Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Saeed A. Bajwa, M.D.
Docket No. A-17-25
Decision No. 2799
June 22, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Saeed A. Bajwa, M.D. (Petitioner) appeals a November 10, 2016 decision by an administrative law judge (ALJ), *Saeed Bajwa, M.D.*, DAB CR4732 (ALJ Decision). That decision sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment and billing privileges based on 42 C.F.R. § 424.535(a)(3).

We affirm the ALJ's conclusions that CMS had a basis to revoke Petitioner's enrollment and billing privileges under section 424.535(a)(3) given Petitioner's April 21, 2015 conviction for a felony offense and that the revocation, which CMS imposed with a reenrollment bar of three years, was effective on the date of the conviction.[1]

Legal Background

A "supplier" of Medicare services (which includes physicians and physician practices) must be enrolled in the Medicare program in order to receive payment for items and services covered by Medicare. 42 C.F.R. § 424.505. Supplier enrollment is governed by the regulations in 42 C.F.R. §§ 424.500-.570. Those regulations authorize CMS to revoke a supplier's Medicare billing privileges for any of the "reasons" specified in section 424.535(a).

[1] Although Petitioner challenges CMS's basis for the revocation, he does not challenge the effective date of the revocation or the length of the reenrollment bar. In any event, the ALJ correctly concluded that the effective date was the date of Petitioner's conviction. *See* 42 C.F.R. § 424.535(g), cited in ALJ Decision at 7 (Conclusion of Law 3). He also correctly determined that he had no authority to review CMS's determination to impose a three-year bar on Petitioner's reenrollment in the Medicare program. *See* ALJ Decision at 12, citing 42 C.F.R. § 424.535(c); *Vijendra Dave, M.D.*, DAB No. 2672, at 10-11 (2016).

Section 424.535(a)(3), as amended effective February 3, 2015, provides that CMS may revoke a supplier's Medicare billing privileges if the supplier was, "within the preceding 10 years, convicted (as that term is defined in 42 C.F.R. § 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.535(a)(3)(i); 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). The same amended regulation lists certain felony offenses that are "include[d]" among "but are not limited in scope or severity to" the "felony offense[s] that CMS determines [are] detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.535(a)(3)(ii).

When a revocation is based on a felony conviction, the revocation's effective date is the date of conviction. *Id*. § 424.535(g). A revoked supplier is barred "from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar." *Id*. § 424.535(c). The reenrollment bar is a minimum of one year but no more than three years. *Id.*

A supplier may appeal a revocation determination in accordance with the procedures in 42 C.F.R. Part 498. The supplier must first request "reconsideration" of the initial revocation determination. 42 C.F.R. §§ 498.5(1)(1), 498.22. If dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. *Id*. § 498.40.

Case Background

Petitioner is a neurologist who participated in the Medicare program prior to the revocation of his enrollment. ALJ Decision at 7. On April 21, 2015, a federal district court convicted Petitioner, pursuant to his earlier guilty plea, of one count of making a false statement in violation of 18 U.S.C. § 1001(a)(2). *Id*. at 8, citing CMS Ex. 1, at 266. As part of his plea, Petitioner agreed to the statement of facts filed with the plea agreement. *Id*. at 7, citing CMS Ex. 1, at 258-59.

In a letter dated November 16, 2015, National Government Services (NGS), a CMS Medicare Administrative Contractor, notified Petitioner that it had reopened an earlier initial determination (dated October 16, 2015) and was issuing a revised determination revoking Petitioner's Medicare enrollment and billing privileges under section

424.535(a)(3) based on his April 21, 2015 federal court felony conviction.[2] ALJ Decision at 2, citing CMS Ex. 1, at 32. The letter specifically stated, "In conclusion, upon careful review of the facts and circumstances surrounding the conviction, we find your continued participation in the Medicare program detrimental to the best interests of the [Medicare] program and its beneficiaries." CMS Ex. 1, at 34. Petitioner requested reconsideration, and on April 11, 2016, an NGS hearing officer upheld the revocation under section 424.535(a)(3)(ii)(B) and imposed a three-year re-enrollment bar. ALJ Decision at 2.

Petitioner filed a hearing request with exhibits A through O. ALJ Decision at 2. On June 14, 2016, CMS filed a combined pre-hearing brief and motion for summary judgment with CMS exhibits (CMS Ex.) 1 through 26. *Id.* at 3. On June 15, 2016, CMS filed a revised brief and motion. *Id*. CMS also filed a list of proposed witnesses. *Id*. at 5. On July 7, 2016, Petitioner filed his pre-hearing brief with Petitioner exhibits (P. Ex.) 1 through 9. *Id*. at 3. The ALJ admitted CMS exhibits 1 through 26 and Petitioner exhibits 1 through 9 but did not admit Petitioner exhibits A through O. *Id*. at 2-3 and n.2. Petitioner did not submit a list of proposed witnesses or argue that testimony was necessary to resolve issues of disputed fact. *Id*. at 5. Petitioner also agreed that summary judgment was appropriate "in the absence of any genuine dispute as to any material fact."[3] *Id*. at 6, citing P. Br. at 1 n.1.

Standard of Review

The ALJ's grant of summary judgment is a legal issue that we address de novo. *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 6 (2016). Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. "The applicable substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the case under the governing law will properly preclude the entry of summary judgment." *Southpark Meadows Nursing & Rehab. Ctr.*, DAB No. 2703, at 5 (2016) (internal quotation marks and brackets omitted). In addition, with respect to an allegation of ALJ

[2] The October 16, 2015 initial determination was based on this ground and also on section 424.535(a)(9), failure to report the revocation. ALJ Decision at 2, citing CMS Ex. 1, at 1. The April 11, 2016 notice of the reconsideration decision also cited section 424.535(a)(9) as a second basis for the revocation. CMS Ex. 1, at 1. However, the ALJ noted CMS's acknowledgment that the November 16, 2015 reopened and revised initial determination did not cite section 424.535(a)(9) as a basis for the revocation. ALJ Decision at 2; *see also* CMS Ex. 1, at 32-33. The ALJ then concluded that CMS "ha[d] abandoned any argument that 42 C.F.R. § 424.535(a)(9) is a basis for revocation . . . despite the citation of that regulatory provision in the reconsidered determination." ALJ Decision at 2. Neither party contests this ALJ conclusion on appeal; accordingly, we do not have before us any issue as to whether an alleged violation of section 424.535(a)(9) was a second basis for the revocation.

[3] There is no indication in the record that either party cited any such dispute.

procedural error, the Board reviews the allegation to determine "whether the ALJ committed an error of procedure that resulted in prejudice (including an abuse of discretion under the law or applicable regulations)." *Precision Prosthetic, Inc.*, DAB No. 2597, at 10 (2014) (internal quotation marks omitted).

Discussion

Petitioner makes three main arguments: 1) that the ALJ erred in concluding that there had been no illegal retroactive application of the amended version of section 424.535(a)(3) since the amendments took effect before Petitioner's conviction, and his conviction – not the underlying criminal conduct as asserted by Petitioner – was the basis for the revocation; 2) that the ALJ erred in concluding that NGS, as CMS's contractor, was authorized to revoke Petitioner's enrollment and billing privileges on CMS's behalf; and 3) that the ALJ erred in concluding that he had no authority to review CMS's exercise of discretion to revoke Petitioner's enrollment and billing privileges. *See* Request for Review (RR) at 1-3, 12-13. As explained below, we find no merit in Petitioner's arguments and conclude that the ALJ correctly determined that CMS had a basis to revoke Petitioner's Medicare enrollment and billing privileges effective April 21, 2015, the date of Petitioner's felony conviction.

A. *The ALJ correctly concluded that there was no retroactive application of amended section 424.535(a)(3) since the amendments took effect February 3, 2015, before the date of Petitioner's conviction, which was the basis for CMS's authority to revoke under section 424.535(a)(3).*

1. Petitioner was convicted after the effective date of the amendments to the regulation.

In determining that Petitioner was convicted of a felony offense forming the basis for a revocation under section 424.535(a)(3), the ALJ applied section 424.535(a)(3) as amended by the Secretary effective February 3, 2015. The amended regulation provides as follows:

> **§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.**
>
> (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:
>
> * * *

> (3) Felonies. (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.
>
> (ii) Offenses include, but are not limited in scope or severity to –
>
> (A) Felony 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.
>
> (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.
>
> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the [Social Security] Act.
>
> (iii) 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.

79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014).[4] The ALJ found that Petitioner was convicted of his felony offense on April 21, 2015, a date that is within 10 years preceding CMS's November 16, 2015 revocation action, as required by the regulation. ALJ Decision at 8. The ALJ further concluded that under the regulation, Petitioner's conviction, not the criminal conduct underlying that conviction, provided the basis for the

[4] The Secretary made corresponding amendments to section 424.530(a)(3), which authorizes CMS to deny enrollment to providers and suppliers based on felony convictions. *See* 79 Fed. Reg. at 72,531-32. Although section 424.530(a)(3) is not at issue here, we mention this for the reader's information since the Federal Register citations and quotations sometimes refer to both sections.

revocation. *Id.* at 9-10. Since Petitioner's conviction post-dated the effective date of the amended regulation, the ALJ concluded that the regulation was not applied retroactively.[5] *Id*. at 9, 11.

We agree with the ALJ. Indeed, as CMS notes, the undisputed facts in this case clearly show that the amended regulation was applied prospectively since "CMS revoked Petitioner's enrollment and billing privileges *after* the effective date of the amendments . . . and *after* Appellant's conviction." CMS Response at 16 (emphasis in original; citations omitted).[6]

Petitioner does not dispute that his conviction occurred after the effective date of the regulations. However, Petitioner argues that section 424.535(a)(3) makes the date of the criminal conduct that led to his felony conviction, not the date of his conviction, the critical point for determining whether CMS's revocation has impermissible retroactive effect. RR at 15, 20-24. Petitioner then argues that "[u]nder the regulation in effect in 2011, [Petitioner's] conduct was not a basis for revocation[,]" because, according to Petitioner, "[t]he regulation in effect at that time [of his criminal conduct] permitted revocation based on a felony conviction only if the felony fell into one of four specifically enumerated categories that the Secretary had 'determined' to be detrimental to the program or its beneficiaries." *Id*. at 15, citing 42 C.F.R. § 424.535(a)(3)(i) (2011). Petitioner contends that his "conviction" did not fit into any of the enumerated categories. *Id*. at 16.

[5] The ALJ also concluded there was no violation of the qualified prohibition in section 1871(e)(1)(A) of the Social Security Act (Act) against retroactive application of substantive changes in the regulations or certain specified sub-regulatory administrative issuances. ALJ Decision at 9. The ALJ based that conclusion on his finding that applying the amended regulation did not affect Petitioner's enrollment and billing privileges prior to the date of his conviction (April 21, 2015), which, as provided in section 424.535(g), was also the effective date of his revocation, as well as on his finding that there was "no evidence of any effect upon Petitioner's enrollment and billing privileges prior to February 3, 2015, the effective date of the [amended regulation] applied by CMS and NGS in this case." *Id*. Petitioner does not dispute, and, therefore, we do not address, this particular conclusion or its supporting findings. However, we do discuss later our reasons for rejecting Petitioner's argument that the amendments to section 424.535(a)(3) effected a substantive change that expanded the felonies covered by the regulation.

[6] The amended regulation also took effect before the date of CMS's initial determination to revoke. Accordingly, this case does not raise a question as to whether the ALJ's, and our, conclusion that there was no retroactive application of the amended version of section 424.535(a)(3) would be different if the amended version took effect after the conviction but before CMS's initial determination to revoke. We note, however, that Board decisions have held that the version of the regulations in effect as of the date of CMS's initial determination to revoke are controlling. *See, e.g., Norman Johnson, M.D.*, DAB No. 2779, at 18-20 (2017) (citing cases and holding that the version of section 424.535(g) in effect at the time of CMS's initial determination to revoke controlled the effective date of the revocation).

2. The plain language of amended section 424.535(a)(3) (effective February 3, 2015) and the statute it implements supports the ALJ's conclusion that Petitioner's conviction, not his criminal conduct, was the basis for CMS's exercise of its revocation authority.

There is no merit to Petitioner's argument that the regulation makes a provider's or supplier's criminal conduct, rather than the felony conviction, the basis for revocation and, thus, the date of his conduct is the critical date for determining whether the amended regulation was applied retroactively in his case. We begin by noting that Petitioner makes no distinction for purposes of this argument between the language of the amended regulation and the prior version, and there is none. Before the amendments at issue, section 424.535(a)(3) stated, as relevant to this issue, "(a) *Reasons for revocation*. CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons: . . . (3) *Felonies.* 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. . . ." 42 C.F.R. § 424.535(a)(3) (Oct. 1, 2013) (emphasis added). Amended section 424.535(a)(3) states, as relevant to this issue, that "CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons: . . . (3) *Felonies*. (i) The provider, supplier or any owner or managing employee of the provider or supplier, was . . . convicted . . . of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries." 79 Fed. Reg. at 72,532 (emphasis added). The underscored language plainly shows that the regulation, in both its current amended version and its prior version, makes the conviction of a felony, not the conduct leading to that conviction, the trigger for CMS's revocation authority. Thus, the ALJ correctly concluded:

> The regulation clearly requires a felony conviction[,] and revocation is not permitted under this provision based only upon the commission of a crime. In this case the event that triggers the application of 42 C.F.R. § 424.535(a)(3), Petitioner's conviction, occurred approximately two months after the February 3, 2015 effective date of [amended] 42 C.F.R. § 424.535(a)(3). Therefore, as a matter of undisputed fact there was no retroactive application of the new regulatory provision.

ALJ Decision at 11. The ALJ's conclusion is also consistent with the Medicare Act, which provides that "[t]he Secretary may refuse to enter into an agreement with a physician or supplier . . ., or may 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 interest of the program or program beneficiaries." Social Security Act § 1842(h)(8), 42 U.S.C. § 1395u(h)(8) (emphasis added).

Petitioner's response to the regulation's plain language is tortured and unpersuasive. Petitioner actually agrees that "[u]nder the regulation, revocation is permitted only upon a conviction for that offense . . . ." RR at 23. However, Petitioner posits, this is only "because a conviction supplies proof – indeed, beyond a reasonable doubt – that the provider has engaged in the disfavored conduct [i.e. "a Federal or State felony offense that CMS determines is detrimental to the best interest of the Medicare program and its beneficiaries"]." *Id*. Thus, Petitioner concludes, "The conviction itself is not the critical fact; otherwise, *any* conviction for a felony offense would permit revocation." *Id*. (italics in original). Petitioner cites no authority for this theory in the Medicare statute, regulation or administrative issuances, and the argument misses the point. The language "a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries" provides and describes CMS's authority to determine what felony convictions provide a basis for revocation; that language does not address, much less alter, the language making the conviction the legal trigger for CMS's exercise of its revocation authority.

Petitioner cites federal court cases that it says "support[ ] the conclusion that, for purposes of the rule against retroactivity, the date of conduct – and not the date of the resulting conviction – is what is relevant." RR at 20-21 (citing cases explaining that a regulation has an impermissible retroactive effect if it impairs rights a party possessed at the time he or she acted, or increases a party's liability for past conduct). These cases do not address and are not relevant to the issue of what triggers CMS's revocation authority under section 424.535(a)(3). That issue, as discussed, is governed by the language of the regulation which contains no words such as "acted," "actions," or "conduct" but does contain the word "conviction." It is neither necessary nor appropriate to look to extraneous legal authority to ascertain the meaning of section 424.535(a)(3) since the regulation is not ambiguous but, rather, states in plain language that "conviction" of a felony offense, not the underlying conduct, provides the basis for a revocation. *Omni Manor Nursing Home*, DAB No. 2374, at 4 (2011) ("Since the regulation on its face is unambiguous, there is neither a need to nor basis for looking to the preamble for clarification."); *Napoleon S. Maminta, M.D.*, DAB No. 1135, at 8 (1990) (explaining and applying the general rule of statutory construction that the plain meaning of the statute should control, and that resort to legislative history is appropriate only where a statute is ambiguous). ALJs and the Board are required to apply the regulations as written. *E.g. Central Kansas Cancer Institute*, DAB No. 2749, at 7, 10 (2016); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (holding that ALJs and the Board "may not invalidate either a law or regulation on any ground").

Even if section 424.535(a)(3) were ambiguous as to whether a conviction triggers CMS's revocation authority, the cases cited by Petitioner would not provide authority applicable to construing the regulation. The cited cases discuss whether the effect of laws actually applied retroactively have an illegal effect (thus making it impermissible to apply them retroactively) when, as a matter of fact, the amended regulation at issue here was applied prospectively, not retroactively. The legal test for determining whether the retroactive application of a law is permissible is not relevant where, in fact, there has been no retroactive application.

3. The amended regulation did not effect a substantive change in CMS's authority to determine which felonies are detrimental to the best interests of the Medicare program and its beneficiaries.

Petitioner argues that the amendments to section 424.535(a)(3) effected a substantive change in the revocation authority afforded CMS under the prior version of the regulation by, according to Petitioner, expanding that authority to include felonies not specifically enumerated in the prior version of the regulation. RR at 15-20. The ALJ concluded that the amended regulation "is clear that that list [of presumptively detrimental felonies in section 424.535(a)(3)(ii)] is not exhaustive and revocation is not limited to being based only upon those felonies." ALJ Decision at 11. The ALJ, however, did not discuss whether this was a change from the prior version of the regulation. *See id*. at 11 n.7 (ALJ stating he "express[ed] no opinion as to whether there would be a different outcome in this case if the version of 42 C.F.R. § 424.535(a)(3) in effect at the time of Petitioner's criminal conduct, *i.e*. July 2011, was applied"). The ALJ did state, correctly, that the relevant statutory provision, section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)), which predated the amendments to section 424.535(a)(3) by many years,[7] "does not limit the Secretary to a list of felony offenses that are detrimental but grants the Secretary the discretion to make that determination." ALJ Decision at 10. Petitioner does not allege error in the ALJ's declining to address his argument that the list of felonies in the prior regulation was exclusive, and it seems probable, in context, that the ALJ thought it unnecessary to address the issue since he had concluded (as we have) that Petitioner's conviction, rather than his conduct (as urged by Petitioner), triggered CMS's revocation authority, thus making the amended regulation applicable. In any event, there is no merit to the "substantive change" argument Petitioner makes.

[7] This section was added to the Medicare Act by the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4302, 111 Stat. 251, 382 (Aug. 5, 1997).

Petitioner's argument that the revocation would not be valid under the prior version of section 424.535(a)(3) rests on a theory that the February 2015 amendments "expand[ed] the universe of felonies for which a conviction could result in revocation of a provider's or supplier's billing privileges, from an exclusive list to an unlimited list." RR at 17. Petitioner relies on selected passages (or paraphrases thereof) from the regulatory history, citing, in particular, the use of language such as "change", modify" and "revise" rather than the word "clarify" or "clarifies." *Id*. at 17-19 (citations omitted). We find no merit in Petitioner's argument.

In the first place, Petitioner's argument ignores the plain language of the prior version of section 424.535(a)(3). That regulation authorized CMS to revoke Medicare enrollment and billing privileges for a "conviction [within the 10 years preceding enrollment or revalidation of enrollment] of a Federal or State felony offense that CMS has determined [as compared to the amended language "CMS determines"] to be detrimental to the best interests of the [Medicare] program or its beneficiaries." 42 C.F.R. § 424.535(a)(3) (Oct. 1, 2013). The regulation then stated that those "[o]ffenses include" and listed certain types of felony offenses. *Id.* § 424.535(a)(3)(i)(A)-(D) (Oct. 1, 2013). As CMS asserts, the Secretary's choice of the word "include," which is commonly understood as illustrative rather than language of limitation – such as "are limited to" – shows that the specific felonies listed are not exclusive. CMS Response at 22.

As CMS further notes (*see* CMS Response at 23-24), Board decisions and the courts have consistently upheld CMS's reading. In *Fady Fayad, M.D.*, DAB No. 2266, at 17 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011), the ALJ upheld, and the Board affirmed, CMS's determination that Petitioner's conviction for conspiracy to defraud, although not one of the listed felonies, was detrimental to the best interests of Medicare program. The federal district court that upheld the Board decision agreed, citing "hornbook law" that prefacing a list with the word "including" indicates that the list is illustrative, not exclusive and, concluding, therefore, that the fact that conspiracy to defraud was not one of the listed offenses did not render the Secretary's decision erroneous. *Fayad v. Sebelius*, 803 F. Supp. 2d at 704. Although Petitioner questions CMS's reliance on this court decision, Petitioner admits that the *Fayad* court "held that the pre-2015 version of section 424.535 could reasonably be read to allow revocation for any felony conviction." RR at 19-20 n.13.

In *Abdul Razzaque Ahmed, M.D*., DAB No. 2261 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010), CMS excluded a physician on the ground that his felony conviction for obstruction of a criminal investigation of health care offenses was a financial crime under 42 C.F.R. § 424.535(a)(3)(i)(B) (Oct 1, 2008). The ALJ concluded that although that particular offense was not one listed in the regulation, it was a crime "similar to" the listed financial crimes and, thus, covered by the regulation because the physician's crime involved creating and submitting to investigators documents that concealed or bolstered

false Medicare claims. DAB No. 2261, at 5, 8. The Board upheld the ALJ, relying on the illustrative nature of the language "such as" which preceded the list of financial crimes in section 424.535(a)(3)(i)(B). *Id.* at 8-11. The Board concluded that this language "impl[ies] 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.'" *Id.* at 10.

Although the illustrative language in *Ahmed* ("such as") preceded a list of financial crimes rather than the list of felonies generally, the principle – that illustrative language does not connote exclusivity of a list that follows – is equally applicable. The District Court upheld the Board in *Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010). Petitioner objects that the court decision should not be read as undercutting its argument that the listed felony offenses in the prior version of section 424.535(a)(3) as a whole was exclusive since the court specifically held only that the list of financial crimes in section 424.535(a)(3)(i)(B) was not exclusive. RR at 19-20 n.13 (emphasis added). However, as CMS indicates, the *Ahmed* court also noted "that the broad catchall [phrase] for any 'felony offense that CMS has determined to be detrimental to the interests of the program and its beneficiaries' could arguably be read to provide a basis for revocation on its own without addressing the particularized offenses which 'include' (but are not necessarily limited to) such offenses as those comprising § 424.535(a)(3)." 710 F. Supp. 2d at 173 n.9 (citation omitted); CMS Response at 23-24. In the case at hand, CMS's initial and reconsidered determination letters clearly stated that the revocation was based on CMS's determination that Petitioner's conviction was detrimental to the Medicare program and its beneficiaries. The initial determination letter stated, "In conclusion, upon careful review of the facts and circumstances surrounding the conviction, we find your continued participation in the Medicare program detrimental to the best interests of the [Medicare] program and its beneficiaries." CMS Ex. 1, at 34. The reconsidered determination letter stated, "CMS made the determination that your conviction is detrimental to the Medicare program and its beneficiaries." *Id.* at 9. That letter further stated that CMS's determination was "well within the discretion afforded under the law" to revoke "if a supplier is convicted of a felony that is detrimental to the best interests of the Medicare program and its beneficiaries" since Petitioner's "conviction for providing material misstatements to the FBI . . . within the context of a criminal investigation raises questions about your trustworthiness and veracity."[8] *Id*. at 14.

[8] These facts, among others (*see* CMS Response at 25 n.17), distinguish this case from *Subramanya K. Prasad, M.D.*, DAB CR4522 (2016), an ALJ decision relied on by Petitioner (*see* RR at 14). In any event, it is well-settled that "ALJ decisions have no precedential weight and are not binding on the Board or other ALJs." *Melissa Michelle Phalora*, DAB No. 2772, at 14 (2017).

We also find unpersuasive Petitioner's attempt to show an expansion of the felonies by selective parsing of language from the regulatory history. Petitioner cites the following passage from the proposed amendments to section 424.535(a)(3): "In order to allow us discretion to deny or revoke enrollment **based on any felony conviction** that we believe is detrimental to the Medicare program or its beneficiaries, **we propose to eliminate the enumerated list of felonies** and instead provide that enrollment may be denied or revoked based upon any such felony conviction." RR at 19, quoting 78 Fed. Reg. 25,013, 25,021-22 (April 29, 2013) (emphasis supplied by Petitioner). However, as CMS notes, the final rule, in fact, "retain[ed] the list of felonies[,]" rather than eliminating it, "because such list could be helpful in identifying for the public some of the felonies that may serve as a basis for denial or revocation."[9] CMS Response at 8, citing 79 Fed. Reg. at 72,511. The final rule also clarified CMS's existing position that the list was not exclusive by adding to the "Offenses include" language the phrase "but are not limited in scope or severity to." *See* 79 Fed. Reg. at 72,512 (stating that this change was to "further emphasize CMS' discretion to use felonies other than those specified in §§ 424.530(a)(3) and 424.535(a)(3) as grounds for denial or revocation") (emphasis added).

In addition, one of the passages Petitioner describes wholly undercuts its theory. Petitioner describes a Federal Register passage in the final rule as "explaining that an 'important change' was to revise the language in 424.535(a)(3) from 'has determined' to 'determines' because the former language would now incorrectly imply that the list of felonies in that section is exhaustive." RR at 18,[10] citing 79 Fed. Reg. at 72,511-12. This description is not quite accurate as the passage actually reads, "The phrase 'has determined' incorrectly implies that the only felonies that may serve as a basis for denial or revocation are those specifically listed in §§ 424.530(a)(3) and 424.535(a)(3)." 79 Fed. Reg. at 72,511. Nonetheless, the word "incorrectly," which appears in both Petitioner's description and the actual quoted language, clearly shows that even before the amendment, CMS did not view the list of felonies as exclusive. Moreover, Petitioner's description omits the sentence immediately following the one it inaccurately describes which states, "We believe that the term 'determines' makes clearer that the lists of felonies are not exhaustive and include other felonies that CMS may deem as meeting the 'detrimental' standard based on the particular facts of the case." 79 Fed. Reg. 72,511-12 (cited in CMS Response at 8) (emphasis added). Making a regulation "clearer" does not connote a substantive change but merely a clarification of existing meaning or intent.

[9] Although the amendments did not expand the felonies covered by sections 424.530(a)(3) and 424.535(a)(3), they did expand the coverage of those sections "to include felony convictions against a provider or supplier's 'managing employee,' as that term is defined in § 424.502." 79 Fed. Reg. 72,512, 72,531, 72,532.

[10] Petitioner cites to "73 FR 72511-12" but the passage is actually at 79 Fed. Reg. 72,511-12.

B. *The ALJ correctly concluded it was not improper for NGS, CMS's administrative contractor, to take the revocation action on behalf of CMS.*

Petitioner takes issue with the ALJ's rejection of his argument that it was improper for NGS to issue the revocation on CMS's behalf. RR at 25, citing ALJ Decision at 12 and Finding No. 5 (ALJ Decision at 7). Petitioner recognizes "that the statute allows the Secretary to delegate certain tasks to her contractors," as the ALJ found. *Id*. However, Petitioner insists that "the plain language of the regulation reserved only to CMS the authority to make the revocation determination, and it is an elementary principle of administrative law that agencies are bound by their own regulations." *Id*. This argument, even if correct, would not help Petitioner because the record shows that CMS, not NGS, in fact made the decision to revoke, although NGS issued the notice of the revocation on behalf of CMS. *See* CMS Ex. 1, at 10 (statement in NGS's reconsideration letter that Petitioner's "revocation occurred at the direction of CMS" and that although "NGS . . . assist[ed] in the administration of the Medicare program" by "issu[ing] the notice on CMS's behalf . . .[,] the underlying decision came from CMS"). Indeed, as CMS notes, the extensive communications between Petitioner's counsel and CMS counsel reflect Petitioner's understanding that CMS made the determination. *See, e.g*., CMS Ex. 20, at 18, 21, 22, 24 (correspondence referring to the determination as that of CMS). CMS also points out (CMS Response at 28-29) that CMS guidance directs administrative contractors to obtain prior approval of revocations and revocation letters from CMS's Provider Enrollment & Oversight Group (PEOG). *See* CMS Response at 28-29, citing Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15, § 15.27.2(B).[11] Thus, while a contractor may determine that there is a basis for a revocation action and recommend an action to CMS, a notice of revocation ultimately issued by a contractor represents a revocation decision by CMS.

CMS also notes that the Board has rejected arguments that CMS contractors lack the authority to make determinations concerning a provider's or supplier's enrollment in the Medicare program. In *Fady Fayad, M.D*., the Board held that sections 1842 and 1874A of the Medicare statute, 42 U.S.C. §§ 1395u and 1395kk-1, authorize CMS to delegate to its Medicare Administrative Contractors the authority to make revocation determinations under section 424.535(a). DAB No. 2266, at 17-20. A contractor's issuance of a revocation notice is also lawful, the Board said, "because [the Department of Health & Human Services] has, in effect, retained final authority over contractor-issued revocation

[11] This version of MPIM § 15.27.2(B) in effect on the date of the initial determination can be found in the CMS Manual System, Pub. 100-08, Transmittal 609 (Aug. 14, 2015), "Clarification Regarding the Processing of Certain Provider Enrollment-Related Transactions" (available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R609PI.pdf (last visited June 22, 2017)). We read the directive for prior approval as specifically addressing only revocations under section 424.535(a)(3).

determinations by subjecting them to review, when challenged, by departmental ALJs and the Board." *Id*. at 19; *see also Brian K. Ellefsen, D.O.*, DAB No. 2626, at 5-6 (2015) (applying the *Fayad* reasoning to reject a physician's contention that only CMS – and not its contractor – had the authority to deny his application for Medicare enrollment under 42 C.F.R. § 424.530(a)); *Douglas Bradley, M.D.*, DAB No. 2663, at 14-15 (2015) (citing *Fayad* and *Ellefsen* and holding that even absent specific direction by CMS for the contractor to take the revocation action against Dr. Bradley, the contractor's doing so would be lawful). In other words, the Board has concluded that although 42 C.F.R. § 424.535(a) states, "CMS may revoke," the contractor's duly delegated administrative authority is such that a revocation notice issued by a contractor represents and conveys a decision by CMS. Petitioner does not even discuss these Board decisions, much less proffer reasons to question the Board's reasoning in them, reasoning that a United States District Court expressly affirmed in the *Fayad* case. *See* 803 F.Supp.2d at 705 (finding a contractor's authority to make an initial determination to revoke a lawfully delegated function because it was necessary to carry out purposes of Medicare program and because the Secretary "exercised ultimate review authority over [the contractor's] issuance of the revocation determination")

Accordingly, we conclude that the ALJ did not err in concluding that NGS acted within the administrative authority delegated to it by CMS when it issued the revocation notice on CMS's behalf.

C. *The ALJ correctly concluded that he had no authority to review how CMS chose to exercise its discretionary revocation authority and, hence, no authority to determine whether CMS's choice was arbitrary or capricious.*

Petitioner takes issue with the "ALJ's conclusion that the revocation was not arbitrary or capricious . . . ." RR at 29, citing ALJ Finding No. 5 (ALJ Decision at 7). Petitioner argues that there is no evidence that NGS or CMS took into consideration any of what Petitioner characterizes as "the substantial mitigating circumstances relating to Dr. Bajwa's conviction" when determining to revoke his Medicare enrollment and billing privileges. *Id*. The full text of the ALJ Finding cited by Petitioner is as follows:

> Petitioner has not shown that the CMS determination to revoke in this case was arbitrary, capricious, or an abuse of discretion as the evidence shows that CMS and its contractor acted within the scope of the authority delegated by the Act and regulations.

ALJ Decision at 7, Finding No. 5. While this finding might possibly be read in isolation as indicating that the ALJ actually reached the merits of Petitioner's arbitrary and capricious argument, the ALJ later clarified that he did not. In response to Petitioner's argument that it was arbitrary and capricious for CMS and NGS to decide that

Petitioner's conviction was for a felony offense detrimental to the Medicare program, the ALJ explained that he "ha[d] no authority to review the exercise of discretion by NGS and CMS to declare that the offense of which Petitioner was convicted was detrimental." ALJ Decision at 13. Thus, the ALJ's conclusion was based on his understanding of the limits of his review authority, not the substantive merit (or lack thereof) in Petitioner's arbitrary-and-capricious argument. The ALJ's understanding of the limits of his review authority was correct.

ALJs and the Board are bound by the regulations and may not declare them unconstitutional or decline to follow them on that basis. *See, e.g., Fady Fayad, M.D.*, DAB No. 2266, at 14. Section 424.535(a) of the provider and supplier enrollment regulations (42 C.F.R. Part 424, subpart P) specifies the reasons for which CMS may legally revoke a provider or supplier's billing privileges. So long as an ALJ finds that CMS has shown that one of the regulatory bases for enrollment exists, the ALJ (and the Board on appeal) may not refuse to apply the regulation and must uphold the revocation. *See, e.g., Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015) (stating that an administrative law judge and the Board must sustain a revocation "[i]f the record establishes that the regulatory elements are satisfied"); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (stating that the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a "legal basis for its actions"); *see also id.* at 13 (explaining that "the right to review of CMS' determination by an ALJ serves to determine whether CMS had the authority to revoke [a Petitioner's] Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke" (emphasis in original)).

Accordingly, while the regulation affords CMS discretion to revoke or not to revoke in a particular case, neither an ALJ nor the Board may review how CMS exercises that discretion or substitute its own discretion.[12] *Letantia Bussell, M.D.* at 13. The Board held in *Fayad* that CMS may revoke a provider's or supplier's billing privileges based solely on a qualifying felony conviction, without regard to equitable or other factors, explaining as follows:

> If CMS proves that the supplier was convicted of [a qualifying felony], and that the supplier's conviction was the basis for the challenged revocation, then the Board must sustain the revocation, regardless of other factors, such

[12] Indeed, Petitioner acknowledges that "[i]f the grounds for the revocation truly exist, the exercise of CMS's discretion to make (or not make) such a revocation is not reviewable . . . ." RR at 32 n.21. Petitioner merely argues that this limitation on the ALJ's review authority does not apply here because, Petitioner asserts, CMS had no legal authority for the revocation. We have already rejected that argument, however, for the reasons explained in detail above.

> as the scope or seriousness of the supplier's criminal conduct and the potential impact of revocation on Medicare beneficiaries, that CMS might reasonably have weighed in exercising its discretion.

Fady Fayad, DAB No. 2261, at 16 (citing *Abdul Razzaque Ahmed*, DAB No. 2261, at 16-17, 19). Thus, the ALJ here correctly determined that he had no authority to review CMS's exercise of its discretion to revoke Petitioner's Medicare enrollment and billing privileges and, thus, no authority to determine whether that exercise was arbitrary and capricious based on the mitigating circumstances alleged by Petitioner.

Petitioner notes that despite this conclusion, the ALJ "inexplicably" went on to express his opinion by stating, "However, if I were to conduct such a review, I would have no trouble reaching the same conclusion." RR at 29 n.20, citing ALJ Decision at 13. The ALJ did state his opinion that "Petitioner's crime of making false statements or representations to the FBI is easily analogized to the financial crimes that are presumptively detrimental on the basis that Petitioner's crime also evinces a lack of trustworthiness, reliability, and honesty that is necessary to entrust one with access to the public fisc, in this case the Medicare Trust Fund." ALJ Decision at 13 (citing Board statement in *Fayad* that while it did not need to examine the ALJ's conclusion he had no authority to review CMS's determination that Fayad's felony was detrimental to the Medicare program, it would affirm the determination because Fayad's assistance in falsifying immigration forms "evidenced a lack of trustworthiness in his dealings with the federal government" – DAB No. 2266, at 17). However, Petitioner alleges no error by the ALJ in his making that statement. To the extent Petitioner is suggesting that an ALJ's or the Board's following a statement regarding lack of jurisdiction with an opinion as to what it would conclude if it could reach the issue somehow eliminates the lack of jurisdiction, we find no basis in law for such a suggestion.

We also reject Petitioner's suggestion (RR at 29 n.20) that the Board's decision in *Ahmed* is inconsistent with the ALJ's conclusion that he had no authority to review whether CMS's exercise of its discretion to revoke was arbitrary and capricious. Petitioner cites the Board's statement in *Ahmed* that "[t]he revocation was not arbitrary or capricious" out of context. The Board's full statement was: "The revocation was not arbitrary or capricious because it was, as we concluded in the previous two sections, based upon a legally proper interpretation and application of section 424.535(a)(3)." DAB No. 2261, at 19. Thus, the Board made the statement in connection with its rejection of Dr. Ahmed's argument that the absence of certain pre-revocation procedures "renders the[ ] [revocation] decision arbitrary, capricious, and without any rational basis[,]" not in connection with its rejection of Ahmed's argument, similar to the argument here, that it was arbitrary and capricious not to have weighed alleged mitigating circumstances or factors other than the conviction. *See id.* at 18-19.

Similarly, Petitioner takes the Board's statement in *Bussell* out of context. RR at 29 n.20 (citing *Bussell* for a Board "finding [that the] revocation determination was 'in no way arbitrary or capricious'"). Dr. Bussell had argued that section 424.535(a)'s specification that "income tax evasion" was a felony offense authorizing revocation did not necessarily mean that a conviction for that offense was "detrimental per se to the program and beneficiaries." DAB No. 2196, at 9. The Board rejected that argument, but added that "even were we to accept Dr. Bussell's reading, . . . the determination that her income tax evasion was detrimental to the program and beneficiaries would clearly be within CMS's discretion to make and in no way arbitrary or capricious." *Bussell* at 10 n.11. Thus, once again, the Board was not addressing the issue this Petitioner raises as to whether ALJs and the Board may decide whether CMS's alleged failure to not consider alleged mitigating circumstances when determining whether to revoke is arbitrary and capricious.

Thus, we conclude that the ALJ correctly determined he had no authority to review how CMS chose to exercise its discretionary revocation authority and, hence, no authority to determine whether CMS's choice was arbitrary or capricious.

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member