

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Francis J. Cinelli, Sr., D.O.
Docket No. A-17-77
Decision No. 2834
November 21, 2017

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Francis J. Cinelli, Sr., D.O. (Petitioner) appeals the March 10, 2017 decision of the Administrative Law Judge (ALJ). *Francis J. Cinelli, Sr., D.O.*, DAB CR4807. In that decision, the ALJ affirmed a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner’s Medicare enrollment and billing privileges due to his felony conviction for “aiding and abetting the filing of a false tax return,” and for failing “to timely report the felony conviction.” ALJ Decision at 1. The ALJ also held that the revocation became effective on March 20, 2015. *Id.* at 9.

For the reasons discussed below, we affirm the ALJ’s decision.

Legal Background

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act) §§ 1811, 1833.¹ Medicare is administered by CMS, which delegates certain program functions to private contractors that function as CMS’s agents in administering the program – in this case, Novitas Solutions, Inc. (Novitas). *See* Act §§ 1816, 1842, 1866, 1874A; 42 C.F.R. § 421.5(b).

The relevant regulations governing Medicare enrollment are found in 42 C.F.R. Part 424, subpart P (sections 424.500 through 424.570). In order to receive Medicare payment for items or services furnished to program beneficiaries, a provider or supplier must be “enrolled” in Medicare. 42 C.F.R. § 424.505.

¹ The current version of the Social Security Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.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.

CMS has broad authority to revoke Medicare enrollment and billing privileges of a provider or supplier convicted of felonies that the Secretary determines to be detrimental to the best interests of the program and its beneficiaries. *See* Act § 1866; 42 C.F.R. § 424.535(a).

The regulations at 42 C.F.R. § 400.202 define a “supplier” as “a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare.”

A key purpose of enrollment is to ensure that providers and suppliers comply with eligibility and other requirements for program participation and payment. Section 424.535(a) authorizes CMS to revoke the Medicare enrollment of a supplier for any of the “reasons” specified in paragraphs one through 14 of that section. 42 C.F.R. § 424.535(a). The enumerated reasons for revocation include conviction for a felony which CMS determines to be detrimental to the Medicare program and its beneficiaries:

(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.

CMS specified financial crimes as a class of felonies it had found to be detrimental to Medicare and its beneficiaries.

(ii) Offenses include, but are not limited in scope or severity to—

(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 pre-trial diversions.

42 C.F.R. § 424.535(a)(3)(ii)(B).

The enumerated reasons for revocation also include failing to timely report an adverse legal action:

Failure to report. The provider or supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart.

Section 424.535(a)(9). Physicians must report, within 30 days, any adverse legal action to their Medicare contractor. *See* section 424.516(d)(1)(ii).

The effective date of revocation is determined in accordance with section 424.535(g). That regulation states, in relevant part, that “[w]hen a revocation is based on . . . a felony conviction . . . , the revocation is effective with the date of . . . felony conviction” 42 C.F.R. § 424.535(g).

“If a . . . supplier . . . has their billing privileges revoked, they are barred from participating in the Medicare program from the [effective] date of the revocation until the end of the re-enrollment bar.” Section 424.535(c).

The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation. *See* section 424.535(c)(1).

Case Background²

On March 20, 2015, Petitioner pled guilty in the United States District Court for the Eastern District of Pennsylvania to the sole count of a Criminal Information charging him with aiding and abetting the filing of a false tax return for calendar year 2008 (a Class E felony carrying a statutory maximum sentence of three years of imprisonment and \$250,000 fine), a violation of 26 U.S.C. § 7206(2),³ and 18 U.S.C. § 2. CMS Ex. 8A, at 1, 37, 52. At sentencing, the Assistant United States Attorney (AUSA) recited the facts underlying the charges and which supported the guilty plea petitioner entered before the court. The AUSA explained that from January 2007 through 2011, Petitioner was a medical doctor and part owner of the Bangor Medical Center, and that Petitioner and his

² The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

³ Section 7206(2) of the Internal Revenue Code states: “Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; [] shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 [], or imprisoned not more than 3 years, or both, together with the costs of prosecution.” CMS Ex. 9.

son operated a vitamin store at the same location in Bangor, Pennsylvania. *Id.* at 58. The AUSA described how Petitioner aided and abetted his son's efforts to avoid reporting income from his work at the vitamin store to the Internal Revenue Service (IRS) on his 2008⁴ tax return in several ways, including:

- paying his son for his work at the vitamin store partly by regular payroll check, partly in the form of cash from Petitioner and partly in the form of cash and checks from the revenues of the vitamin store;
- instructing his son to keep payments from customers of the vitamin store made directly to the son; and
- allowing his son to deposit checks and cash paid to the vitamin store into his son's personal bank account.

See id. at 58-59.

On September 18, 2012, Novitas, the Part B Medicare Administrative Contractor, notified Petitioner that it had processed Petitioner's Medicare enrollment revalidation application⁵ and required verification of certain enrollment information. CMS Ex. 1, at 2. The notice advised Petitioner that 42 C.F.R. § 424.516 requires providers and suppliers to submit updates and changes to enrollment information "to maintain active enrollment status in the Medicare Program," including information about "final adverse legal actions, including felony convictions[.]" *Id.*

On February 25, 2016, Novitas notified Petitioner that CMS had determined to revoke his Medicare enrollment effective March 20, 2015, pursuant to 42 C.F.R. § 424.535(a)(3), because it had discovered his March 2015 felony conviction for aiding and abetting the filing of a false tax return, and, pursuant to 42 C.F.R. § 424.535(a)(9), because Petitioner had failed to notify CMS of the adverse legal action within 30 days of the conviction (as is required under 42 C.F.R. § 424.516). CMS Ex. 2. CMS also imposed a three-year bar to re-enrollment in the Medicare program.⁶ *Id.*

⁴ The date of the offense is cited as April 15, 2009, for the filing by Petitioner's son of his 2008 federal tax return. CMS Ex. 8A, at 1.

⁵ Medicare regulations require physician suppliers such as Dr. Cinelli to resubmit and recertify the accuracy of their enrollment information every five years. *See* 42 C.F.R. § 424.515. CMS may also conduct off-cycle revalidations in addition to the regular 5-year revalidation, and may, as warranted, request a supplier to recertify the accuracy of enrollment information at any time. *See id.* § 424.515(d)(1).

⁶ On appeal, Petitioner does not challenge the effective date of revocation or the three-year re-enrollment bar. Therefore, we do not discuss these matters any further in this decision.

Petitioner requested reconsideration, claiming that he was unaware of the requirement to “report the felony offense to Medicare.” CMS Ex. 3, at 1. Petitioner stated that he believed “all reporting was done through the court system” and that “all credentialing for him ha[d] been done in accordance with Medicare procedures,” and that the state Board of Osteopathic Physicians had allowed him to keep his license. *Id.* He also stated that revocation constituted a hardship on his Medicare beneficiary patients. *Id.* Petitioner did not deny that he had been convicted of a felony or state that he had notified CMS or Novitas of his conviction.

On June 13, 2016, a Novitas hearing officer issued a reconsidered determination upholding the initial determination. CMS Ex. 7. The hearing officer concluded that CMS was within its authority under sections 424.535(a)(3) and 424.535(a)(9) to revoke Petitioner’s Medicare enrollment based on Petitioner’s felony conviction for aiding and abetting the filing of a false tax return and for failing to report the conviction. *Id.* at 1-3. The hearing officer concluded that Petitioner had offered no evidence to show that he had complied with the Medicare enrollment standards for which his enrollment and billing privileges were revoked, and therefore upheld the initial determination. *Id.* at 3. Petitioner requested ALJ review.

In his Request for Hearing (RFH),⁷ Petitioner contended that the crime for which he was convicted did not warrant revocation because there was no nexus between his crime and any harm to the Medicare program. CMS Ex. 5, at 5, 8. In support of his position, Petitioner cited several disciplinary decisions of the Pennsylvania medical licensing board wherein that body allowed one physician to retain his medical license despite having been convicted of filing a false tax return and allowed two others to retain their medical licenses despite having been convicted of Medicare fraud. *Id.* at 9 (citations omitted). Because his crime was “not connected to Medicare or billing of [his] patients” and because he did not file a false tax return of his own, Petitioner argued, CMS should not “discipline” him more harshly than the Commonwealth of Pennsylvania disciplined other physicians for (arguably) more egregious conduct. *See id.* at 9-10.

Petitioner also argued that he was deprived of his right to due process when he was not afforded a hearing prior to CMS’s revocation determination because Medicare enrollment is a “significant property interest.” *Id.* at 8. In support of his argument, Petitioner cited two U.S. Supreme Court decisions⁸ without explaining how those decisions support his argument. *Id.*

⁷ Petitioner’s Request for Hearing is not paginated. We identify pages in the Request for Hearing by sequential order.

⁸ In his Request for Hearing, Petitioner provided only a partial citation for one decision, which we were able to identify and fully cite here as *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542; 105 S.Ct. 1487 (1985).

In his brief (Petitioner's Brief),⁹ Petitioner made five arguments for overturning the contractor's determination: 1) that his crime is not a financial crime for purposes of section 424.535(a)(3)(ii)(B), in that it is not one of the felonies specified in the regulation and he himself did not file a false tax return; 2) CMS did not give him clear, specific notice that he was required to report his felony conviction; 3) his conviction was unrelated to the practice of medicine; 4) revocation "deprived him of his right to practice medicine"; and 5) his advanced age, his status as a veteran of the armed forces and history of service to his community are "equitable considerations" that weigh in favor of permitting him to participate in Medicare. Petitioner's Brief.

Neither party proffered witness testimony; therefore, the ALJ found no reason for an in-person hearing. *See* ALJ Decision at 3. The ALJ affirmed the contractor's determination. She found that Petitioner was convicted of a felony and concluded that aiding and abetting the filing of a false tax return was a financial crime pursuant to section 424.535(a)(3). *Id.* at 5. She also found that offenses listed in section 424.535(a)(3) have been determined by CMS to be *per se* detrimental to the best interests of the Medicare program and its beneficiaries, and concluded that Novitas had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges. *Id.* She further found that Petitioner failed to timely notify CMS of the adverse legal action following his criminal conviction, and concluded that CMS had properly revoked Petitioner's Medicare enrollment. *Id.* at 9.

In rejecting Petitioner's argument that he was not convicted of a financial crime, the ALJ reasoned that the phrase "such as" in section 424.535(a)(3) demonstrates CMS's intention not to limit qualifying "financial crimes" only to those specifically identified in the regulation. *Id.* at 6. She found that Petitioner's crime, consisting of assisting in the filing of fraudulent documentation reporting revenue for tax purposes, is financial in nature ("certainly a financial crime") and, quoting the Board's decision in *Stanley Beekman, D.P.M.*, DAB No. 2650 at 7 (2015), concluded that section 424.535(a)(3) applied to "any financial crime, regardless of whether the supplier's particular financial crime is specified in the regulation's illustrative list of financial crimes." *Id.* She also rejected Petitioner's argument that his crime was not similar to tax evasion done for financial enrichment, reasoning that the crime may also accrue to Petitioner's benefit due to the close family relationship between parent and child. *See id.* at 7. Further, the ALJ cited the Board's decision in *Fady Fayad, M.D.*, DAB No. 2266 at 15 (2009),¹⁰ in rejecting Petitioner's

⁹ CMS moved for summary judgment. Petitioner opposed CMS's motion. The ALJ upheld CMS's determination to revoke Petitioner's enrollment and billing privileges based on the written record, not on summary judgment. ALJ Decision at 3.

¹⁰ The United States District Court for the Eastern District of Michigan affirmed the Board's decision. *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (2011).

argument here, which Dr. Fayad had also made, that a provider's or supplier's felony conviction for a financial crime must "be related to a health care program or health care fraud." *Id.* at 8. The ALJ concluded that the equitable considerations Petitioner raised were "irrelevant" and that she could not "refuse to apply the regulation" on such bases, and that she "must uphold the revocation." *Id.*, citing *Beekman*, DAB No. 2650 at 10, and *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008) (the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a "legal basis for its actions"). Moreover, the ALJ held that she could not grant equitable relief. *See id.*, citing *US Ultrasound*, DAB No. 2302 at 8 (2010). The ALJ found no merit in Petitioner's contention that CMS had a duty to notify Petitioner of his obligation to report timely any adverse legal action, reasoning that Petitioner was "responsible for knowing the rules pertaining to Medicare suppliers" and that "[i]gnorance of the reporting requirements did not relieve Petitioner of the obligation" under section 424.516(d)(1)(ii) to notify CMS of his criminal conviction. *Id.* at 9. She rejected his contentions that he believed his conviction "had been reported 'through government channels,'" and that the revalidation notice was insufficient to inform him of his reporting duty. *See id.* The ALJ did not address Petitioner's argument that depriving him of a pre-revocation hearing violated his right to due process. Petitioner timely appealed the ALJ's decision.

Standard of Review

The Board's standard of review on a disputed factual issue is whether the ALJ decision or ruling is supported by substantial evidence in the record. *Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare* (at <http://www.hhs.gov/dab/guidelines/prsupenrolmen.html>). The standard of review on a disputed issue of law is whether the ALJ decision or ruling is erroneous. *Id.*

Analysis

A. *The ALJ Decision is supported by substantial evidence in the record and is free from legal error.*¹¹

On appeal,¹² Petitioner contends that because section 424.535(a)(3)(ii)(B) does not expressly state that aiding and abetting the filing of a false tax return is a crime on which

¹¹ On appeal to the Board, Petitioner does not challenge the ALJ's rejection of his claim for equitable relief. *See* ALJ Decision at 8. We find no error in the ALJ's determination that she had no authority to grant equitable relief.

¹² Petitioner's submission to the Board is styled "Memorandum of Law in Opposition to ALJ Leslie C. Rogall's Decision Affirming CMS's Revocation of Petitioner's Medicare enrollment and Billing Privileges." It serves as Petitioner's request for the Board to review the ALJ's decision; therefore, we will refer to the memorandum as Petitioner's Request for Review (RR).

revocation may be based, the regulation is ambiguous as to whether his crime is a “financial crime” within the meaning of the regulation. RR at 3.¹³ Therefore, Petitioner argues, the ALJ should have interpreted the regulation “in a light most favorable” to Petitioner. Petitioner also contends that the ALJ was inconsistent in her interpretation and application of the regulatory language and, therefore, “the rule of lenity should be applied in favor of” Petitioner, according to “a well[-]established principle” in Federal court criminal proceedings. *Id.* at 3-4, 6. Petitioner also argues for the first time that he did not receive sufficient notice of the penalties for violating section 424.516(d)(1)(ii) of the regulations, which violated his right to due process. *Id.* at 7.

1. The ALJ correctly determined that the record established a qualifying felony conviction for a financial crime for purposes of revocation under 42 C.F.R. § 424.535(a)(3).

Petitioner’s complaints of “inconsistency” in the ALJ’s application of “ambiguous” regulatory language¹⁴ are unavailing. The fact that Petitioner’s conviction was for a crime not among those enumerated in the provision of the regulation authorizing revocation is irrelevant. The ALJ did not err when she reasoned that “[t]he words ‘such as’ imply that the subsequent list of illustrative crimes (in the regulation), including crimes similar to those named in the list, are not the only set of crimes that may be considered financial.” ALJ Decision at 6. The Board has previously held that subparagraphs (A) – (D) of section 424.535(a)(3)(i) specify certain felonies, including those criminal offenses that would result in a mandatory exclusion under section 1128(a)(1) of the Act, that the Secretary has determined are per se detrimental to the best interest of the Medicare program and its beneficiaries. *Dinesh Patel, M.D.*, DAB No. 2551 at 11 (2013), citing *Fayad* at 4, citing *Bussell* at 9-10. The Board has also held that CMS may revoke Medicare billing privileges under the authority of section 424.535(a)(3) based on *any* financial crime, regardless of whether it is one of the crimes enumerated in the regulation’s illustrative list of financial crimes. *Beekman*, DAB No. 2650, at 7 (2015), citing *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 10 (2009), *aff’d*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010) (“even 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.”); *see also Fayad*, DAB No. 2266, at 8 (2009) (“section 424.535(a)(3)(i) is reasonably read as setting out a non-

¹³ Petitioner’s Request for Review is not paginated. We identify pages in the Request for Review by sequential order.

¹⁴ Petitioner uses the word “statute” in his Request for Review, which we understand from the context to mean the regulation.

exhaustive list of crimes that may constitute a basis for revocation.”). There is nothing ambiguous about the words “such as,” used in this context, because they clearly indicate that the subsequent list consists of illustrative examples and is not a complete list of the crimes determined to be detrimental to the Medicare program.

The ALJ also correctly found that Petitioner’s crime is a financial crime under the regulation. ALJ Decision at 5. In finding that Petitioner was convicted of a financial crime, the ALJ stated:

Aiding, assisting, procuring, counseling or advising the preparation of a false tax return *is* a financial crime, in that the perpetrator of the crime is assisting in the filing of a fraudulent document reporting financial information.

Id. at 6. The ALJ considered the facts underlying Petitioner’s guilty plea as described to the criminal trial judge at his sentencing hearing, including the fact that Petitioner “structured his son’s *compensation* for the work that was done at the vitamin store such that his son was being *paid* partly by *payroll* check, partly in the form of *cash* from the defendant directly, and partly in the form of *cash and checks* from the *revenues* of the vitamin store.” ALJ Decision at 7 (quoting CMS Ex. 8 at 58-59) (italics added). It is well within the purview of the ALJ, as finder of fact, to conclude that terms in common usage like “compensation,” “paid,” “payroll,” “cash,” “checks,” and “revenues,” all relate to financial transactions. Moreover, the factual predicate for Petitioner’s conviction also included this description:

[W]hen the [Petitioner’s] son diverted from the vitamin store’s – the *revenues*, those should have been coming into the Bangor Medical Center, but the [Petitioner] allowed his son to keep some of that *money* as a way of providing his son with additional *income* that the IRS didn’t know about.

Id. (Italics added.) Simply put, Petitioner’s crime consisted of (among other things) Petitioner helping his son take money, which was intended for the business, and divert it for his son’s personal use, in such a way that his son could hide that money from the Internal Revenue Service. The plain meaning of the regulation is that providers and suppliers guilty of such financial crimes are subject to revocation, and the ALJ did not err in affirming the CMS contractor’s revocation determination pursuant to section 424.535(a)(3)(ii)(B) based on these facts and circumstances. As we noted above, even 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; here, it is reasonable to conclude that aiding and abetting the filing of a false tax return, particularly as Petitioner carried it out in this case, is sufficiently financial in character for CMS to find that it was a financial crime.

2. The ALJ correctly determined that Petitioner failed to notify CMS of his conviction as required by section 424.516(d)(1)(ii), to establish a basis for revocation under 42 C.F.R. § 424.535(a)(9).

As courts and the Board have recognized, Medicare providers and suppliers, as participants in the program, have a duty to familiarize themselves with Medicare requirements. *Gulf South Medical*, DAB No. 2400, at 9 (2011); *John Hartman, D.O.*, DAB No. 2564, at 3 (2014) (quoting *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984) (“those who deal with the government are expected to know the law[.]”); see also *Thomas M. Horras and Christine Richards*, DAB No. 2015, at 34 (2006) (officer and principal of provider had responsibility to be aware of and adhere to applicable law and regulations), *aff’d*, *Horras v. Leavitt*, 495 F.3d 894 (8th Cir. 2007). Petitioner does not dispute that he failed to report his criminal conviction to Novitas, as required by the regulations. However, Petitioner contends that he lacked adequate notice of his duty to report his conviction to Novitas and of the resulting penalties for failing to do so.¹⁵ He argues that “[w]hen the penalty for violating a statute involves the employment of the alleged violator, the Due Process Clause of the Fifth Amendment requires that the violator be afforded notice of the penalty and be given an opportunity to respond before the penalty is enforced,” citing *Ward v. United States Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011). RR at 7.

As noted above, section 424.535(a)(9) clearly states that failure to comply with the reporting requirements of section 424.516(d)(1)(ii) and (iii) is grounds for revocation. Petitioner’s failure to familiarize himself with these regulatory provisions does not equate to a lack of notice of them.

Petitioner’s reliance on the decision in *Ward* is misplaced. In *Ward*, the United States Court of Appeals for the Federal Circuit held that the United States Postal Service violated its own procedure when it terminated an employee after considering evidence communicated ex-parte to the deciding agency official, prior to giving the employee notice that the evidence would be considered and an opportunity to be heard on the issue. See *Ward* at 1278. Further, the court held that the Merit Systems Protection Board failed to analyze the due process issue presented. The court ruled that “[w]here a public employee has a property interest in continued employment, the Due Process Clause of the Fifth Amendment requires that the employee be afforded notice ‘both of the charges and of the employer’s evidence’ and an ‘opportunity to respond’ before being removed from employment.” *Id.* at 1279 (citation omitted).

¹⁵ Petitioner failed to argue before the ALJ that he received insufficient notice of the penalties for violating section 424.516(d)(1)(ii) of the regulations; however, we address that argument here as part and parcel of the analysis of whether the record reflects that Petitioner received adequate notice of the duty to report his criminal conviction to CMS.

The decision in *Ward* is readily distinguishable from this case. Petitioner is not a public employee, whose guarantee of procedural due process prior to termination from employment arises from the employee's property interest (where applicable) in continued employment. *See id.* Petitioner attempts to draw an analogy between his Medicare participation and public employment, thus creating the same "significant property interest" in Medicare enrollment as may exist in public employment. CMS Ex. 5 at 8. However, Petitioner has failed to provide any authority supporting his contention that participation as a supplier in a public health program is tantamount to holding public employment or that enrollment as a Medicare supplier of services creates a property interest entitling him to a pre-revocation opportunity to be heard.¹⁶ Further, CMS did not violate its procedure for revoking Petitioner's Medicare enrollment, which provides the opportunity to respond in the form of contractor, ALJ and Board review post-revocation. Petitioner does not argue that he has been denied this appeals process and, in fact, has exercised his right to appeal through each level of administrative review.

Although Petitioner's enrollment as a Medicare supplier obligated him to familiarize himself with Medicare program requirements, substantial evidence in the record also establishes that Petitioner was provided notice of his obligation to report to CMS any adverse legal actions against him within 30 days and failed to report his criminal conviction, in violation of section 424.516(d)(1)(ii), and that such failure subjected him to revocation under section 424.535(a)(9). Novitas wrote to Petitioner in September 2012 seeking Medicare enrollment revalidation information. CMS Ex. 1, at 2. At the top of the second page of the letter, Novitas informed Petitioner as follows:

To maintain an active enrollment status in the Medicare Program, regulations found at 42 CFR 424.516 require that you submit updates and changes to your enrollment information in accordance with specified timeframes.

Id. Petitioner argues that the notice consists only of "a few lines in a seven page letter whose primary purpose was not to convey notice of this duty to report felony convictions, but rather simply to re-validate enrollment." RR at 7. Despite Novitas having provided Petitioner actual written notice of the duty to report any adverse legal action, Petitioner

¹⁶ Courts that have considered the issue have almost without exception concluded that a physician or other health care practitioner or entity does not have a protected interest in continuing eligibility for Medicare participation or reimbursement. *Robert F. Tzeng, M.D.*, DAB No. 2169, at 13, n.16 (2008), citing, e.g., *Erickson v. United States ex. rel. Dept. of Health and Human Serv.*, 67 F.3d 858, 862 (9th Cir. 1995); *Koerpel v. Heckler*, 797 F.2d 858, 863-65 (10th Cir. 1986); *Cervoni v. Secretary of Health, Ed. and Welfare*, 581 F.2d 1010, 1018-19 (1st Cir. 1998); *Gellman v. Sullivan*, 758 F. Supp. 830, 833-34 (E.D.N.Y. 1991); but see *Ram v. Heckler*, 792 F.2d 444, 447 (4th Cir. 1986) (stating that the plaintiff physician's "expectation of continued participation in the Medicare program is a property interest protected by the Due Process Clause of the Fifth Amendment" but laying out no reasoning for that assertion).

simply contends that the notice was not clear or specific enough. Yet the notice expressly requires updated information concerning his enrollment status and provides the specific citation to the authority under which CMS requires such information. CMS Ex. 1, at 2. Therefore, even if Petitioner did not understand from the letter that he must report his criminal conviction to Novitas, he could have reviewed the regulation itself in order to see first-hand what CMS required. As noted above, section 424.516(d)(1)(ii) states “[p]hysicians must report, within 30 days, any adverse legal action to their Medicare contractor.” The plain language of the regulation would have fully informed Petitioner of his duty to report his criminal conviction. Further, if he was unsure about what to do after his conviction, the September 2012 notice letter provided a telephone number for Petitioner to call, advising:

If you have any questions concerning billing information, claim status, processing information, general policy and/or would like to speak with an Enrollment Representative, you may direct them to the following telephone number[.]

CMS Ex. 1, at 2.

As noted above, the ALJ did not address Petitioner’s contention that he was deprived of due process because his Medicare enrollment and billing privileges were revoked before he was afforded a hearing. Before the ALJ, petitioner compared enrollment in Medicare as a supplier of services to his status as a state-licensed physician. He argued that he was entitled to a hearing prior to being deprived of a property right such as the right to practice medicine, citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542; 105 S.Ct. 1487 (1985); and *Boddie v. Connecticut*, 401 U.S. 371, 379; 91 S.Ct.780, 786; 28 L.Ed.2d 113 (1971).

Neither case is on point. The Court in *Loudermill* held that a public employee with a recognized property interest in continued employment must be afforded, pre-termination, the opportunity to respond to charges leading to termination. *See Loudermill*, at 470 U.S. 533; 105 S.Ct. 1493-95. As we discussed above, Petitioner does not have a property interest in Medicare enrollment the way an employee may in ongoing employment (in *Loudermill*, the property interest in employment was created by statute). *See id.*, at 470 U.S. 533; 105 S.Ct. 1491-93. In *Boddie*, the Court held that the right to due process prohibits states from denying “solely because of inability to pay, access to its courts to individuals who seek dissolution of their marriages.” *Boddie*, at 401 U.S. 371; 91 S.Ct. at 783. Although Petitioner cites the decision in *Boddie* to support his argument that he must “be given an opportunity for a hearing before he is deprived of any significant property interest,” Petitioner has failed to establish a property interest in Medicare enrollment. Moreover, Petitioner has provided no authority to support his implication

that Medicare enrollment, a status controlled and administered by CMS, is equivalent to any property interest in the license to practice medicine, which is controlled and administered by the state which granted the license (here, the Commonwealth of Pennsylvania). Thus, Petitioner may have a property interest in his license to practice medicine but he concedes that he has retained his medical license in Pennsylvania despite his criminal conviction and the revocation of his Medicare enrollment and billing privileges. Petitioner's Brief at 7 ("Dr. Cinelli continues to hold a license to practice as an osteopathic physician and surgeon in the Commonwealth of Pennsylvania. He continues to work approximately four days a week at the Bangor clinic."). Accordingly, Petitioner has failed to show that revocation of his Medicare enrollment without an opportunity to be heard pre-revocation violated his right to procedural due process. Therefore, the ALJ did not err in affirming Novitas's determination to revoke Petitioner's Medicare enrollment and billing privileges due to his failure to report his conviction to Novitas within 30 days.

B. Petitioner's other argument lacks merit.

Petitioner argued that inconsistency in the ALJ's application of ambiguous regulatory language requires the application of a "rule of lenity" regarding CMS's determination to revoke his Medicare enrollment and billing privileges. We discussed above our conclusion that there was nothing inconsistent about the ALJ's application of the regulations, and the regulations are not ambiguous. However, even if either were true, no "rule of lenity" applies in the context of this administrative appeal. The Board has rejected the applicability of the "rule of lenity" to civil administrative enforcement. *Orton Motor Co., d/b/a/ Orton's Bagley*, DAB No. 2717, at 21 (2016) (finding error where the ALJ invoked the principle of lenity after characterizing civil monetary penalties (CMPs) for misbranding tobacco as "punitive"), citing *Douglas Schram, R.Ph.*, DAB No. 1372, at 13 (1992) (holding that in the case of "civil administrative enforcement" such as mandatory exclusion by the Inspector General from all federal health care programs, lenity does not apply) and *Joann Fletcher Cash*, DAB No. 1725, at 10 (2000) (holding that exclusion and CMP authorities under section 1128 of the Act are "civil and remedial rather than criminal and punitive," pointing to its goals in protecting "the funds of Federal health care programs and the programs' beneficiaries and recipients from untrustworthy providers"). Like the imposition of CMPs and exclusion, revocation is a remedial measure whose purpose is not to punish the program participant for past misconduct but to protect the program and its beneficiaries from fraud, abuse, and other harm that might arise in the future. *Tzeng*, at 14. Thus, while CMS's revocation decision is a consequence of Petitioner's felony conviction, CMS did not discipline or hold him "liable" for his crime. Instead, CMS acted within the scope of its authority to protect the Medicare program and its beneficiaries from a physician who it had reason to believe might harm the program. *Id.*

Conclusion

For the reasons stated above, we affirm the ALJ's decision upholding the revocation of Petitioner's Medicare enrollment effective March 20, 2015.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member