Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jorge L. Garib, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-881

Decision No. CR2289

Date: December 2, 2010

DECISION

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment and sustain the determination of its contractor, First Coast Service Options (First Coast), denying Petitioner Jorge L. Garib, M.D.'s application for enrollment as a Medicare supplier. Petitioner does not dispute that he was convicted of a felony for a financial crime on February 11, 2000, authorizing the denial of his enrollment for ten years under applicable law and regulations. Petitioner argues that his application should not have been denied because the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) determined not to exclude Petitioner from participation in federal health care programs under different authority. As I explain below, I also deny CMS's motion to dismiss Petitioner's appeal, Petitioner's motion for summary judgment, and Petitioner's request for other relief.

I. Statute and Regulation

Section 1842(h)(8) of the Social Security Act (Act), 42 U.S.C. § 1395u(h)(8), authorizes the Secretary of HHS to "refuse to enter into an agreement with a physician or supplier" to participate in Medicare as a supplier and to terminate or refuse to renew such agreement, "in the event that such physician or supplier has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to

the best interests of the program or program beneficiaries."[1] *See* Act § 1866(b)(2)(D), 42 U.S.C. § 1395cc(b)(2)(D) (providing that the Secretary may "refuse to enter into an agreement" if the Secretary "has ascertained that the provider has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries").

CMS regulations implement the Secretary's authority to deny enrollment based on felony convictions at 42 C.F.R. § 424.530(a)(3), which states that "CMS may deny a provider's or supplier's enrollment in the Medicare program for the following reasons," which include, as relevant here:

> (3) *Felonies.* If within the 10 years preceding enrollment or revalidation of enrollment, the provider, supplier, or any owner of the provider or supplier, 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. CMS considers the severity of the underlying offense.
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> (i) Offenses include—
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> * * * *
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> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

II. Background

By letter dated September 8, 2009, First Coast notified Petitioner that it had denied his application to participate in Medicare as a supplier under 42 C.F.R. § 424.530(a)(3)(i)(B), based on his conviction of two federal felony offenses on February 11, 2000. CMS Ex. 2. First Coast informed Petitioner that he was "[b]arred from enrolling in Medicare until after February 11, 2010." *Id.* at 1. Petitioner timely requested reconsideration, and, on July 7, 2010, First Coast sustained the denial of enrollment, citing section 424.530(a)(3)(i)(B), and "the enrollment bar set in place by the conviction dated February 11, 2000." CMS Ex. 5, at 2.

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[1] A physician is a Medicare "supplier," which is defined in the Medicare statute to mean "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare statute. Act § 1861(d), 42 U.S.C. § 1395x(d).

Petitioner timely filed a hearing request (HR) pursuant to 42 C.F.R. § 498.40 and included a motion for summary judgment and 21 exhibits. In the HR, Petitioner argues that the denial of his enrollment should be reversed, because: (1) the OIG determined not to exclude Petitioner from federal health care programs for his criminal convictions; and (2) his denial is inequitable. Petitioner also asks that CMS remove all references in its records to his having been purportedly "excluded."

The appeal was originally assigned to Board Member Leslie A. Sussan, who, on August 9, 2010, issued an Acknowledgment and Pre-Hearing Order setting procedures for the appeal. Petitioner submitted a pleading dated August 27, 2010, titled "Informing Recent Development and Proposing Course of Action on Remaining Issue," and three exhibits. In that submission, Petitioner reported that First Coast had on August 18, 2010 enrolled him in Medicare effective July 7, 2010, and, in light of his recent enrollment, Petitioner still questioned whether First Coast improperly denied his enrollment on September 8, 2009 and whether Board Member Sussan would expunge any reference in First Coast records to Petitioner being excluded from the Medicare and Medicaid programs. Judge Sussan ordered CMS to respond to Petitioner's submission in its ordered exchange brief and subsequently granted CMS an extension of time to do so. Request for CMS to Respond to Additional Information (Sept. 3, 2010); Order (Sept. 7, 2010). CMS submitted its motion to dismiss or for summary judgment and supporting brief (CMS Br.), dated September 21, 2010, and its six exhibits. [2] Petitioner submitted a reply to CMS's motion to dismiss or for summary judgment, dated September 30, 2010. This case was transferred to me on October 25, 2010.

Neither party objected to the admission of any exhibit. CMS did not assert that any of Petitioner's exhibits constitute new documentary evidence, the admission of which at the Administrative Law Judge (ALJ) level is limited by 42 C.F.R. § 498.56(e). The July 7, 2009 reconsideration decision does not state what materials Petitioner submitted on

[2] In moving to dismiss, CMS argues that I am "not authorized to decide whether CMS should exercise its authority assuming that the authority to deny enrollment exists in a particular case." CMS Br. at 6. CMS does not explain, however, why I should dismiss Petitioner's entire appeal and, in fact, acknowledges that Petitioner may request a hearing to challenge the determination to deny his application for enrollment. *Id*. at 5 (citing 42 C.F.R. § 498.3(b)(17) (noting appealable initial determinations include "[w]hether to deny or revoke a provider or supplier's Medicare enrollment in accordance with § 424.530 or § 424.535")). In light of CMS's recognition of a right to challenge whether a regulatory basis exists for the denial of Petitioner's enrollment, I deny the motion to dismiss without further discussion.

reconsideration.[3] In any event, as I conclude below, there are no material facts in dispute,
and Petitioner's exhibits do not indicate any basis to reverse the denial of his enrollment. Accordingly, I admit all of the parties' exhibits.

III. Issue, Analysis, Conclusions of Law

A. Issue

The issue in this case is whether either party is entitled to summary judgment based on an undisputed showing that the denial of Petitioner's enrollment in Medicare was legally authorized.

B. Analysis

My conclusions are in the italicized headings and subsequent discussions below.

1. The case can be decided through summary judgment.

The Pre-Hearing Order that Board Member Sussan issued in this case stated that an in-person hearing would be necessary only if one party presented admissible written direct testimony of a witness whom the opposing party sought to cross-examine. Neither party submitted any written direct testimony, proposed to call any witness, nor requested an in-person hearing. I find no need or purpose to convene an in-person hearing and proceed to consider the merits of the case based on the written record before me.

Both parties have moved for summary judgment. The Departmental Appeals Board (Board) stated the standard for summary judgment as follows:

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[3] The 21 exhibits Petitioner submitted with his HR include Medicare enrollment applications; correspondence relating to the denial of his enrollment and his request for reconsideration; and materials relating to his conviction, the suspension and reinstatement of his medical license by the Commonwealth of Puerto Rico, his professional qualifications and certifications, and the OIG's determination not to exclude Petitioner from federal health care programs. The three exhibits Petitioner enclosed with his August 27, 2010 submission consist of a letter from First Coast dated August 18, 2010, enrolling Petitioner in Medicare effective July 7, 2010, which CMS submitted as its exhibit 1, and correspondence related to the enrollment; a letter in response from Petitioner to First Coast requesting expungement of information implying that he was excluded; and a letter from OIG dated April 16, 2006, stating that Petitioner would not be excluded based on his convictions, which CMS submitted with its exhibit 3.

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc*, DAB No. 2291, at 4-5 (2009).

Neither party alleges that any material facts are in dispute, and they debate only whether CMS was authorized under those facts to deny Petitioner's enrollment application based on his felony convictions. Accordingly, summary judgment is appropriate.

2. Undisputed facts demonstrate that CMS was authorized to revoke Petitioner's enrollment under section 1842(h)(8) of the Act and 42 C.F.R. § 424.530(a)(3).

CMS, through its contractor First Coast, denied Petitioner's application for enrollment as a Medicare supplier on the ground that Petitioner had been convicted, within the previous ten years, of a felony for a financial crime, which is the type of offense that CMS "has determined to be detrimental to the best interests of the program and its beneficiaries." CMS Ex. 2 (First Coast Denial Letter, Sept. 8, 2009); CMS Ex. 5, at 1 (reconsideration decision stating that First Coast denied enrollment "based on a previous felony conviction for a financial crime."). Petitioner admits, that on February 11, 2000, he was convicted of conspiracy to defraud the United States and of making false declarations before a grand jury, both federal felony offenses under 18 U.S.C. §§ 371 and 1623, respectively. CMS Ex. 6, at 1-2 (citing letter from Petitioner to CMS, June 12, 2009), and 4-9 (setting forth criminal judgment, United States District Court for the District of Puerto Rico, July 17, 2000); HR at 4. According to Petitioner, the former offense concerned his misuse of the assets of a private corporation of which he was part owner, and the latter offense concerned denying contributions to a political party. CMS Ex. 6, at 1-2; HR at 7-8. As a result of his conviction, Petitioner was sentenced, on July 17, 2000, to 60 months

imprisonment and two years of supervised release, and he was ordered to pay a fine of $10,000 and restitution of $88,764. CMS Ex. 6, at 4-9; P. Ex. 19. Petitioner reported to CMS that his license to practice medicine in Puerto Rico was suspended in July 2003 as a result of the convictions and was reinstated in January 2009. CMS Ex. 6, at 1.

I conclude that the undisputed facts concerning Petitioner's convictions amply support CMS's determination that Petitioner was convicted of a felony "financial crime" covered by section 424.530(a)(3)(i)(B). In reaching this conclusion, I "examine[] the conduct and circumstances underlying Petitioner's offense" and "consider[] whether it is similar to a named crime." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 7 (2009) (ALJ), *aff'd, Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010).[4] Additionally, as the Board stated in *Ahmed:*

> [E]ven if Petitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime. Financial crimes, the regulation states, are crimes "such as extortion, embezzlement, income tax fraud, insurance fraud and other similar crimes" (emphasis added). The words "such as" imply that the subsequent list of illustrative crimes, including crimes similar to those named in the list, are not the only set of crimes that may be considered "financial."

Ahmed, DAB No. 2261, at 10. Accordingly, considering Petitioner's felony convictions involved conspiring to engage in fraud, misusing corporate assets, and the payment of $88,764 in restitution, I find Petitioner was convicted of a financial crime as described in *Ahmed.* Moreover, as a matter of law, CMS could reasonably determine that offenses relating to defrauding the United States and making false declarations to a grand jury under criminal statute 18 U.S.C. § 1623 are detrimental to the best interests of the Medicare program or program beneficiaries, authorizing the denial of Petitioner's enrollment under section 1842(h)(8) of the Act and the regulations. Nonetheless, as CMS denied enrollment based on one of the felony offenses listed in section 424.530(a)(3)(i), CMS was not required to determine that Petitioner's particular offenses were detrimental to the best interests of Medicare and its beneficiaries. *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008) (The presence of an offense among those listed in analogous section 424.535(a)(3)(i) authorizing revocation for conviction of listed felony offenses means

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[4] *Ahmed* involved a revocation of enrollment under section 424.535(a)(3)(i)(B), which authorizes revocation for the same felony financial crimes listed in section 424.530(a)(3)(i)(B) dealing with denial of enrollment. *Ahmed* is thus fully applicable here.

that CMS has already determined that the offense "is detrimental per se to the [Medicare] program and its beneficiaries.").

My review is limited to whether CMS has established a legal basis for its determination to deny Petitioner's enrollment. *See id.* at 12-13 (2008) (ALJ review of revocation of enrollment for felony offenses under section 1842(h) of the Act is "limited to whether CMS had established a legal basis for its actions."). I conclude based on undisputed facts that CMS was authorized under section 424.530(a)(3)(ii)(B) to deny Petitioner's enrollment and that I am required to sustain CMS's determination.

3. CMS's authority to revoke Petitioner's enrollment under section 1842(h)(8) of the Act and 42 C.F.R. § 424.530(a)(3) was not affected or diminished by the OIG's determination not to exclude Petitioner under different authority.

Petitioner's sole legal argument is that the OIG decision not to exclude Petitioner from federal health care programs based on his felony convictions, under section 1128(a) of the Act, precluded CMS from denying his application for enrollment as a Medicare supplier. As the Board has explained, Section 1128(a) "requires the Secretary to exclude individuals or entities that have been convicted of health care 'program-related' crimes" (i.e., those "related to the delivery of an item or service" under Medicare or any state health care program), or offenses relating to patient abuse, felony health care fraud, or controlled substances. *Fady Fayad, M.D.*, DAB No. 2266, at 15 n.12 (2009); Act § 1128(a). A letter dated February 26, 2004, from a special agent from the OIG, informed Petitioner that, as a result of his convictions, HHS was "required to exclude you from eligibility to participate in the Medicare, Medicaid, and **all** Federal health care programs" pursuant to section 1128(a) of the Act, 42 U.S.C. 1320a-7(a), for a minimum of five years. CMS Ex. 3, at 4 (emphasis in original). However, by letter dated April 18, 2006, an OIG agent informed Petitioner that "[a]fter a complete review of all information in the file, we have determined that the exclusion from Medicare/Medicaid participation will not be implemented. We have closed our case file, and anticipate no further action regarding this matter at this time." *Id.* at 5.

Petitioner argues that First Coast and CMS lacked authority to deny his enrollment, because section 1128(c)(3) of the Act, which authorizes the Secretary to waive certain exclusions under section 1128(a), states that "[t]he Secretary's decision whether to waive the exclusion shall not be reviewable." HR at 9.

Petitioner's argument erroneously equates or confuses CMS's denial of a Medicare supplier's enrollment, under section 1842(h)(8) of the Act and section 424.530 of the regulations, with the OIG's exclusions of health care providers from participating in federal health care programs under section 1128 of the Act. The Board has made clear, in decisions addressing the revocation of physicians' Medicare billing privileges under 42

C.F.R. § 424.535(a)(3), for felony convictions that also authorize denial of enrollment under section 424.530(a)(3), that "[e]xclusion under section 1128 and revocation under section 424.535 are separate and distinct enforcement tools, each with its own requirements and consequences." *Fady Fayad, M.D.*, DAB No. 2266, at 12 (citing *Ahmed*, DAB No. 2261, at 13). The Board's analysis in revocation cases applies equally to the denial of supplier enrollment on the same grounds under section 424.530(a)(3).[5]

As the Board has pointed out, the list of offenses authorizing denial or revocation of enrollment under sections 424.530(a)(3) and 424.535(a)(3) is not coextensive with the list of offenses mandating exclusion under section 1128(a). Section 1128(a), as noted above, mandates exclusion for crimes that have some relation to health care and health care programs, including felony health care fraud, or which involve controlled substances. By contrast, "[r]evocation [and thus denial on the same grounds] may be based on conviction for a crime that is unrelated to health care or a health care program." *Fady Fayad, M.D.*, DAB No. 2266, at 15. CMS denies and revokes enrollment based on felonies that are determined to be "detrimental to the best interests of the [Medicare] program or program beneficiaries," including those listed in the regulations, with no requirement that the crimes be related to Medicare or health care. Act § 1842(h)(8). The Board further explained that "[e]xclusions under section 1128 are made by the HHS Office of Inspector General (OIG), not by CMS, and may be appealed under an administrative appeals process separate from the appeals process for enrollment denials and revocations." *Fady Fayad, M.D.*, DAB No. 2266, at 12 n.9 (*comparing* 42 C.F.R. Part 1005 (setting out the appeal rights of individuals and entities whom the OIG has excluded pursuant to section 1128) with 42 C.F.R. § 424.545 (Oct. 1, 2008) (specifying that providers and suppliers whose Medicare enrollment has been revoked or denied have appeal rights under 42 C.F.R. Part 498, subpart A)).

Thus, notwithstanding Petitioner's argument that "the effect of enrollment and billing 'denial' is the same as an 'exclusion'" (P. Reply at 2), OIG's determination not to exclude Petitioner under section 1128(a) had no bearing on CMS's authority under section 1842(h)(8) of the Act and the regulations to deny Petitioner's application for enrollment based on his conviction within the previous 10 years of a felony financial crime covered in section 424.530(a)(3)(B) of the regulations. Section 424.530 does permit denial of Medicare enrollment of a provider or supplier who has been convicted of

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[5] In *Ahmed*, CMS revoked the supplier's Medicare billing privileges under section 424.535(a)(3)(i)(B), which authorizes revocation for the same felony "[f]inancial crimes" that authorize denial of enrollment under section 424.530(a)(3)(i)(B). In *Fayad*, CMS revoked the supplier's billing privileges under the introductory language in section 424.535(a)(3), which, like the denial regulation, describes a "felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries."

"felonies outlined in section 1128 of the Act" or who has been "[e]xcluded from the Medicare, Medicaid and any other Federal health care Programs . . . in accordance with section 1128" of the Act. 42 C.F.R. § 424.530(a)(2)(i), (a)(3)(i)(D). However, CMS did not deny Petitioner's enrollment on either of those grounds. CMS Ex. 2.

As there is no requirement in section 1842 of the Act or section 424.530(a)(3) of the regulations that a supplier's felony financial crime relate to Medicare or to health care for CMS to deny enrollment, Petitioner's argument that his offenses were not health care related, which CMS does not dispute, shows no error in CMS's determination. *See, e.g., Fady Fayad, M.D.*, DAB No. 2266, at 15 ("Section 424.535(a)(3)(i)(B) permits CMS to revoke a supplier's billing privileges based on a 'financial crime' without requiring that the crime be related to a health care program or health care fraud.").

Additionally, because the OIG's decision not to exclude Petitioner from federal health care programs under section 1128 of the Act had no bearing on CMS's authority to deny his application for enrollment as a Medicare supplier under section 1842(h) of the Act and the regulations, it is not relevant whether the OIG determined to "waive" exclusion of Petitioner, as Petitioner asserts. There is, however, no evidence in the record that OIG did, in fact, waive the exclusion, as that term is used in the law. Section 1128(c)(3)(B) of the Act permits the Secretary, "upon the request of the administrator of a Federal health care program . . . who determines that the exclusion would impose a hardship on beneficiaries . . . of that program," to waive an exclusion under section 1128(a) (except for exclusions for convictions relating to patient abuse under 1128(a)(2)), "with respect to that program in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community." Petitioner submitted no evidence that these prerequisites for his exclusion to be waived were met. The letter from the OIG agent stating that the exclusion would not be implemented does not state that the exclusion had been "waived."[6]

[6] The OIG letter dated April 18, 2006 does not state why the OIG determined not to implement an exclusion. I note, however, that Petitioner maintains that his offenses were not among those for which an individual may be excluded under section 1128(a) of the Act. Those offenses include "program-related crimes" and felony offenses "relating to health care fraud . . . which occurred after the date of the enactment [August 21, 1996] of the Health Insurance Portability and Accountability Act of 1996 (HIPPA)." Petitioner asserts, and CMS does not dispute, that his substantive offenses were not specifically related to the Medicare program or to health care fraud and that the "acts leading to [his] conviction under [5 U.S.C.] § 371 predate" HIPPA. HR at 7.

4. I am not authorized to reverse the denial based on equitable arguments or to grant additional relief Petitioner seeks.

Petitioner argues I should reverse the denial of his enrollment because of the "equities of this case." HR at 9-10. He asserts that "longer periods of exclusions are traditionally associated with 'patient abuse' cases," points out that more than three years have elapsed since the OIG determined not to exclude him, states that he is aware of "at least two physicians, convicted as a result of related investigations" whom First Coast has enrolled, and accuses First Coast of "arbitrarily penalizing" him. *Id*.

I have no authority to grant the equitable relief Petitioner seeks. The applicable statute and regulations plainly authorized CMS to deny Petitioner's application for enrollment as a Medicare supplier based on his conviction for a felony financial crime within the previous ten years. As discussed above, my review is limited to whether CMS has established a legal basis for its determination to deny Petitioner's enrollment. Petitioner points to no source of authority for me to overturn, based on equitable considerations he raises, CMS's determination that is in compliance with applicable law and regulation. It is well-established that ALJs are bound by statute and regulations. *Restwell Mattress Co. d/b/a Restwell Mattress Factory*, DAB CR2194, at 6 (2010) (citing *Sentinel Med. Labs., Inc.*, DAB No. 1762, at 9 (2001)). Where a regulation speaks clearly on its face and applies to the question before me, I am bound to follow it. *See US Ultrasound*, DAB No. 2302, at 8 (2010) ("Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."). Petitioner's assertions regarding the different treatment by First Coast of other physicians with criminal convictions affords no basis on which I may reverse the denial of his enrollment. I do note, however, that in August 2010, First Coast enrolled Petitioner in Medicare effective July 7, 2010, apparently in response to an enrollment application and supporting information that Petitioner filed with First Coast beginning in March 2010, more than ten years after his felony convictions. CMS Exs. 1; 6, at 10-11; P. Submission, "Informing Recent Development and Proposing Course of Action on Remaining Issue" (Aug. 27, 2010).

Petitioner also asks that CMS be ordered to "correct [Petitioner's] record to reflect that [he] was never excluded from the program," to "notify all entities, whether private or governmental, that [he] . . . never received an 'exclusion notice' from the program, so as to rectify any prior misleading communications," and to provide Petitioner and the ALJ with "a certified copy of [his] record, including but not limited to: (i) all CMS forms filled by [Petitioner], (ii) all communications . . . and any minutes, memorandum, notes and recordings (including electronically stored information) related to [his] case." HR at 11.

The regulations governing this proceeding grant the right to a review of CMS's determination "[w]hether to deny or revoke a provider or supplier's Medicare enrollment

in accordance with § 424.530 or § 424.535" of title 42 of the C.F.R. 42 C.F.R. § 493.3(b)(17). I am unaware of, and Petitioner does not cite to, any statute or regulation that would authorize an ALJ in this proceeding to order CMS to expunge information from its records or to provide copies of records beyond what CMS submits to an ALJ in the course of the resolution of a petitioner's request for a hearing. In any event, the record before me contains no documents indicating that Petitioner has been excluded from participating in federal health care programs under section 1128, or that CMS has denied Petitioner's enrollment based on his having been so excluded. As I observed above, my authority in this case is limited strictly to deciding whether CMS was authorized by regulation to deny Petitioner's enrollment and, as I discuss above, I conclude that CMS has that authority.

IV. Conclusion

The undisputed facts entitle CMS to summary judgment as a matter of law. I therefore grant summary judgment in favor of CMS and sustain the September 8, 2009 determination denying Petitioner's enrollment. I deny Petitioner's motion for summary judgment and his request for other relief, and CMS's motion to dismiss.

/s/
Joseph Grow
Administrative Law Judge