Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

John A. Hartman, D.O.
Docket No. A-18-83
Decision No. 2911
November 28, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner John A. Hartman, D.O. appeals the April 27, 2018 decision of an administrative law judge (ALJ), *John A. Hartman, D.O.*, DAB CR5082 (ALJ Decision). The ALJ Decision sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to deny Petitioner's application to re-enroll in Medicare under 42 C.F.R. § 424.530(a)(3). 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, 424.505. 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)[1] §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

CMS "may deny" a supplier's application to enroll in Medicare for any of the "reasons" stated in 42 C.F.R. § 424.530(a). Relevant here, CMS is authorized to deny the enrollment of a supplier who –

> 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.

[1] 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.

42 C.F.R. § 424.530(a)(3). The offenses for which CMS may deny enrollment "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.* § 424.530(a)(3)(i)(A).[2]

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.

A supplier whose application to enroll (or renew enrollment) in Medicare has been denied is entitled to a hearing. Act § 1866(j)(8) (a "provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) . . . is denied may have a hearing and judicial review of such denial . . . ."); 42 C.F.R. §§ 498.1(g), 498.3(b)(17), 498.5(l), 498.22(a). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ. *Id.* §§ 498.5(l)(2), 498.40. If dissatisfied with the hearing decision of the ALJ, the supplier or CMS (or its contractor) may request review by the Board. *Id.* § 498.5(l)(3).

Case overview[3]

Petitioner is a Doctor of Osteopathic Medicine who specializes in internal medicine. Request for hearing at 1. He enrolled in Medicare in 1987. P. Br. to the ALJ at 1.

In May 2009, Petitioner was involved in an automobile accident for which he was charged with, and pleaded guilty to, second degree felony assault in violation of Missouri Revised Statutes (Mo. Rev. Stat.) § 565.060.1(4) (2006) (operating a motor vehicle while

[2] Section 424.530(a)(3), as quoted here in part and in full in the ALJ Decision, at 3-4, has been in effect since February 3, 2015. 79 Fed. Reg. 72,500, 72,531-32 (Dec. 5, 2014).

[3] 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 his findings.

intoxicated, thereby causing injury to another person). *Id.* at 1-2; CMS Ex. 1, at 28, 48. On March 6, 2013, Wisconsin Physicians Service Insurance Corporation (WPS), a CMS Medicare Administrative Contractor, revoked Petitioner's Medicare enrollment and billing privileges, effective June 21, 2012, in part, pursuant to 42 C.F.R. § 424.535(a)(3)[4] based on Petitioner's June 21, 2012 plea of guilty to felony assault arising from the 2009 incident. CMS imposed a three-year re-enrollment bar.[5] P. Br. to the ALJ at 1-2; CMS Ex. 1, at 65-67. After a denial of his request for reconsideration of the revocation, Petitioner filed a request for hearing before an ALJ. An ALJ upheld the revocation by decision dated January 6, 2014. *John Hartman, D.O.*, DAB CR3056 (2014). On appeal, the Board upheld the ALJ's decision. *John Hartman, D.O.*, DAB No. 2564 (2014). Petitioner did not seek judicial review or reopening and revision of the Board's decision. The Board's decision became final and binding. 42 C.F.R. § 498.90.

In March 2017, Petitioner sought to re-enroll in Medicare. ALJ Decision at 9; CMS Ex. 1, at 12-45; CMS Ex. 3, at 3. By an April 13, 2017 initial determination, WPS denied re-enrollment, citing section 424.530(a)(3), as well as section 424.530(a)(4), which provides that CMS may deny enrollment if a supplier submits false or misleading information in an enrollment application. CMS Ex. 2, at 1. WPS stated that Petitioner did not report the 2012 felony conviction or the 2013 revocation. *Id.*

Upon review of Petitioner's request for reconsideration, in which Petitioner stated that he had in fact disclosed all final adverse determinations in his 2017 re-enrollment application, CMS's Center for Program Integrity, Provider Enrollment & Oversight Group issued a June 27, 2017 reconsidered determination, stating that it was "overturn[ing]" the contractor's reliance on section 424.530(a)(4) as a basis for denial. CMS Ex. 3, at 1, 3, 5. CMS explained, however, that it nevertheless was upholding the denial under section 424.530(a)(3), based on the 2012 conviction. CMS wrote:

[4] Section 424.535(a)(3) in effect at the time of the 2013 revocation authorized CMS to revoke a supplier's enrollment and billing privileges if the supplier "within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries." Under section 424.535(a)(3)(i)(A) then in effect, qualifying "[o]ffenses include[d] . . . [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." Section 424.535(a)(3), as revised effective February 3, 2015 (79 Fed. Reg. at 72,532) remains in effect.

[5] 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. 42 C.F.R. § 424.535(b), (c). The re-enrollment bar lasts between one year and three years. *Id.* § 424.535(c). Revocation based on a felony conviction is effective the day of the conviction. *Id.* § 424.535(g).

> [O]n June 21, 2012, [Petitioner] was convicted of assault in the second degree, a felony offense that CMS has determined is *per se* detrimental to the Medicare program and its beneficiaries as identified under 42 C.F.R. § 424.530(a)(3)(i)(A). Therefore, CMS finds that the denial of [Petitioner's] Medicare enrollment application is appropriate under 42 C.F.R. § 424.530(a)(3).
>
> Accordingly, the reconsideration request is denied and the denial of [Petitioner's] Medicare enrollment application is upheld. Therefore, CMS has decided not to grant [Petitioner] access to the Medicare Trust Fund (by way or issuance) of a Medicare number.

Id. at 5.

By an August 28, 2017 reopened and revised reconsidered determination, CMS informed Petitioner that it was upholding the denial of re-enrollment. CMS Ex. 1, at 1-6. The content of the August 28, 2017 determination is almost identical to the June 27, 2017 determination, and includes verbatim the rationale language we have quoted above from the June 27, 2017 determination. *See id.* at 5-6. The August 28, 2017 determination, however, specified that that decision "vacates and supersedes [CMS's] June 27, 2017 determination." *Id.* at 1 (citing 42 C.F.R. §§ 498.30 and 498.32).

Petitioner requested a hearing before an ALJ on the August 28, 2017 determination. By his April 27, 2018 decision granting, sua sponte, summary judgment for CMS, the ALJ upheld the denial of re-enrollment under section 424.530(a)(3). The ALJ determined that there was no need for a hearing because the undisputed material facts established that, on June 21, 2012, Petitioner pleaded guilty to, and was convicted within the meaning of section 1001.2 of, a felony offense – a violation of Mo. Rev. Stat. § 565.060.1(4), a class C felony under Mo. Rev. Stat. § 565.060.3 – within ten years preceding his 2017 re-enrollment application. ALJ Decision at 7-9. The ALJ thus determined that CMS had legal grounds under section 424.530(a)(3) for denying re-enrollment based on the felony offense, "which CMS has determined is detrimental to Medicare and its beneficiaries." *Id.* at 8, 9.

The ALJ also noted that where, as here, a legal basis for denying re-enrollment is established, the ALJ's "jurisdiction does not extend to review whether CMS properly exercised its discretion to deny Petitioner's Medicare enrollment application." *Id.* at 8; *id.* at 10-11 (similar discussion, citing *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008)). The ALJ also explained that he found in the August 28, 2017 determination "good evidence" of a CMS hearing officer's exercise of discretion to determine that

Petitioner's offense was detrimental to the best interests of the Medicare program and its beneficiaries. The ALJ noted in particular the hearing officer's "reference to the list of offenses in the regulation," which includes "assaults and similar crimes" among qualifying "[c]rimes against persons." *Id.* at 10 (citing 42 C.F.R. § 424.530(a)(3)(i)(A)).

The ALJ also rejected Petitioner's arguments, among others, that CMS did not actually exercise its discretion here in deciding to deny re-enrollment; that his offense is not one on which denial of re-enrollment may be based; that he was not "convicted" because the state court suspended imposition of a sentence on the 2012 plea; and that in denying his application to re-enroll after the expiration of the three-year re-enrollment bar, CMS effectively imposed a bar longer than the maximum allowable duration. *Id.* at 10-14.

Petitioner timely appealed the ALJ's decision to the Board. The parties submitted their briefs. On September 26, 2018, the parties presented oral argument before a panel of three Board Members who are signatories to this decision.

Standard of review

Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009) (citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004)). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. *Id.* (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.

Discussion

In section A, we address a preliminary issue: whether the ALJ erred in deciding this appeal on summary judgment sua sponte. We conclude that he did not err. In section B, we explain why we conclude that the ALJ properly determined that CMS had a legal basis for denying re-enrollment under section 424.530(a)(3) and address related arguments on whether Petitioner's offense is detrimental to the best interests of the Medicare program and its beneficiaries, CMS's discretionary authority to deny re-enrollment, and equity and policy concerns. In section C, we address the argument that CMS unlawfully extended the re-enrollment bar beyond three years. Lastly, in section D, we state that we have no authority to reverse an application of the regulations on re-enrollment based on constitutional challenges.

A. *The ALJ did not err in issuing a decision on summary judgment sua sponte.*

The ALJ issued a decision on summary judgment for CMS, sua sponte, on the central legal question presented – whether there is a legal basis for denying Petitioner's re-enrollment application under section 424.530(a)(3). ALJ Decision at 6-7.

Petitioner states that he "had no objection to *the ALJ's* plan of applying summary judgment standard *sua sponte*." Brief in support of request for review (RR) at 43 (Petitioner's emphasis). He nevertheless takes issue with the ALJ's proceeding to decision by summary judgment, asserting that the summary judgment process "is not . . . expressly authorized by law in these proceedings" and that neither he nor CMS moved for summary judgment. *Id.*; Reply brief (Reply) at 12 (stating that his "conditional acquiescence *to the ALJ's plan* of using summary judgment is not the equivalent of a request by Petitioner" (Petitioner's emphasis)). He also asserts that the ALJ's decision is "invalid" because the ALJ did not first identify the undisputed material facts. RR at 45.

The regulations in 42 C.F.R. Part 498 do not provide for summary judgment procedures. However, ALJs of the Civil Remedies Division have long applied summary judgment principles in Part 498 cases presenting no genuine disputes of material fact, looking to Rule 56 of the Federal Rules of Civil Procedure as guidance. The summary judgment process is often used in Part 498 enrollment (and revocation) appeals, and the Board has upheld ALJ summary judgment decisions where it found no error in the ALJ determinations that the undisputed material facts established a lawful basis for revocation or denial of enrollment. *Cornelius M. Donohue, DPM*, DAB No. 2888 (2018) (revocation), which we cite elsewhere herein, is one recent example. Petitioner cites no authority for his assertion that an adjudicator or tribunal may not use summary judgment procedures unless the governing regulations specifically authorize their use.

The essential question presented here is whether Petitioner, the party who did not prevail before the ALJ, had notice that the ALJ might decide the appeal on summary judgment based on the facts asserted by CMS, the prevailing party. *See S.A. Brooks, DPM*, DAB No. 2615, at 12-14 (2015) (remanding the ALJ's decision granting summary judgment for petitioner sua sponte where the ALJ did not give CMS notice that he might do so based on the facts asserted by petitioner and without viewing the evidence in the light most favorable to CMS). We have reviewed the record below with this question in mind.

The ALJ's Acknowledgment and Prehearing Order (pages 4-6) and the Civil Remedies Division Procedures (CRDP) (¶ 19), both provided to the parties on November 2, 2017, gave the parties early notice that, although the Part 498 regulations do not establish summary judgment procedures, either party may move for summary judgment and that

the ALJ will look to Rule 56 (section (f)(3) of which provides that, "[a]fter giving notice and a reasonable time to respond," a court "may" "consider summary judgment on its own") as guidance. Petitioner did not object to the Prehearing Order or the CRDP.[6] Later, by his February 15, 2018 Order, the ALJ notified the parties that there appeared to be no genuine dispute of material fact and gave them an opportunity to submit additional briefs and supporting affidavits or declarations addressing whether summary judgment is appropriate. February 15, 2018 Order (citing Rule 56(f)(3)). In response, Petitioner filed a supplemental brief in which he essentially set out an abbreviated version of the arguments in his pre-hearing brief, as well as his own sworn declaration and that of M.M., the Chief Executive Officer of a hospital at which Petitioner wants to work if he were to be re-enrolled in Medicare. In his supplemental brief, Petitioner stated that he "takes no position as to the applicability of [Rule 56(f)(3)]" but, "to expedite this matter, [he] has no objection if the ALJ wishes to make a decision as a matter of law based on the undisputed facts." P. Supp. Br. at 1-2. The ALJ thus gave Petitioner notice and opportunity to respond as contemplated by Rule 56, and Petitioner availed himself of the opportunity to respond that he did not object.

As for the assertion that the ALJ's decision is "invalid" because the ALJ did not identify the undisputed material facts, Petitioner relies on Rule 56(f)(3), which contemplates summary judgment sua sponte after the court "identif[ies] for the parties material facts that may not be genuinely in dispute." RR at 44, 45. The ALJ did not state the facts he believed were undisputed and material. However, Petitioner offers no authority for the proposition that the ALJ's decision is rendered altogether "invalid" only because the ALJ proceeding sua sponte did not first identify the undisputed material facts consistent with Rule 56(f)(3).[7] The assertion of error is untenable, first, because the ALJ informed the parties that he would consider Rule 56, but only as guidance, thereby also informing them that he was not bound to follow Rule 56. *See, e.g., Wade Pediatrics*, DAB No. 2153, at 16 (2008) (citing *Thelma Walley*, DAB No. 1367 (1992), and stating that "an ALJ may not hold the parties to the Rule 56 procedures without notice, but that the federal rule nonetheless provides helpful guidance on the standard to apply") (emphasis in original), *aff'd, Wade Pediatrics v. Dep"t of Health & Human Servs.*, 567 F.3d 1202 (10th Cir. 2009).

[6] The Prehearing Order, page 2, stated that a party may request clarification of, or object to, any provision of the Prehearing Order by motion within ten days. The record reveals no request for clarification or objection.

[7] Below, Petitioner did not object to the ALJ's not first identifying the undisputed material facts. Rather, as noted, he stated only that he "takes no position as to the applicability of" Rule 56(f)(3). P. Supp. Br. at 1. It is only now that he invokes Rule 56(f)(3) to assert that the ALJ's decision is wholly "invalid" because the ALJ did not first identify the undisputed material facts in accordance with Rule 56(f)(3).

Moreover, as we said, the issue here, where neither party moved for summary judgment, is whether Petitioner was notified of the *facts* asserted by CMS in support of its denial of re-enrollment. The Prehearing Order directed Petitioner to file his pre-hearing exchange (pre-hearing brief and exhibits) within 60 days after CMS files its pre-hearing exchange. The parties complied with the ALJ's instructions.[8] Then CMS filed a "notice of intent" informing the ALJ and Petitioner that CMS would not file a "reply brief." After considering both exchanges, the ALJ issued his February 15, 2018 Order notifying the parties that he was considering summary judgment. CMS responded first, by filing a "Waiver of Filing Additional Pleadings" to inform the ALJ and Petitioner that CMS would not submit a supplemental brief. Petitioner then filed his supplemental brief. The ALJ then issued his decision. Accordingly, CMS's pre-hearing exchange constituted the only submission on which CMS rested its case in defense of its denial of re-enrollment.

In its pre-hearing brief, CMS asserted that the record supports a 2012 felony conviction for assault, a crime that CMS determined was detrimental to the best interests of the Medicare program and its beneficiaries, on which the 2013 revocation was based and that the same conviction is the basis for CMS's 2017 discretionary determination to deny re-enrollment under section 424.530(a)(3), thereby notifying Petitioner of the facts CMS was asserting were material to the core issue of whether CMS had a legal basis for denying re-enrollment. In his February 15, 2018 Order, the ALJ neither identified material facts not addressed by CMS, nor stated that he disagreed in any way with CMS as to the facts. Petitioner therefore should have known, and actually was notified, that the ALJ could decide for CMS on summary judgment on the legal basis for denial based on CMS's asserted facts. Under these circumstances, we discern no harm to Petitioner that could alter the outcome on the central legal issue based on the ALJ's not following Rule 56(f)(3) to the letter. *See Brooks*, DAB No. 2615, at 12 (citing *Tranzact Technologies, Ltd. v. Evergreen Partners, Ltd.*, 366 F.3d 542 (7th Cir. 2004) (upholding a sua sponte grant of summary judgment where the complaining party could not show on appeal that it was deprived of a chance to present a viable claim) and *Oppenheimer v. Morton Hotel Corp.*, 324 F.2d 766 (6th Cir. 1963) (per curiam) (upholding a sua sponte grant of summary judgment where essential facts in the record were undisputed and there was no claim on appeal that counsel had further evidence to submit), and noting that courts have declined to reverse sua sponte summary judgment decisions where the appellant cannot show prejudice).

[8] CMS timely filed its pre-hearing exchange. However, by his December 5, 2017 Order, the ALJ rejected CMS's exhibits because they did not conform to certain requirements in his Prehearing Order. CMS resubmitted revised exhibits and an amended brief, which the ALJ accepted. Petitioner then filed his pre-hearing exchange.

Petitioner makes no case for harm and identifies no genuine dispute of material fact on the issue of whether CMS lawfully denied re-enrollment under section 424.530(a)(3). He makes instead vague, unexplained arguments that the ALJ drew "evidentiary determinations through the lens of construing evidence in a light more favorable to CMS"[9] and that the ALJ's proceeding by summary judgment "prejudice[d]" him because it "saddled [him] with an improper burden and . . . precluded [the ALJ] from weighing evidence."[10] RR at 44, 45; Reply at 12-13 (similar argument). We construe these arguments as essentially an expression of dissatisfaction with the outcome on summary judgment and an unfounded assertion that Petitioner would have prevailed had the ALJ not proceeded by summary judgment. We find no reason to question the soundness of the ALJ's determination on the core legal issue. As we explain later, the undisputed facts support a determination that Petitioner was convicted of a qualifying felony offense and no inference to the contrary could be drawn on the evidence by any reasonable trier of fact. CMS thus had a legal basis for denying re-enrollment.

Equally unavailing are the arguments that the "Undisputed Background Facts" in the request for hearing[11] should have been deemed "admitted" by CMS "as a matter of law" since CMS did not specifically dispute those facts and, accordingly, "the *only* proper course for the ALJ would [have been] to deem *all* of Petitioner's fact allegations to be true" and "[c]onstruction, interpretation or assessment of evidence in a light favorable to CMS's position simply did not apply." RR at 45 (Petitioner's emphasis). In a similar vein, in his supplemental brief submitted to the ALJ, Petitioner asserted that *he* was entitled to judgment as a matter of law, stating that *he* "agrees that the facts he has offered in this matter are not in dispute and asserts that he is entitled to judgment as a matter of law." P. Supp. Br. at 2. Essentially, Petitioner is asserting that the ALJ must have simply accepted as true or established whatever facts *Petitioner* averred so long as CMS did not dispute each and every one of those facts and decided in Petitioner's favor. Petitioner's argument, taken at face value, is that an ALJ could not decide against a party

[9] In the summary judgment context, evidence is viewed in the light most favorable to the non-moving party and all reasonable inferences are drawn in that party's favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Petitioner presumably is asserting that, although neither party moved for summary judgment, the ALJ in considering summary judgment sua sponte should have viewed the evidence in the light most favorable to him. But, as we state herein, Petitioner has not identified a single disputed material fact that could change the outcome on the core legal question; nor does he address what if any inference the ALJ should have drawn, but failed to draw, in his favor.

[10] The adjudicator does not make credibility determinations, weigh evidence, or decide which inferences to draw from the facts when deciding on summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

[11] Petitioner now implies that he specifically asserted *undisputed material* facts in his hearing request that, if accepted as true, would have altered the outcome in his favor. Petitioner's hearing request set out "background facts" and included an additional section headed "Factual Support," which included averred facts and argument. The facts as averred in the hearing request would *not* have changed the outcome in Petitioner's favor on the legality of denial here.

so long as the opposing party does not specifically object to every "fact" as averred by the other party, regardless of whether the facts as averred are actually grounded in evidence and material to resolving the legal issues. We reject this argument as lacking any legal authority and inconsistent with any accurate understanding of the summary judgment standard.

Petitioner also asserts that CMS did not even make its prima facie case that Petitioner was not in compliance with any relevant legal requirement, which he says must occur before he would be required to show substantial compliance by a preponderance of the evidence. RR at 42-43. Moreover, he asserts, he nevertheless has affirmatively proven that his application met all supplier enrollment requirements. *Id.* at 46. According to Petitioner, the ALJ's failure to specifically determine whether Petitioner's application met those requirements is itself legal error that warrants reversal of the ALJ's decision. *Id.* at 46-47. We reject these arguments.

Although CMS did not move for summary judgment, its pre-hearing exchange supported summary judgment on the central issue of legality of denial of re-enrollment under section 424.530(a)(3), thereby also establishing its prima facie case. Once CMS establishes its prima facie case, the non-federal party (Petitioner) must show compliance by a preponderance of the evidence. *See Adora Healthcare Servs., Inc.*, DAB No. 2714, at 4-5 (2016), *recon. denied*, DAB Ruling 2017-4 (May 18, 2017) and *Promptcare New England Respiratory LLC*, DAB No. 2673, at 7-8 (2016) (both discussing the burden of proof of the non-federal party in Part 498 proceedings to show compliance with applicable requirements by a preponderance of the evidence after CMS makes its prima facie case); *Anderson*, 477 U.S. at 255 (in ruling on summary judgment, the evidence must be viewed through the prism of substantive evidentiary burdens to be borne by the parties). In the enrollment context here, that means Petitioner must show that CMS lacked a basis to deny re-enrollment. Petitioner has not made such a showing.

B. *CMS lawfully denied re-enrollment under 42 C.F.R. § 424.530(a)(3).*

1. The undisputed facts establish that Petitioner was convicted of a felony crime against person(s) under 42 C.F.R. § 424.530(a)(3)(i)(A), thus establishing a lawful basis for denial of re-enrollment under 42 C.F.R. § 424.530(a)(3).

On June 21, 2012, Petitioner pleaded guilty to second degree felony assault in violation of Mo. Rev. Stat. § 565.060.1(4) (2006). RR at 7, 8; DAB No. 2564, at 2. On September 7, 2012, a state court accepted his plea and entered judgment of guilt. DAB No. 2564, at 2. In his appeal of the 2013 revocation, Petitioner did not dispute that the court had accepted his guilty plea, but asserted that he was not "convicted" of felony assault under

state law because the state court "suspended imposition of sentence" and because his offense was to be removed from the state criminal record after successful completion of probation. On appeal of the revocation, an ALJ rejected that argument, and the Board agreed with the ALJ. *Id.* at 2-3. The Board stated:

> The ALJ correctly rejected this argument, even if it is true that Missouri law does not recognize a "conviction" as having occurred during (or as a result of) Petitioner's state criminal proceeding. For reasons the Board explained in *Lorrie Laurel, PT*, DAB No. 2524 (2013), federal law – not state law – governs whether a supplier has been "convicted" of an offense, as that term is used in section 424.535(a)(3). That regulation clearly dictates that Petitioner, having pled guilty to felony assault, "was convicted" of that crime because the regulation explicitly embraces "[f]elony crimes against persons, such as . . . assault . . . for which the individual was convicted, *including guilty pleas*." 42 C.F.R. § 424.535(a)(3)(i)(A); *see also Lorrie Laurel, P.T.* at 4 (holding that a guilty plea to an offense listed in section 424.535(a)(3)(i)(B) constituted a "conviction" because the regulation "expressly authorizes CMS to revoke an individual's billing privileges based on '[f]inancial crimes . . . for which the individual was convicted, including guilty pleas'"); *Deal v. United States*, 508 U.S. 129, 131-32 (1993) ("It is certainly correct that the word *'conviction' can mean* either *the finding of guilt* or the entry of a final judgment on that finding," which "includes both the adjudication of guilt and the sentence" (italics added).).

Id. at 3; *see also Kimberly Shipper, P.A.*, DAB No. 2804, at 8 (2017) (Federal law, not state law, determines what constitutes a conviction for purposes of Medicare enrollment.), *appeal docketed*, No. 6:17-cv-00253-RP-JCM (W.D. Tex. Sept. 22, 2017).

That Petitioner was "convicted" in 2012 of felony assault by a guilty plea is an established fact. That was true in 2014, when the Board issued its decision on the revocation based on section 424.535(a)(3) in effect at the time of the revocation. That remains true under section 424.530(a)(3) as revised effective February 3, 2015, 79 Fed. Reg. at 72,531-32, and in effect at the time of denial of re-enrollment. The February 3, 2015 revision to section 424.530(a)(3) (which largely parallels section 424.535(a)(3) as also revised effective the same day) added language that whether a supplier is

"convicted" is determined by section 1001.2's definition of that term.[12] "Convicted" in relevant part means that a "State . . . court has accepted a plea of guilty or *nolo contendere* by an individual." 42 C.F.R. § 1001.2. Petitioner pleaded guilty to second degree felony assault, and the court accepted that plea. Accordingly, Petitioner is indeed "convicted" for purposes of the 2017 denial of re-enrollment under section 424.530(a)(3).

Petitioner attempts to revive an argument raised during the revocation proceedings, that is, he was not "convicted" because the court ordered a "'suspended imposition of sentence,' which is not a criminal conviction or judgment under Missouri law."[13] RR at 8. He also argues that the ALJ erred in finding a conviction for "assault" for purposes of section 424.530(a)(3) merely because that regulation and Mo. Rev. Stat. § 565.060 use the word "assault." *Id.* at 17-18. Petitioner urges us to apply the principles of statutory interpretation to ascertain the meaning of "assault" as used in section 424.530(a)(3)(i)(A) because this regulation indicates that assault is a crime involving intent but does not define "assault." *Id.* at 18-19. He also points to the dictionary definition of "assault," which includes criminal intent. *Id*. at 19-20 (citing *Blacks Law Dictionary*, 6th ed. 1990, at 114). He says that the state law, in contrast, defines "assault" to include "criminal negligence." *Id.* at 20 (stating that "[a] person commits the crime of assault in the second degree if he . . . [w]hile in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in [Missouri] and, when so operating, acts with **criminal negligence** to cause physical injury to any other person than himself . . . ." (quoting Mo. Rev. Stat. § 565.060.1(4)) (internal quotation marks omitted) (Petitioner's emphasis)). He states that because the "nominal 'assault' charge" to which he pleaded guilty did not require intentional misconduct whereas section 424.530(a)(3)(i)(A) does, his offense falls outside the purview of the enrollment regulations. *Id.* at 21; Reply at 5.

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[12] In the proposed rule incorporating the section 1001.2 definition of "convicted" into the enrollment regulations, CMS explained that it was responding to public inquiries about the meaning of the term and to provide a better understanding of what arrangements or circumstances would be considered convictions. CMS stated:

> We have received inquiries over the years regarding the proper interpretation of the term ''convicted'' as it is used in the context of § 424.530(a)(3) and § 424.535(a)(3). We believe that utilizing a well-established regulatory definition of the term would clarify for the public the types and scopes of convictions that fall within the purview of these two sections. We note that this regulatory definition is based on the definition of ''convicted'' in section 1128(i) of the Act.

78 Fed. Reg. 25,013, 25,022 (April 29, 2013). Reviewing this preamble language, the Board stated that the revision did not change the meaning of "convicted" in the enrollment context, but rather clarified the term's meaning. *See Shipper*, DAB No. 2804, at 10.

[13] Section 1001.2 also defines "convicted" to mean that "[a]n individual . . . has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld." The Missouri court's "suspended imposition of sentence" possibly fits into this definition of "convicted." In any case, Petitioner was "convicted" based on the court's acceptance of his guilty plea.

We reject these arguments. First and foremost, just as federal law governs a determination of whether a supplier has been "convicted" of an offense for revocation purposes (DAB No. 2564, at 3), federal law governs a determination of whether that supplier has been convicted of a qualifying offense for enrollment purposes. Petitioner was "convicted" in accordance with applicable federal enrollment regulations.

Second, Petitioner's offense qualifies for denial of enrollment. Section 424.530(a)(3)(i) states that "[o]ffenses include, but are not limited in scope or severity to"; then sets out four categories of such offenses, the first of which (under (A)) is "[f]elony crimes against persons"; and under (A), identifies examples of such crimes, but does not by its terms limit that category only to the named crimes ("such as murder, rape, assault, and other similar crimes . . ."). The regulation thus plainly provides that denial of enrollment may be based on (felony) crimes against persons, one example of which is assault.[14] It is undisputed that Petitioner's offense was felony assault.

Because the regulations are plain enough, and the application of the undisputed facts to the plain language of the regulations supports that Petitioner was convicted of felony assault, a crime against person(s), we see no need to ascertain the precise meaning of "assault" as he urges us to do.[15] The argument attempting to distinguish "criminal intent" crimes from "criminal negligence" crimes appears to assume that section 424.530(a)(3)(i)(A) contemplates *only* those felony crimes against persons for which the underlying statute defining the crime specifically includes intent as an element. But nothing in the plain language of section 424.530 supports such a reading. Sections 424.530(a)(3)(i) and 424.530(a)(3)(i)(A) read together mean that enrollment may be denied based on a felony conviction for crime(s) against person(s). That section 424.530(a)(3)(i)(A) identifies example crimes like murder (an "intent" crime) and then uses the words "other similar crimes" does not necessarily mean that the regulation contemplates *only* "intent" crimes.

[14] The Board has stated, in the context of section 424.535(a)(3) (which, as revised and currently in effect, largely parallels current 424.530(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." *Fady Fayad, M.D.*, DAB No. 2266, at 8 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011). The ALJ noted that section 424.530(a)(3)(i)(A) identifies "assault" as an example of "[c]rimes against persons" and "similar crimes" that are "detrimental to Medicare and its beneficiaries." ALJ Decision at 10. We read the ALJ's words to mean that Petitioner's felony assault falls within the regulatory category of disqualifying crimes, "crimes against persons." We have no reason to disagree with the ALJ's analysis.

[15] *See Florence Peters, D.P.M.*, DAB No. 1706, at 7 (1999) (stating that "[t]he general rule of statutory construction is that the plain meaning of the statute should control" but legislative history may be considered where the statutory language is ambiguous and subject to more than one interpretation).

While crimes like murder and rape are distinguishable in various ways from vehicular assault while intoxicated to which Petitioner pleaded guilty, nothing in the regulations provides that those distinctions affect the application of the regulation given its purposes. However, the anchor in the regulations distinguishing among felonies in the enrollment context is a focus on the risk the person who committed the crime poses to the integrity of the program and the beneficiaries the program serves. CMS addressed this point in the preamble to the proposed rule:

> In light of the very serious nature of any felony conviction, we believe it is unwise to restrict our authority in § 424.530(a)(3)(i) and § 424.535(a)(3)(i) to the categories of felonies identified in (a)(3)(i); this is especially true considering that the types of felony offenses often vary from state to state. Any felony conviction, regardless of the type, raises real questions as to whether the provider or supplier can be relied upon to be a trustworthy partner in the Medicare program, and it is important to do everything possible to prevent unnecessary risks to Medicare beneficiaries and the Medicare Trust Fund. That stated, we are aware that certain felony convictions may raise more concerns than others, and we will continue to carefully assess the types of felony convictions that pose greater risk to Medicare beneficiaries and the Medicare Trust Fund.

78 Fed. Reg. at 25,021. In so stating CMS also reinforced its position that it has the authority to consider a particular felony crime to determine what if any risk the person who committed such a crime poses to the program *regardless of how the underlying criminal statute defines the crime*. In accordance with the enrollment regulations discussed above and in light of CMS's preamble language, that Petitioner pleaded guilty to violating Missouri law which includes criminal *negligence* as an element of "assault" does not warrant a conclusion that there is no qualifying felony assault for purposes of section 424.530(a)(3). Regardless of intent or negligence, Petitioner's assault was a felony crime against a person. It is thus a crime on which enrollment denial may be based. And, as we address below, although CMS was not required to make a specific determination that Petitioner's offense posed a risk to the program, it nevertheless exercised its discretion in deciding not to re-enroll Petitioner.

2. CMS was not required to make a specific determination on whether Petitioner's offense was detrimental to the best interests of the Medicare program and its beneficiaries as the offense is per se, or presumptively, detrimental.

Petitioner argues that section 424.530(a)(3) authorizes denial of enrollment only if CMS makes a case-specific determination that an offense is detrimental to the best interests of the Medicare program and its beneficiaries. Relying on some preamble language, Petitioner asserts that CMS stated it would do so in recognition of variations in state law

classifications of certain crimes, but did not do so here. RR at 21 n.75, 23, 26-27, 30-31 (quoting preamble language in 79 Fed. Reg. 72,500, 72,510-12); Reply at 5-6. According to Petitioner, even though the regulation states nothing about "*per se* violations," CMS applied a "*per se* rule" to determine that his offense is "*per se* detrimental" by simply "match[ing]" his offense to the "unrefined and nonspecific" example of "assault" identified in the regulation. RR at 26-27, 32. He asserts that the ALJ erred by upholding the denial despite the lack of evidence of a case-specific determination. *Id.* at 27-29, 32.

As we have said, the undisputed evidence supports that Petitioner was convicted of a felony crime against a person, thus establishing a lawful denial basis. No case-specific determination on whether that offense is detrimental was required because the offense is a qualifying crime against person(s). *See Donohue,* DAB No. 2888, at 6 ("[N]o . . . determination [on whether a crime is detrimental] is required if, as is the case here, the supplier's offense falls within one of the categories of crimes that CMS has, by rulemaking (in section 424.535(a)(3)), determined to be detrimental to Medicare.").

In any case, read in context, CMS's use of the words "per se detrimental" is a reference to and reliance on the Board's rationale in *Letantia Bussell, M.D.*, DAB No. 2196 (2008), which involved revocation under section 424.535(a)(3) based on a felony conviction for income tax evasion. *See* CMS Ex. 1, at 5-6 (quoting almost verbatim parts of DAB No. 2564, the Board's decision upholding the revocation of Petitioner's billing privileges, at 4-5, which quoted *Bussell*'s "per se" language). In *Bussell*, the Board held, in part, that the crimes listed in section 424.535(a)(3)(i)(B) (e.g., income tax evasion) are "detrimental per se to the program and its beneficiaries." DAB No. 2196, at 9.

Petitioner asserts that *Bussell,* from which the "*per se* rule concept originated," "lacks precedential value" and is "an invalid statement of law" because *Bussell* was based on the Board's consideration of preamble language on *prior* 42 C.F.R. § 424.535 at 71 Fed. Reg. 20,768 (April 21, 2006), in which CMS referred to felonies that it "has determined" to be detrimental to the best interests of the Medicare program and its beneficiaries. RR at 29-30. Petitioner says, "*Bussell* stands for the (now erroneous) proposition that if the revocation (or denial) decision involves one of the specific offenses listed in [section] 424.535(a)(3) (or, by extension here, to § 424.530(a)(3), which is identical), CMS need not examine the circumstances of the individual offense at issue. Rather, the named offense is *per se* detrimental and CMS's discretion relates only to the decision to either revoke or deny in the face of that violation." *Id.* at 30 (footnote omitted). He then asserts that in subsequent preamble language CMS "clarified unequivocally that the notion of detriment *per se* of a particular offense is not a part of" the enrollment regulations. *Id.* at 30-31.

Petitioner appears to view the 2014 rulemaking revising sections 424.530 and 424.535 as indicative of a significant departure from the pre-revision regulations supporting a rigid "per se" approach whereby the felony crimes expressly identified in the regulations disqualified a supplier from enrollment or authorized revocation, to a more individualized, case-by-case approach where each felony is examined de novo individually regardless of whether the crime is listed in the regulations. From that, Petitioner asserts that *Bussell*, issued in 2008 before the regulatory changes, is no longer good law. We reject the arguments. The Board's "per se" rationale in *Bussell* is applicable in this section 424.530(a)(3) enrollment denial.

First, CMS did not change the "per se" crimes or categories of crimes. The prior section 424.535(a)(3)(*i*)(B) addressed in *Bussell* named "income tax evasion" as a financial crime on which revocation may be based; identical language is found in revised section 424.535(a)(3)(*ii*)(B). Likewise, the prior section 424.530(a)(3)(*i*)(A) named "assault" as a crime against person(s), as does the revised section 424.530(a)(3)(*i*)(A). To the extent the prior and revised regulations expressly identify certain crimes, be they financial crimes or crimes against persons, those crimes are "per se" or presumptively detrimental crimes. *See Donohue,* DAB No. 2888, at 5 n.3 (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").

Second, the 2014 rulemaking did not represent a change in CMS's approach. We note that the words "has determined" in prior sections 424.530(a)(3) and 424.535(a)(3) were revised to "determines." However, addressing that change, CMS explained that the use of the words "has determined" to refer to detrimental offenses "incorrectly implies that the only felonies that may serve as a basis for denial or revocation are those specifically listed in §§ 24.530(a)(3) and 424.535(a)(3)." 79 Fed. Reg. at 72,511. It went on to say that the revision to "determines" "makes clearer that the lists of felonies [in both the prior and revised regulations] are not exhaustive and include other felonies that CMS may deem as meeting the 'detrimental' standard based on the particular facts of the case." *Id.* at 72,511-12. "Making a regulation 'clearer' does not connote a substantive change but merely a clarification of existing meaning or intent." *Saeed A. Bajwa, M.D.*, DAB No. 2799, at 12 (2017) (discussing the preamble in 79 Fed. Reg. at 72,511-12). That meaning or intent, as articulated in the preamble, is that CMS has had, and still has, authority to determine whether a particular crime poses a risk to the program.

Third, Petitioner's proposed construction would make the continued inclusion of the regulatory lists of crimes considered detrimental to Medicare meaningless. It is a basic canon of construction that interpretations that treat legislative or regulatory language as surplusage are disfavored.

Accordingly, the Board's rationale in *Bussell* is still a valid statement of law, and Petitioner's felony assault is per se, or presumptively, detrimental. The ALJ correctly observed that the reconsidered determination used the term "per se" to indicate that assault was specifically named in the regulation. ALJ Decision at 11. He also correctly noted that "[t]he Board has referred to the list of offenses [in the regulation] as 'presumptively detrimental'" as another way of stating that those offenses are "per se" detrimental. *See id.* at 11 n.6 (citing *Bajwa* at 9).

3. CMS exercised its discretion here to deny re-enrollment upon a qualifying felony conviction; we may not look behind that exercise of discretion.

Petitioner interprets CMS's action to have been a determination that CMS understood it was *required* to deny his re-enrollment application. He asserts that there is no evidence that CMS knew that it could exercise discretion to allow him to re-enroll since section 424.530(a) does not mandate denial ("CMS may deny") based on a guilty plea for "putative 'assault.'" RR at 21-24 (citing *Brian K. Ellefsen, D.O.*, DAB No. 2626 (2015)); Reply at 7-8. He also argues that the ALJ erred in upholding the denial despite the lack of any evidence that CMS actually exercised discretion. RR at 25-26 & 26 n.85.

The ALJ found indicia of exercise of discretion to deny Petitioner's application and a determination that Petitioner's offense is detrimental to the best interests of the Medicare program and its beneficiaries. ALJ Decision at 10 (citing CMS Ex. 1, at 1-7; stating that there is "good evidence that CMS, specifically the CMS hearing officer, exercised discretion and determined that Petitioner's offense was detrimental . . . making reference to the list of offenses in the regulation"). The ALJ also observed that the hearing officer did *not* state that the regulation required denial. Rather, the ALJ said, the hearing officer found that Petitioner's crime "involved a felony crime against a person, specifically assault," a crime named in section 424.530(a)(3)(i)(A). *Id.* at 11. The ALJ also stated that the regulations do not require CMS to explain specifically how it weighed various considerations (e.g., the argument that allowing Petitioner to re-enroll would not harm the program or beneficiaries); nor was the ALJ authorized to look behind CMS's exercise of discretion to deny re-enrollment. *Id.* (citing *Bussell*).

We fully agree with the ALJ's rationale underlying his determination that CMS actually exercised its discretion here. The ALJ correctly stated that he may not look behind that exercise of discretion. Neither can we. *Bussell* at 13. We add to the ALJ's rationale our observations on CMS's determination.

The denial in this case is readily distinguishable from that in *Ellefsen*. In *Ellefsen*, the Board determined that CMS's contractor could choose to deny Dr. Ellefsen's enrollment application based on his convictions for making and subscribing false income tax returns and conspiracy to defraud the United States, but remanded only because the language in

the contractor's reconsidered determination raised real questions about whether the contractor "consciously [took] the discretionary judgment called for by the regulation in determining whether to deny and not act in a mistaken belief that denial was mandated by regulation." DAB No. 2626, at 4. In contrast to *Ellefsen*, here, far from using language indicating or suggesting that CMS was not aware that it had discretionary authority to either allow or deny re-enrollment or that it misunderstood the regulations to mean that it must deny re-enrollment, CMS stated that it "finds that the denial of Dr. Hartman's Medicare enrollment application is *appropriate* under 42 C.F.R. § 424.530(a)(3)." CMS Ex. 1, at 5 (italics added). CMS then wrote, "*CMS has decided not to grant you access* to the Medicare Trust Fund . . . ." *Id.* at 6 (italics added). This language, read together with the rest of CMS's six-page determination (CMS Ex. 1) discussing in some detail the 2009 incident, the 2012 guilty plea, the suspended imposition of a sentence and probation, and Petitioner's arguments in support of re-enrollment, satisfies us that CMS considered Petitioner's circumstances and arguments but nevertheless decided to deny re-enrollment. The Board has made clear that *Ellefsen* should not be read as requiring that CMS or its contractors use any particular language to show their understanding of discretion, or as indicating that an ALJ must routinely assess a contractor's understanding of its discretion because, as a general rule, ALJs and the Board can presume such an understanding, DAB No. 2626, at 9, unless an ALJ or the Board is unable to "rely on that presumption" due to the lack of clarity in the determination notice. *Id.* at 7-9. This case presents no such ambiguity problem. We therefore disagree with Petitioner to the extent he suggests that we remand this appeal for further action.

We also address the preamble to the 2014 final rule since Petitioner relies on it to support his assertion that CMS has pledged to take a case-by-case approach in exercising its discretion, but has not done so here. CMS wrote:

> [W]e are not suggesting that every felony conviction will automatically result in [denial of enrollment or revocation]. Each case will be carefully reviewed on its own merits and . . . we will act judiciously and with reasonableness in our determinations.

79 Fed. Reg. at 72,510. CMS also stated:

> [W]e will only exercise our authority under §§ 424.530(a)(3) and 424.535(a)(3) after very careful consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction. It should in no way be assumed that every felony conviction will automatically result in a denial or revocation.

Id. at 72,512.

It is true that CMS stated it will consider the circumstances of a given case. However, we reject Petitioner's argument that the 2014 preamble language indicates that CMS's understanding of its enrollment authority differs from its prior understanding or represents a departure from a prior "per se" approach to enrollment. Having considered the full context in which CMS made the statements we quote above, we construe the language to have been intended to reinforce and reaffirm CMS's existing position that it has discretion to determine who will be permitted to enroll or re-enroll and whose billing privileges will be revoked, but that in exercising discretion CMS will continue to consider the offense and circumstances surrounding the conviction in view of variations in criminal laws. *See* 79 Fed. Reg. at 72,509-10 ("[C]onsidering the very serious nature of any felony conviction, our authority in §§ 424.530(a)(3)(i) and 424.535(a)(3)(i) should not be restricted to the categories of felonies identified in (a)(3)(i); this is especially true considering that the types of felony offenses often vary from state to state."), 72,510 (stating, "we have always considered – and will continue to do so – the seriousness of the offense in determining whether a denial or revocation is warranted"; discussing the need for "flexibility" in revocation and enrollment determinations in light of the seriousness of felony crimes and variations in criminal laws). We note that the preamble language is also consistent with the Board's 2009 discussion of CMS's authority under the *prior* regulations – that CMS may determine on a case-by-case basis whether an offense is detrimental to the best interests of the Medicare program and its beneficiaries. *See Fayad*, DAB No. 2266, at 8 (stating that 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").

Lastly, on the topic of CMS's discretion, we observe that, in response to comments objecting to denial of enrollment or revocation of billing privileges based on certain types of felonies, such as those related to drugs, alcohol, or traffic violations, CMS stated that denial of enrollment or revocation indeed may be based on such offenses:

> We do not believe that felonies relating to drugs, alcohol, or traffic violations cannot be detrimental to the best interests of the Medicare beneficiaries, and thus should be automatically excluded from the purview of §§ 424.530(a)(3) and 424.535(a)(3). While certain categories carry different, potentially more severe penalties than others, each case is distinct and state law classifications of certain criminal actions can vary widely. Therefore, we must maintain the flexibility to address all potential situations.

79 Fed. Reg. at 72,510; *see also Brenda Lee Jackson*, DAB No. 2903 (2018) (affirming the ALJ's decision, which upheld revocation of billing privileges based on a felony conviction for driving under the influence of alcohol or drugs). This language is relevant in the context of this case, particularly in light of CMS's rationale in denying Petitioner's application.

4. Petitioner's public policy and other related arguments essentially amount to a disagreement with CMS's exercise of discretion to deny re-enrollment and a request for reversal based on equity reasons, which we may not grant.

Petitioner asserts that the ALJ made no finding of fact or conclusion of law and gave "little explanation or analysis" on his argument that barring him from participating in Medicare would contravene the basic policy goal of the program, which is to provide needed health care services to millions of Americans, particularly those beneficiaries in underserved rural areas like that in Missouri who need Petitioner's services and who without Medicare coverage would not be able to afford such services. RR at 38, 41. Acknowledging that the enrollment regulations are in place to "combat and reduce the number of fraudulent and abusive providers and suppliers in the Medicare program, thereby protecting the Trust Funds and the Medicare beneficiaries[,]" Petitioner states that he has not defrauded the program or abused his billing privileges, and is not at risk of becoming a supplier who could defraud the program or abuse his billing privileges were he permitted to re-enroll. *Id.* at 39 (quoting 71 Fed. Reg. 20,753, 20,773-74 (April 21, 2006)) (internal quotation marks omitted). According to Petitioner, in view of CMS's express statement of its policy to consider case-specific circumstances (which, to Petitioner, means that CMS has acknowledged that "equitable considerations" "always will play a role in" enrollment determinations, Reply at 12), CMS should have re-enrolled him. RR at 40-41.

Petitioner also asserts that the evidence he has proffered "unequivocally demonstrate[s]" that his offense was not and is not detrimental to the best interests of the Medicare program and its beneficiaries because the one-time offense in 2009 did not involve his medical practice or any claim for Medicare money, and his professional ability or competence has not been questioned. *Id*. at 34-35; *id.* at 9 (stating that the Missouri Board of Registration for the Healing Arts has lifted the probation on his medical license so that his license is in good standing). He states that, in light of such evidence and his full compliance with all probation terms, upon which he was discharged early from probation, and given the need of his services in the rural community in which Petitioner wishes to practice if permitted to resume participation in Medicare, a denial "could *only* be the product of an abuse of discretion" by CMS. *Id.* at 35-38 (Petitioner's emphasis).

The ALJ noted Petitioner's "correct[]" identification of "two goals of Medicare and the law implementing the program" – to protect program integrity and to provide needed health care – but concluded that neither policy goal was violated here. ALJ Decision at 14. CMS, the ALJ stated, "determined the balance of the scales tipped against Petitioner." *Id.* To the extent Petitioner's argument may be understood as a request for equitable relief, the ALJ also stated, he did not have authority to grant such relief. *Id.* (citing *US Ultrasound*, DAB No. 2302, at 8 (2010)).

Just as the ALJ was without authority to reverse the denial of re-enrollment for equity reasons, we also lack such authority. Although Petitioner denies that he is asking for equitable relief (Reply at 11), he nevertheless makes arguments that collectively can only be understood as an appeal to equity considerations rooted in a disagreement with how CMS exercised its discretion here. We do not doubt that beneficiaries may need or benefit from Petitioner's services, or question that Petitioner has fulfilled his court-ordered obligations and is ready and able to provide needed services. CMS does not point to any evidence suggesting that Petitioner poses a risk of fraud on the program. We recognize that a U.S. Congressman and state legislators have voiced their support for permitting Petitioner to re-enroll. CMS Ex. 1, at 59-64; RR at 10-12, 37. But we cannot allow considerations like legislators' support or claims of potential benefits to future patients to intrude on sound decision-making on the *legal basis* for denial any more than the ALJ could. *Cf. Foot Specialists of Northridge*, DAB No. 2773, at 19 (2017) ("[N]either the Board nor the ALJ . . . has authority to alter a legally valid revocation, even were the basis for equity present."); *Amber Mullins, N.P.*, DAB No. 2729, at 6 (2016) (and cases cited therein). The authority to balance equitable considerations with risks to the program and beneficiaries rests with CMS, while our role is to evaluate if CMS's action is legally authorized. Moreover, CMS had no legal obligation to consider equity factors in deciding whether to allow or deny re-enrollment here. *Cf. Ellefsen*, DAB No. 2626, at 9 ("CMS may revoke based solely on a qualifying felony conviction, without regard to equitable or other factors.").

C. *CMS did not extend the re-enrollment bar beyond three years.*

Petitioner challenges the legality of the 2017 denial of re-enrollment under section 424.530(a)(3) based on the 2012 guilty plea related to the 2009 felony, where his billing privileges were revoked in 2013 based on the same 2012 guilty plea. RR at 16 (asserting that CMS cannot "use" the 2012 plea "twice"). Accordingly, says Petitioner, CMS cannot bar him from participating in the program based on the 2012 plea after June 21, 2015, three years after the effective date of the 2013 revocation, because section 424.535(c)(1) mandates a maximum three-year re-enrollment bar. *Id.* at 13-15; Reply at 4 n.4 (asserting that a prior felony conviction is not a "disqualifying factor" for re-

enrollment when the supplier already has been barred for the maximum three years based on that conviction). Petitioner states that he raised these arguments below but the ALJ did not address them and made "no attempt to harmonize the conflicting application" of sections 424.535(a)(3) and 424.530(a)(3). RR at 17.

Nothing in the plain language of sections 424.535 and 424.530, or even more broadly the language in Part 424, subpart P, precludes CMS from revoking and later denying re-enrollment based on the same underlying offense. Moreover, section 424.535 does not provide that where a supplier has been revoked for a three-year period that supplier may not later be denied re-enrollment if he or she already has been barred for three years. *See* ALJ Decision at 13-14 (making similar points). To the contrary, that sections 424.535(a)(3) and 424.530(a)(3) expressly authorize CMS to revoke enrollment and deny enrollment, in both instances, for a qualifying felony conviction that occurred "within the preceding 10 years" contemplates the possibility that a supplier could be kept out of the program for a period longer than three years through revocation and subsequent denial of re-enrollment whether revocation and denial of re-enrollment were based on the same underlying conviction or on two different but nevertheless disqualifying convictions.[16]

Section 424.535(a)(3)(iii) in particular is notable. It states:

> Revocations based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

That section 424.535(a)(3)(iii) contemplates revocation longer than three years where the supplier has had multiple qualifying offenses indicates that the three-year re-enrollment bar in section 424.535(c) is not an absolute maximum bar in every case regardless of the

[16] The record includes a copy of WPS's 2013 notice revoking Petitioner's billing privileges. CMS Ex. 1, at 65-67. Therein WPS expressly stated: "You may not participate in the Medicare program again until 06/21/2015, three years from the effective date of this revocation. Your re-enrollment after that date, of course, would require that you meet all of Medicare's eligibility criteria . . . ." *Id.* at 66. Petitioner quotes a portion of WPS's 2013 letter that includes this language. RR at 15. WPS therefore notified Petitioner in 2013 that a future re-enrollment application *could* be denied notwithstanding the three-year re-enrollment bar.

circumstances. In the Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15 ("Medicare Enrollment"), § 15.27.2.A,[17] CMS restated the section 424.535(a)(3)(iii) language and added the following:

> An enrollment bar issued pursuant to 42 CFR § 424.535(c) does not preclude CMS or its contractors from denying re-enrollment to a provider or supplier that was convicted of a felony within the preceding 10-year period or that otherwise does not meet all criteria necessary to enroll in Medicare.

MPIM, Ch. 15, § 15.27.2.A. The MPIM language is not inconsistent with the plain language of sections 424.530 and 424.535 and may be read harmoniously with section 424.535(a)(3)(iii) and section 424.535(c)'s re-enrollment bar provisions. The MPIM states more directly and clearly what the regulations permit: CMS may revoke enrollment for a qualifying felony conviction that occurred within the preceding ten years and set a re-enrollment bar from one to three years at the time of revocation, but also may later deny re-enrollment for a qualifying felony conviction that occurred within the preceding ten years, whether or not that conviction is the same conviction for which revocation was imposed.

We read the regulations as contemplating that there may be circumstances under which keeping a provider or supplier out of the program for three years (which is the re-enrollment bar imposed for revocations based on section 424.535(a)(3) felony convictions under the guidelines in MPIM, Ch. 15, § 27.2.D[18]) does not sufficiently protect the program. Nothing in Part 424, subpart P carves out an exception to limit the total length of time a supplier may be kept out of the program where CMS or the contractor "uses" a particular lawful basis (qualifying offense) "twice."

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[17] In the MPIM, chapter 15, CMS sets out the procedures for its Medicare fee-for-service contractors to follow to establish and maintain provider/supplier enrollment. MPIM, Ch. 15, § 15.1 ("Introduction to Provider Enrollment"). Unlike the Medicare statute and regulations, CMS's manual instructions to its contractors do not have the force and effect of law and are not binding on ALJs or the Board. *Tri-Valley Family Medicine, Inc*., DAB No. 2358, at 9 (2010) (citing *Fayad*, DAB No. 2266, at 9 n.6); *Foxwood Springs Living Ctr.*, DAB No. 2294, at 8-9 (2009). Because a manual "does not have the legal authority of the statute and regulations, its instructions must give way to the statute and regulations to the extent of any conflict." *Conn. Dep't of Social Servs.*, DAB No. 1982, at 20 (2005). The manual language we have considered, however, is relevant to and instructive on the question presented and does not present any such conflict.

[18] The MPIM, Ch. 15, § 27.2.D also adds: "Reenrollment bars apply only to revocations, not to denials. The contractor shall not impose a reenrollment bar following a denial of an application." (Emphasis in original.)

Furthermore, the two provisions are not duplicative or repetitive. The effect of the re-enrollment bar after revocation is a mandatory preclusion of re-enrollment during that time period (even if it extends beyond the 10-year period after the conviction). After the end of the bar, the supplier may seek re-enrollment under the same terms as a new applicant – which includes being subject to CMS's decision about whether denial of re-enrollment is appropriate when less than 10 years have elapsed since a conviction. Petitioner offers no authority, binding or not, that supports his position on this issue.

For the reasons we have explained, we conclude that CMS was authorized to deny re-enrollment to Petitioner.

D. *The Board does not have authority to overturn applicable regulations based on constitutional challenges to their validity*.

The ALJ stated that "Petitioner cited no authority for the application of the prohibition against double jeopardy in this context," which "is not a criminal or civil penalty (and it is referred to as neither by the drafters of the regulation), but is more akin to an ineligibility or disqualifier for professional licensing" and the Part 424 enrollment regulations have not been declared punitive in nature. ALJ Decision at 13 (citing *Joann Fletcher Cash*, DAB No. 1725 (2000)). The ALJ also noted that sections 424.535(c) and 424.530(a)(3), respectively, authorize CMS to impose a re-enrollment bar lasting from one to three years and to deny enrollment based on a felony conviction within ten years of submittal of an application if CMS determines that the felony offense is detrimental to the best interests of the Medicare program and its beneficiaries. *Id.* at 13-14. The ALJ wrote, "Petitioner cites no authority for the proposition that these delegations of authority are impermissible or constitute dual punishment." *Id.* at 14.

Petitioner writes, "While the Board may elect not to rule on constitutional challenges, to ensure that all appropriate challenges are preserved, [he] asserts that all conduct and decisions of Respondent CMS and of the ALJ violate his constitutional right to due process of law under the Fifth Amendment to the United States Constitution, including without limitation his right to procedural due process, substantive due process and to be free from application of vague laws." RR at 16 n.58; *id.* at 18 n.64 (asserting that section 424.530(a)(3) is void for vagueness because it does not define "assault").

The Board and the ALJ must follow the applicable enrollment law and regulations and have no authority to refuse to apply applicable regulations based on constitutional challenges. *See, e.g., 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).”); *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”); *1866ICPayday.com* at 14 (ALJ was bound to apply the revocation regulations and may not invalidate law or regulations on constitutional grounds); *see also Robert F. Tzeng, M.D.*, DAB No. 2169, at 13-14 n.16 (2008) (“Courts . . . 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.”) (and cited cases). We understand Petitioner’s statements to mean that Petitioner is well aware that we have no authority to provide the relief he seeks based on constitutional grounds, but nevertheless note his arguments, as he states that he wishes to preserve them for judicial review of the Board’s decision.

Conclusion

The Board affirms the ALJ Decision.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member