are inconsequential since he was convicted of a felony for violating section 847.0135(3). That is the basis for revocation.

Moreover, that the ALJ did not expressly address the case-specific determination in his decision does not necessarily mean that he found CMS's argument concerning that determination unpersuasive, or that the ALJ affirmatively "discarded" or rejected that argument. The absence of mention of something does not necessarily mean a rejection of, or disagreement with, it. In any case, we have already explained our rationale for rejecting Petitioner's arguments concerning the so-called "theory" and determined that his felony crime is a crime against a person (which, as noted earlier, the ALJ also found) that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries. Petitioner also appears to disregard that in its response brief to the Board (pages 4-5, 9, 10), CMS quoted relevant language from both the revised initial and reconsidered determinations and stated that it had made an "individualized determination" that Petitioner's crime is a qualifying crime, thus arguing that revocation here may be grounded in its case-specific determination as well as the "[f]elony crimes against persons" language of section 424.535(a)(3)(ii)(A).

In sum, we conclude, as the ALJ did, that there is no genuine dispute of material fact on whether CMS lawfully revoked Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3). CMS has established a legal basis for revocation. Therefore, we, like the ALJ, must uphold the revocation. *See, e.g., Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008).

II. The ALJ erred in changing the effective date of revocation; the effective date of revocation is October 24, 2007, the date of Petitioner's felony conviction.

In its 2015 initial determination and the 2016 revised initial determination, Novitas, acting for CMS, assigned October 24, 2007, the date of Petitioner's felony conviction, as the effective date of revocation. CMS Ex. 1, at 48, 181. That action comports with 42 C.F.R. § 424.535(g), which states that the effective date of revocation based on a felony conviction is the date of conviction. Section 424.535(g) took effect on January 1, 2009. 73 Fed. Reg. 69,726, 69,940 (Nov. 19, 2008). It was in effect at the time of the 2016 revised initial determination, as it was in 2015, when Novitas issued the initial determination later rendered moot upon reopening.

Petitioner did not challenge the effective date in his request for hearing. However, in his brief in response to CMS's motion for summary judgment, he asserted (albeit briefly) that CMS should not have applied 42 C.F.R. § 424.535(g) to determine the effective date since that regulation was not in effect in 2007. P. Response at 19. Addressing that assertion, the ALJ concluded that "Novitas and CMS incorrectly determined the effective date of revocation." ALJ Decision at 13. The ALJ reasoned that Novitas and CMS should have determined the effective date by applying 42 C.F.R. § 424.535(f), which was in effect at the time of Petitioner's conviction and provided that "[r]evocation becomes effective within 30 days of the initial revocation notification." ALJ Decision at 13-14 (quoting 42 C.F.R. § 424.535(f) (2007)) (internal quotation marks omitted). Applying section 424.535(f), the ALJ changed the effective date of Petitioner's revocation to October 9, 2016, which is 30 days after the September 9, 2016 reopened and revised initial determination. *Id.* at 15. The ALJ did so despite quoting the Board's holding in *Norman Johnson, M.D.*, DAB No. 2779 (2017) that the effective date in the case of a revocation based on a felony conviction "is controlled by the version of section 424.535(g) in effect on the date [the CMS contractor] issued the initial revocation determination, not by the version in effect on the date of his conviction." *Id.* at 14 (citing DAB No. 2779, at 19). The ALJ appears to have concluded that *Johnson* did not preclude his changing the effective date because the Board had not discussed in *Johnson* what he characterized as "the limit Congress imposed upon retroactive application of the Secretary's regulation in section 1871(e)(1)(A) of the Act, a statute with which [he was] bound to comply." *Id.* at 14. The ALJ said, "Pursuant to [section 1871(e)(1)(A)], the regulations of the Secretary are not applied retroactively, unless the Secretary determines that: '(i) such retroactive application is necessary to comply with statutory requirements; or (ii) the failure to apply the change retroactively would be contrary to the public interest.'" *Id*. (quoting Act § 1871(e)(1)(A)). The ALJ stated that CMS has not shown that the Secretary has so determined with respect to section 424.535(g). *Id.*

The ALJ's rationale on the effective date question suggests that the ALJ disagrees with applying section 424.535(g) to determine the effective date of a revocation based on a conviction where, as here, the conviction on which the revocation is based occurred before the effective date of section 424.535(g), rather than the lawfulness of the effective date regulation per se. In *Johnson*, the Board held that ALJs and the Board apply the effective date regulation in effect at the time of the initial determination to revoke. *See Johnson* at 19 and cases cited therein. Our holding in *Johnson* is well-settled, and that holding is consistent with the basic principle that the law in effect at the time a decision is rendered is to be applied. *See id.* Moreover, while the ALJ stated that section 1871(e)(1)(A) imposed a "limit" on the "retroactive application of the Secretary's regulation" in section 424.535(g), ALJ Decision at 14, the ALJ's analysis does not quote or otherwise address that part of section 1871(e)(1)(A) which refers specifically to "items

and services furnished before the effective date of the change"[11] or adequately explain why, in his view, section 1871(e)(1)(A) would even apply to CMS's authority to regulate the enrollment of providers and suppliers in the Medicare program under the 42 C.F.R. Part 424, subpart P regulations or, in particular, to the regulation governing the effective date of provider/supplier revocations. We also note that although the ALJ quotes the statutory exceptions to section 1871(e)(1)(A) – including one addressing the public interest – he does not address whether either of those exceptions might apply in the context of provider and supplier enrollment regulations, which are designed to protect the Medicare program and its beneficiaries.

We thus apply section 424.535(g) here as we did in *Johnson*. "[T]he ALJ and the Board are bound by the Secretary's regulations which expressly provide that when a revocation is based on a felony conviction, the revocation takes effect on the date of the conviction" in accordance with 42 C.F.R. § 424.535(g). *Russell L. Reitz, M.D.*, DAB No. 2748, at 8 (2016) and *Central Kansas Cancer Institute*, DAB No. 2749, at 10 (2016). Applying section 424.535(g), as we must, because "we may not invalidate or refuse to apply a regulation" (*Reitz* at 8; *Central Kansas Cancer Institute* at 10), we reverse the ALJ's determination on the effective date. The effective date of revocation is October 24, 2007.[12]

III. Petitioner's arguments concerning insufficient notice of reopening of the initial determination allegedly in violation of 42 C.F.R. § 498.32(a)(2) have no merit.

Before the ALJ, Petitioner asserted that Novitas, acting for CMS, failed to give him notice of the basis or reason for reopening and revising the December 3, 2015 initial determination, in violation of 42 C.F.R. § 498.32(a)(2). P. Br. at 19-21. This regulation, Petitioner asserted, requires that CMS or its contractor "not only show that it did something to revise the initial determination, but also that [it] must explain the basis or reason for the revision[,]" but the revised intial determination did not include this content, and "added no new information to the revision." *Id.* at 21 (Petitioner's emphases). Petitioner moreover complained that, on appeal, CMS did not explain "why" it reopened the initial determination. *Id.* at 20.

---

[11] Section 1871(e)(1)(A) states in its entirety:

> A substantive change in regulations, manual instructions, interpretive rules, statements of policy, or guidelines of general applicability under this title shall not be applied (by extrapolation or otherwise) retroactively to items and services furnished before the effective date of the change, unless the Secretary determines that –
> (i) such retroactive application is necessary to comply with statutory requirements; or
> (ii) failure to apply the change retroactively would be contrary to the public interest.

[12] We may consider whether the effective date was correctly assigned in accordance with the regulations based on the cited basis for revocation. *See Jason R. Bailey, M.D., P.A.*, DAB No. 2855, at 19 n.15 (2018) (and cases cited therein). We have done so here.

The ALJ noted that the 2015 initial determination and the 2016 reconsidered determination clearly informed Petitioner of the regulatory basis for revocation, though they did not specify the subsection or category of offenses in 42 C.F.R. § 424.535(a)(3)(ii) into which Petitioner's felony crime fit, and of his right to reconsideration review and ALJ review, respectively. Likewise, the ALJ said, Petitioner was informed of the basis for revocation in the September 9, 2016 revised initial determination and the February 3, 2017 reconsidered determination. The ALJ concluded that, despite Novitas' failure to specify which category of offenses Petitioner's crime fit and erroneous citations to state statute sections, there was no prejudice to Petitioner as he was informed of the legal basis for revocation and exercised his right to further review at each level of the process. ALJ Decision at 10-12. The ALJ further determined that the revised initial determination satisfied subsections 498.32(a)(1) and (a)(3) because it notified Petitioner of reopening and revision of the initial determination and his right to reconsideration review, but not subsection 498.32(a)(2) because it "d[id] not specifically state why reopening and revision were necessary." *Id*. at 12 (quoting 42 C.F.R. § 498.32(a)(2)) ("The notice of revised determination states the basis or reason for the revised determination."). The ALJ also stated, however, that Petitioner did not explain how Novitas' failure to state the reason for reopening and revision prejudiced him, "except to the extent the reopening and revision restarted the period of the bar to re-enrollment effectively extending it to nearly four years," and ultimately concluded that Novitas' failure to state why reopening and revision were necessary was "not grounds for relief." *Id.* at 13.

Before the Board, Petitioner reprises the arguments made below, asserting, in essence, that noncompliance with 42 C.F.R. § 498.32(a)(2) violated his due process rights because he was not given a specific explanation of the reason for reopening and revision. RR at 15. He argues that the ALJ erred to the extent he determined that the "noncompliant notice did not prejudice" him. *Id.* at 14, 15; P. Reply to the Board at 8-9.

We first observe that, before the Board, Petitioner does not dispute any part of the ALJ's rationale that he was afforded due process to which he was entitled under the 42 C.F.R. Part 498 regulations with respect to his challenge to the revocation. As the ALJ found, and we agree, Petitioner was informed that his enrollment and billing privileges were revoked based on his 2007 felony conviction under 42 C.F.R. § 424.535(a)(3), and of his right to seek reconsideration review of the initial determination and then ALJ review of a reconsidered determination, at initial revocation and on reopening. The essential due process inquiry here is whether Petitioner was given notice of the revocation and the basis for revocation, and of his right to be heard on appeal under the applicable regulations if he disputes the determination to revoke. *See Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 (1988) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them

the opportunity to present their objections." (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (internal quotation marks omitted)); *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 13-14 (2016) (rejecting the supplier's due process argument because he "ha[d] been afforded all of the hearing rights provided by the applicable regulations"). Petitioner, who has been represented by attorneys since the first (2015) notice of revocation, has taken full advantage of the opportunity to be heard, at every stage of review since 2015. We, like, the ALJ, see no infringement of Petitioner's due process rights that would preclude our upholding the revocation as lawful.

Petitioner is also mistaken that he was not actually informed of the reason or basis for reopening and revision as 42 C.F.R. § 498.32(a) requires. He was so informed. In its September 9, 2016 revised initial determination, Novitas reiterated what it had stated earlier – that Petitioner's enrollment and billing privileges were revoked under 42 C.F.R. § 424.535(a)(3) based on his 2007 felony conviction – but, in contrast to the content in the December 3, 2015 initial determination, Novitas added language not previously provided that expanded on the previously stated basis for the revocation by stating that Petitioner's felony crime was "detrimental to the best interests of the Medicare program and its beneficiaries" because "it demonstrates [Petitioner's] moral turpitude, lack of good judgment, and disregard for the welfare of others." CMS Ex. 1, at 181. Regardless of whether the reopening was necessary to state a lawful basis for the revocation (and we make no finding on that issue), it is evident that on reopening, Novitas did, in fact, revise the determination. We therefore reject the argument that the revised initial determination "did not revise anything" (RR at 15) or that, "[t]o this date . . . CMS has never once provided or even attempted to provide Petitioner with any basis or reason for the revised determination" let alone "what it believes that it even 'revised'" (P. Reply to the Board at 3).

To the extent Petitioner's complaints about the reopened and revised initial determination may be construed to mean that Petitioner is asserting that the reopening regulations require CMS or its contractor to specifically explain *why* it is reopening the prior determination, the reopening regulations do not require such an explanation. Rather, as applicable here, section 498.30 permits CMS to reopen "on its own initiative" any initial or reconsidered determination (subject to limits on reopening as stated in section 498.30 inapplicable here) within 12 months after the date of notice of the initial determination. Novitas, acting on CMS's behalf, reopened the December 3, 2015 initial determination on September 9, 2016, within a one-year period. Upon reopening, CMS must give the affected party notice of reopening and any revision, as well as notice of the basis or reason for the revised determination. 42 C.F.R. § 498.32(a)(1), (2). That notice was given. We therefore disagree with the ALJ to the extent he decided that CMS or Novitas must have explained specifically why it was reopening. ALJ Decision at 12 (stating that the revised initial determination did not comply with subsection 498.32(a)(2) because it

"d[id] not specifically state why reopening and revision were necessary").[13] In any case, even were we to assume that the 2016 revised initial determination was somehow defective (it was not), we discern no prejudice to Petitioner since he exercised his right to reconsideration of that revised initial determination as he had earlier on the 2015 initial determination. *See Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008) ("[E]ven assuming inadequate notice [of the basis for a federal agency's determination], [the Board] will not find a due process violation absent a showing of resulting prejudice.").

IV. CMS imposed a three-year re-enrollment bar as permitted by 42 C.F.R. § 424.535(c)(1).

Petitioner asserted below that Novitas reopened and revised its December 3, 2015 initial determination nine months later, on September 9, 2016 to end the prior ALJ proceedings and start anew because Petitioner had "highlighted significant flaws in CMS's reasoning and application of the law" in the 2015 revocation and CMS was "[c]oncerned" about "having to defend" its errors on appeal. P. Br. at 20. By reopening the initial determination and revising it in 2016, Petitioner argued, CMS and its contractor restarted the three year re-enrollment bar imposed on him by the 2015 initial determination, effectively extending the bar to three years and nine months in violation of 42 C.F.R. § 424.535(c). *Id.* at 21-22. He complained that CMS "refused to give [him] credit for the previous nine months already served against his re-enrollment bar." *Id.* at 22.

On these arguments, the ALJ stated that the "impli[cation]" that Novitas reopened and revised to restart and extend the re-enrollment bar "appears to be consistent with the fact that Novitas reopened and revised the initial determination rather than the reconsidered determination due to the fact that the re-enrollment bar runs from the date 30 days after the notice o[f] revocation pursuant to 42 C.F.R. § 424.535(c)." ALJ Decision at 12-13 (citing P. Br. at 19-22). The ALJ then stated, "However, Petitioner does not explain how the Novitas procedural error of failure to state the reason for reopening and revision caused Petitioner any prejudice, except to the extent the reopening and revision restarted the period of the bar to re-enrollment effectively extending it to nearly four years, an issue I discuss hereafter." *Id.* at 13. The ALJ went on to discuss Petitioner's arguments about extending the re-enrollment bar later in his decision (page 15), but concluded that the "duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to review." *Id.* at 15 (citing *Vijendra Dave, M.D.*, DAB No. 2672, at 10-11 (2016)). The ALJ then stated, "Thus, whether or not Petitioner's argument has merit, I have no jurisdiction to review issues related to the duration of Petitioner's re-enrollment bar or whether it was imposed in

[13] Because we have determined that the reopening and revision here were consistent with the regulations and that the regulations do not require an explanation of why CMS decided to reopen, we need not address the ALJ's statement that "the fact the notice of the reopened and revised determination did not state why reopening and revision was necessary is not grounds for relief." ALJ Decision at 13.

violation of the delegation of authority under 42 C.F.R. § 424.535(c)." *Id.* & *id.* n.5 ("I do not intend to suggest that the Board, which conducts final review on behalf of [the] Secretary when requested, could not address this issue.").

Before the Board, Petitioner again expresses his belief that CMS reopened the initial determination to avoid having to defend a legally flawed revocation and states that CMS illegally extended the re-enrollment bar. RR at 15, 16-18. Citing *Dave*, Petitioner says that he is not appealing CMS's determination on the length of the re-enrollment bar, or arguing that the ALJ has authority to review the length of the re-enrollment bar. *Id.* at 17. Rather, he says, he is "arguing that the ALJ and [the] Board have a clear authority to review CMS' imposition of a re-enrollment bar inarguably longer than the maximum length allowed by 42 C.F.R. § 424.535(c)(1)[,]" which is different from the issue of "reviewing CMS' discretion in imposing a re-enrollment bar within the legal boundaries of [this regulation]." *Id.* at 17-18; P. Reply to the Board at 3, 7-8 (similar argument).

The ALJ correctly stated that the length of the re-enrollment bar is not an appealable initial determination and is not subject to his review. However, despite Petitioner's claim that CMS imposed a re-enrollment bar longer than three years (which is baseless, as we explain below), this case does *not* actually present a dispute or issue about the length of the re-enrollment bar that the Board has said in *Dave* is not a reviewable issue. Petitioner has not disputed, and does not now dispute, CMS's authority under the regulation to impose a re-enrollment bar lasting from one to three year(s).

We find no support for the claim that CMS extended the re-enrollment bar beyond three years. In its September 9, 2016 revised initial determination, Novitas stated, "[W]e are reopening and revising our initial revocation determination. This correspondence replaces and supersedes the correspondence dated December 3, 2015." CMS Ex. 1, at 181. It then stated that a three-year re-enrollment bar will begin 30 days after the postmark date of the September 9, 2016 determination. *Id.* at 182. In so stating, Novitas put Petitioner on notice that the 2015 determination will have no effect. Moreover, CMS has consistently represented that the only re-enrollment bar imposed here is the three-year re-enrollment bar imposed by the 2016 revised initial determination, which rendered moot the 2015 initial determination. CMS's motion to dismiss (C-16-780) (arguing that the revised initial determination rendered moot the earlier Novitas determinations); CMS's pre-hearing brief and motion for summary judgment at 11; CMS's response brief to the Board at 12. Petitioner's argument that CMS exceeded the bounds of its regulatory authority in imposing a re-enrollment bar longer than three years has no foundation.

Conclusion

We uphold the ALJ's determination that CMS lawfully revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). We reverse the ALJ's determination that the effective date of revocation is October 9, 2016, and determine that the effective date is October 24, 2007. CMS imposed a three-year re-enrollment bar that began 30 days after the postmark date of the September 9, 2016 revised initial determination, and we have no authority to disturb that administrative action.

/s/
Sheila Ann Hegy

/s/
Christopher S. Randolph

/s/
Susan S. Yim
Presiding Board Member