**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Subramanya K. Prasad, M.D.
(NPI: 1124130349),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-23

Decision No. CR4522

Date: February 5, 2016

# DECISION

The Centers for Medicare & Medicaid Services (CMS), acting through its administrative contractor, CGS Administrators, LLC (CGS), denied the enrollment application that Petitioner, Subramanya K. Prasad, M.D. (herein "Petitioner"), submitted following his period of exclusion from participation in Federal health care programs that resulted from a felony conviction. CGS's denial of enrollment was based on Petitioner's felony conviction for making false statements to a federal agent, in violation of 18 U.S.C. §§ 1001 and 2, within the 10 years preceding his enrollment application. Petitioner timely requested a hearing before an administrative law judge (ALJ). For the reasons stated below, I reverse CMS's denial of Petitioner's enrollment application on this basis.

## I. Background and Procedural History

Petitioner is an internal medicine physician who is licensed to practice in Kentucky and Ohio. CMS Exhibit (Ex.) 2 at 1, 3. On October 18, 2010, the United States Attorney for the Southern District of California charged, in a superseding criminal information, that Petitioner "did knowingly and willfully make a false, fictitious, and/or fraudulent statement as to a material fact" in a matter within the jurisdiction of the Food and Drug

Administration (FDA) in violation of 18 U.S.C. §§ 1001 and 2. CMS Ex. 7. On or about October 18, 2010, Petitioner pleaded guilty to the single count in the superseding criminal information and thereby admitted committing the offense of "False statements to [a] Federal Agent." CMS Ex. 8. On October 18, 2010, United States District Judge Irma E. Gonzalez imposed a sentence of one year of probation, along with forfeiture.[1] CMS Ex. 8 at 1-2.

Effective May 20, 2013, the Inspector General (IG) of the Department of Health and Human Services (Department) excluded Petitioner from participation in all federal health care programs for a period of one year based on section 1128(b)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(2), which permits the IG to exclude an individual who has been convicted, under federal or state law, in connection with the interference with or obstruction of any investigation or audit related to any offense described in section 1128(a) or 1128(b)(1) of the Act. CMS Ex. 4 at 4-7, 9; CMS Ex. 5. In an April 11, 2014 decision, the Departmental Appeals Board (DAB), in reversing a Civil Remedies Division (CRD) ALJ decision[2], concluded that the IG met his burden "of establishing that Petitioner's offense was in connection with the interference with or obstruction of an investigation" and that the IG had "established that it had a basis for excluding Petitioner under section 1128(b)(2) of the Act." CMS Ex. 5 at 8-9; *see Subramanya K. Prasad, M.D.*, DAB No. 2568 at 8-9 (2014). The DAB concluded that a one-year term of exclusion imposed by the IG "is within a reasonable range," and that the length of the exclusion "accounts for the impact of Petitioner's cooperation in accordance with the applicable regulatory mitigating factor while still serving section 1128's remedial objective of protecting federal health care programs and their beneficiaries from untrustworthy providers." *Id.* at 10.

Subsequent to the issuance of the DAB's decision, the IG and Petitioner jointly entered into an Exclusion Agreement in which Petitioner agreed to be excluded "under 42 U.S.C. § 1320a-7(b)(2) from Medicare, Medicaid, and all other Federal health care programs, as defined in 42 U.S.C. § 1320a-7b(f), for a period of 1 year." As part of the agreement, Petitioner explicitly waived his right to appeal the DAB's decision. CMS Ex. 4 at 4-7.

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[1] Records documenting the specific amount of forfeiture or the basis therefor are not included in the parties' exhibits.

[2] The ALJ decision reversed the IG's determination that Petitioner should be excluded from participation in Federal health care programs for a period of one year. Petitioner submitted a copy of this decision as an attachment to his brief. The decision can be found on the DAB's public website at http://www.hhs.gov/dab/decisions/civildecisions/2013/cr3014.pdf (last visited January 29, 2016).

The agreement indicated that the Petitioner's one-year exclusion would be effective May 20, 2013. *Id.* at 5.

On September 8, 2014, the IG informed Petitioner that his eligibility to participate in federal health care programs had been reinstated as of the date of the letter. CMS Ex. 4 at 9. Thereafter, on or about February 20, 2015, Petitioner submitted a Medicare enrollment application, at which time he indicated that he had been subject to a "[M]edicare exclusion" and had been reinstated by the IG on September 8, 2014. CMS Ex. 2.

On May 4, 2015, CGS issued an initial determination in which it denied Petitioner's application, giving the following reason: "42 CFR §424.530(a)(3) – Felonies . . . You are within 10 years of your 2010 felony conviction." CMS Ex. 3 at 1. On June 1, 2015, Petitioner submitted a corrective action plan (CAP) and request for reconsideration. CMS Ex. 4 at 1-2. In an August 24, 2015 letter, CGS denied Petitioner's request for reconsideration, again stating: "Denial reason: 42 CFR §424.530(a)(3) . . . You are within 10 years of your 2010 felony conviction." CMS Ex. 1 at 1.

Petitioner, through his current counsel, filed a request for hearing (RFH) on October 13, 2015. On October 15, 2015, I issued an Acknowledgement and Pre-Hearing Order (Order) directing the parties to file pre-hearing exchanges, consisting of an opening brief by CMS and a response brief by Petitioner, in accordance with specific requirements and deadlines.

CMS filed a Pre-Hearing Brief and Motion for Summary Disposition[3] (CMS Br.), along with eight exhibits (CMS Exs. 1-8). Petitioner submitted a Pre-Hearing Brief and Brief Opposing Summary Judgment (P. Br.). Although my Order did not permit the parties to file any briefs other than the pre-hearing brief (or motion for summary disposition), CMS filed a reply brief (CMS Reply) without seeking leave to do so. I afforded Petitioner an opportunity to respond to CMS's reply brief, and he filed a sur-reply brief (P. Sur-Reply). I admit the briefs and CMS Exs. 1-8 into the record.

Neither party has submitted the written direct testimony of any proposed witnesses. Order ¶ 8. Consequently, there are no witnesses for the parties to cross-examine at an in-person hearing. Order ¶¶ 9-10. The record is closed, and the case is ready for a decision on the merits.

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[3] As an in-person hearing to cross-examine witnesses is not necessary and I am reversing CMS's determination, it is unnecessary to further address CMS's motion for summary disposition.

## II. Issue

Whether CMS has a legitimate basis to deny Petitioner's enrollment application under 42 C.F.R. § 424.530(a)(3) based on Petitioner's October 2010 felony conviction.

## III. Jurisdiction

I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

## IV. Findings of Fact, Conclusions of Law, and Analysis[4]

As a physician, Petitioner is a supplier of health care services for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202, 410.20(b)(1). In order to participate in the Medicare program as a supplier, an individual must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may deny a supplier's enrollment for any reason stated in, *inter alia*, 42 C.F.R. § 424.530.

A supplier's enrollment application for Medicare billing privileges can be denied based on the existence of a felony conviction, as is set forth in 42 C.F.R. § 424.530(a)(3):

> (3) *Felonies.* 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.
>
> (i) Offenses include, but are not limited in scope and severity to—
>
> * * *
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.530(a)(3). This current version of the regulation has been in effect since February 3, 2015. 79 Fed. Reg. 72500, 72531-2 (Dec. 5, 2014). Immediately prior to the

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[4] My findings of fact and conclusions of law are in bold and italics.

regulatory amendment, section 424.530(a)(3) was substantively different, and contained the pertinent regulatory language as follows:

> (3) *Felonies*. If within the 10 years preceding enrollment of 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.
>
> (i) Offenses include—
>
> ***
>
> (D) Any felonies outlined in section 1128 of the Act.

42 C.F.R. § 424.530(a)(3) (2014). The two versions of the regulation each provide a list of the types of felony offenses that CMS considers to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. §§ 424.530(a)(3)(i)(A)-(D). Subsection (D) of the former version of the regulation specified that *any* felony outlined in section 1128 of the Act would be considered *per se* detrimental to the best interests of the program and its beneficiaries, whereas the latter version of the regulation specified that only felonies outlined in section 1128(a) of the Act are *per se* detrimental to the best interests of the program and its beneficiaries. The instant offense has previously been determined by the DAB, and also agreed upon by the parties in an Exclusion Agreement, to have warranted exclusion under section 1128(b)(2) of the Act (pertaining to a conviction that was in connection with the interference with or obstruction of an investigation into any criminal offense described in section 1128(b)(1) or 1128(a) of the Act)).

Suppliers of health care services who have been denied enrollment have a statutory right to a hearing to dispute the denial. 42 U.S.C. § 1395cc(j)(8). A supplier who has been denied enrollment has a right to an administrative law judge hearing and DAB review of the denial of its enrollment in the Medicare program. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2)-(3). An ALJ may review CMS's exercise of its discretion to deny enrollment based on a determination that a felony offense committed by a supplier is detrimental to the best interests of the program and its beneficiaries. *See Fady Fayad, M.D.*, DAB No. 2266 at 16 (2009), *aff'd, Fayad v. Sebelius*, 803 F.Supp. 2d. 699, 704 (E.D. Mich. 2011).

***1. On October 18, 2010, Petitioner pleaded guilty to making false statements to a federal agent in violation of 18 U.S.C. §§ 1001 and 2.***

***2. Petitioner was convicted of a felony offense for purposes of 42 C.F.R. § 424.530(a)(3).***

According to Title 18 of the United States Code, "whoever, in any manner within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than 5 years . . . ." 18 U.S.C. § 1001(a)(2). Title 18 of the United States Code also indicates that an offense is considered to be a felony based on the maximum term of imprisonment, and that an offense that is punishable by more than one year of imprisonment is considered to be a felony. 18 U.S.C. § 3559(a). On October 18, 2010, the United States District Court for the Southern District of California entered a Judgment in a Criminal Case based on Petitioner's guilty plea to the offenses listed in 18 U.S.C. §§ 1001 and 2. CMS Ex. 8 at 1. I conclude that Petitioner was convicted of a felony for purposes of 42 C.F.R. § 424.530(a)(3).[5,6]

***3. Petitioner was convicted of a felony offense that warranted exclusion pursuant to section 1128(b) of the Act.***

The DAB, the highest level appellate review body of the Department, concluded that Petitioner's offense was in connection with the interference with or obstruction of an investigation and that the IG established that it had a basis for excluding him from participation in Federal health care programs pursuant to section 1128(b)(2) of the Act for a period of one year. *Subramanya K. Prasad, M.D.*, DAB No. 2568 at 8-10. In a May 2014 Exclusion Agreement jointly entered into by the IG and Petitioner, "Petitioner agree[d] to be excluded under 42 U.S.C. § 1320a-7(b)(2) from Medicare, Medicaid, and all Federal health care programs . . . for a period of 1 year." Neither party has submitted any new evidence that points to any facts that were not known to the DAB, Petitioner, or the IG at the time of the DAB's decision or the execution of the Exclusion Agreement. In addition, the parties have not alleged that any other exclusion provision is applicable to this case. *See* CMS Br. at 7-8.

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[5] In its decision, the DAB determined that Petitioner had been convicted of a felony, stating: "Petitioner still pled guilty to a felony, and his potential prison time remained five years." *Subramanya K. Prasad, M.D.*, DAB No. 2568 at 8.

[6] Petitioner has acknowledged that he was convicted of a felony offense (CMS Ex. 4 at 1), and he has not argued otherwise in his briefs.

I have no independent basis to conclude that any exclusion provision, other than section 1128(b)(2), is applicable to this case. The conviction-related evidence submitted and admitted into the record in these proceedings with respect to Petitioner's criminal conviction totals five pages and consists of: (1) A superseding information charging that Petitioner made false statements to a federal agent in violation of 18 U.S.C. §§ 1001 and 2, and (2) a Judgment in Criminal Case reporting Petitioner's guilty plea and imposition of a sentence. In support of their respective arguments, Petitioner has submitted a copy of a previous CRD ALJ decision and CMS has submitted a copy of the DAB decision that reversed the CRD ALJ's decision. P. Br., P. Attachment 1; CMS Ex. 5. I note that although both decisions discussed the underlying facts surrounding Petitioner's role in criminal activity, the summaries of the circumstances surrounding Petitioner's conviction contained in these decisions do not constitute actual evidence relating to the circumstances of Petitioner's conviction. Therefore, as concluded by the DAB, and previously agreed upon by Petitioner, section 1128(b)(2) of the Act is the applicable exclusion provision related to Petitioner's criminal conviction.

### *4. Petitioner's felony offense is not listed in 42 C.F.R. § 424.530(a)(3) as being per se detrimental to the best interests of the Medicare program or its beneficiaries.*

The version of 42 C.F.R. § 424.530(a)(3) in effect when the initial determination in this case was issued lists the following offenses as being *per se* detrimental to the best interests of the Medicare program or its beneficiaries:

> (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.
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> (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 Act.

42 C.F.R. § 424.530(a)(3)(i)(A)-(D). As previously discussed, the DAB has concluded, and Petitioner and CMS have agreed, that Petitioner's offense falls under section 1128(b)(2) of the Act. Thus, under subsection (D), which now more narrowly includes

only offenses listed in section 1128(a) of the Act, Petitioner's offense would not warrant a *per se* denial of enrollment in the Medicare program.[7] There is no indication, in either the initial or reconsidered determinations, that Petitioner's felony offense should be considered under subsections (A) through (C) listed above, and I see no such connection in my review of the limited facts before me. Additionally, CMS has not contended in its briefs that enrollment should be denied pursuant to subsections (A) through (C). Therefore, I conclude that Petitioner's felony offense is not an offense listed in 42 C.F.R. § 424.530(a)(3)(i)(A)-(D).

***5. When a felony offense is not listed in 42 C.F.R. § 424.530(a)(3)(i)(A)-(D), a denial of enrollment based on a felony conviction in the ten years preceding the application must be based on a determination that the offense is detrimental to the best interests of the Medicare program or its beneficiaries.***

In its proposed rule addressing the intended revision of 42 C.F.R. § 424.530(a)(3), CMS explained that it would "modify the list of felonies in each section such that any felony conviction—including guilty pleas and adjudicated pretrial diversions—that we have determined to be detrimental to the best interests of the Medicare program and its beneficiaries would constitute a basis for denial or revocation." 78 Fed. Reg. 25013, 25021 (April 29, 2013). CMS further stated that this amendment "would give us the discretion to deny or revoke enrollment based on any felony conviction that we believe to be detrimental to the best interests of Medicare and its beneficiaries." *Id.*

The revised regulation included changes to the enumerated felonies that CMS finds are *per se* detrimental to the best interests of the Medicare program and makes it clear that CMS has the discretion to determine whether *any* felony conviction within 10 years preceding enrollment is detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.530(a)(3). The revised regulation, which became effective on February 3, 2015, explicitly lists four categories of felony offenses that warrant a denial of enrollment for a period of 10 years from the date of conviction, but indicates that offenses "include, but are not limited in scope and severity" to those specified offenses. 42 C.F.R. § 424.530(a)(3)(i). Furthermore, the revised regulation states that enrollment can be denied for any felony offense that CMS "determines is detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.530(a)(3).

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[7] One key change in the regulation is that subsection (D) of the former version more broadly included "[a]ny felonies outlined in section 1128 of the Act" and did not limit the offenses to the ones outlined in section 1128(a) of the Act.

In explaining the regulatory changes in the Final Rule, CMS noted that "[t]he determination of whether a particular conviction will or will not result in the revocation or denial of Medicare enrollment will depend on the specific facts of each individual situation." 79 Fed. Reg. 72510. CMS elaborated, as follows:

> We believe that the term "determines" makes clearer that the lists of felonies in these two provisions are not exhaustive and include other felonies that CMS may deem as meeting the "detrimental" standard based on the particular facts of the case. Second, and 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, we have included the phrase "but are not limited in scope or severity" within both provisions.
>
> However, notwithstanding these changes, we again stress that we will only exercise our authority under §§ 424.530(a)(3) and 424.535(a)(3) after very careful consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction. It should in no way be assumed that every felony conviction will automatically result in a denial or revocation.

*Id.* at 72511-72512. In stating such, CMS indicated that any determination that a felony not contained in the list at 42 C.F.R. § 424.530(a)(3)(i)(A)-(D) would result in a denial of enrollment would first require CMS to determine that the offense was detrimental to the best interests of the Medicare program and its beneficiaries. *Id.* Furthermore, CMS avowed that it would only make such a determination after it carefully considered the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction. *Id.* The plain language of the updated regulation is consistent with the discussion in the final rule, in that it limits denials to instances in which CMS "determines" an offense is detrimental to the best interests of the Medicare program and its beneficiaries. Therefore, CMS must make a determination that a given felony offense is detrimental to the best interests of the Medicare program and its beneficiaries relative to the facts of the specific case when considering an enrollment application from an individual who has committed a felony in the preceding 10 years if the felony offense is not listed in subsections (A) through (D).

### *6. The initial and reconsidered determinations did not state that Petitioner's offense was detrimental to the best interests of the Medicare program and its beneficiaries.*

The May 4, 2015 initial determination and August 24, 2015 reconsidered determination contain the same explanation for the denial of Petitioner's enrollment in the Medicare program, stating identically, to include punctuation and boldface font:

42 CFR §424.530(a)(3)

**You are within 10 years of your 2010 felony conviction.**

CMS Exs. 1 at 1; 3 at 1 (emphasis in original). No further explanation is provided, and neither determination provides any reasoning other than the fact that 10 years has not yet elapsed since Petitioner's felony conviction. The following list of "submitted documentation" is cited in the reconsidered determination:

-Reconsideration request letter dated June 1, 2015
-Letter from the Southern District Ohio's US Probation office dated June 11, 2012
-Office of Inspector General (OIG) reinstatement letter dated September 8, 2014
-Exclusion Agreement between Dr. Prasad and the OIG signed by Dr. Prasad on May 7, 2014
-Attorney letter to OIG dated May 13, 2014

CMS Ex. 1 at 1. Of note is that the hearing officer who authored the reconsidered determination did not indicate that she had considered any other documents pertaining to the offense, such as the superseding indictment, judgment, statements of investigators, and/or transcripts of court proceedings.

While the given reason for the denial of enrollment in the reconsidered determination was solely that Petitioner had a felony conviction in the previous 10 years, CMS, in its opening brief, elaborated on that basis with additional reasoning that is not contained in the four corners of the reconsidered determination. CMS's opening brief explained that "CMS, through its contractor CGS, denied Petitioner's application for enrollment as a Medicare supplier because *Petitioner had been convicted of a felony specifically identified in 42 C.F.R. § 424.530(a)(3)* within the previous ten years." CMS Br. at 5 (emphasis added). CMS offered, in support of this basis, that "[t]his offense falls squarely within the list of felonies in Section 1128 of the Act" because "Petitioner's offense is a '[f]elony outlined in section 1128 of the Act.'" CMS Br. at 6.

CMS, in its reply brief, acknowledged Petitioner's arguments regarding CMS's incorrect application of the regulation and conceded that the felony offense at issue is not enumerated in 42 C.F.R. § 424.530(a)(3)(i)(D), which marked a change in its litigation position. It acknowledged the requirement that CMS "must consider whether the felony is detrimental to the best interests of Medicare." CMS Reply at 2. Although CMS made a bare assertion that "CMS, through its contractor CGS Administrators, determined that these felonies were detrimental to the best interests of the Medicare program and its beneficiaries and denied Petitioner's enrollment on this basis," it does not provide a

citation to any document or other credible evidence in support of this assertion.[8] CMS Reply at 3. Likewise, I have found no such language in the contractor's reconsidered determination. Furthermore, CMS's briefs lack any specific discussion of how Petitioner's conviction for violating 18 U.S.C. §§ 1001 and 2 has been determined to be detrimental to the best interests of the Medicare program.

CMS contends, in its reply, that the regulatory revisions "are intended to *expand* CMS's authority to deny Medicare billing privileges based on a felony conviction" and that Petitioner is incorrect in arguing that the basis provided in the reconsidered determination is incorrect. CMS Reply at 2 (emphasis in original). I observe that, in the proposed rulemaking, CMS stated that it was amending the regulation to give it the "discretion to deny or revoke enrollment based on any felony conviction." 78 Fed. Reg. 25021. While CMS may have sought to expand its authority with regard to the types of felony convictions that would bar Medicare enrollment, it did not indicate that it would do so without first making a determination that was based on the facts of each individual case. CMS overlooks that in seeking the discretion to consider all felony convictions within 10 years of an application, it unambiguously stated that its determination would "depend upon the specific facts of the individual situation" and that "we will only exercise our authority . . . after consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction." 79 Fed. Reg. 72510. In the instant case, the CMS contractor appeared to limit its consideration to whether Petitioner had a

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[8] It is worth noting that in a previous matter before a different ALJ, CMS argued the following, in pertinent part:

> An ALJ may only conduct the most minimal review (i.e., must uphold a denial or revocation under 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3) so long as Petitioner has committed a felony and *CMS's reconsidered determination states that CMS has determined this felony to be detrimental* to the best interests of the program and program beneficiaries).

*Barry Ray, MD*, DAB CR3655 at 13 (2015) (emphasis added). CMS appears to have moved the proverbial target, as in the current case CMS essentially argues that it is not necessary for a contractor, on behalf of CMS, to state that it has actually determined the offense to be detrimental (much less describe how it reached that conclusion). CMS's current position is that the mere fact that the contractor has denied a supplier enrollment pursuant to 424.530(a)(3) is *ipso facto* proof that the supplier has committed an offense CMS has determined to be detrimental to the Medicare program. I reject that position, as it is inconsistent with both the plain language of the regulation and the rationale provided in CMS's rulemaking.

felony conviction in the ten years prior to the application, and CMS, in its brief, added that the contractor "denied Petitioner's application for enrollment as a Medicare supplier because Petitioner had been convicted of a felony specifically identified in 42 C.F.R. § 424.530(a)(3) within the previous ten years." CMS Br. at 5. CMS has not demonstrated that Petitioner's enrollment was denied because CMS determined that his offense was detrimental to the best interests of the Medicare program and its beneficiaries.

***7. Since CMS has not determined that Petitioner's offense was detrimental to the best interests of the Medicare program, and the offense is not among the offenses listed in 42 C.F.R. § 424.530(a)(3)(i)(A)-(D), CMS did not properly deny Petitioner's Medicare enrollment on that basis.***

CMS has asserted that the reconsidered determination denied Petitioner's application "because Petitioner had been convicted of a felony specifically identified in 42 C.F.R. § 424.530(a)(3)," thereby acknowledging that CMS, through its contractor, had denied enrollment based on the fact that it believed the offense was included in the list of enumerated offenses at subsections (A) to (D). CMS Br. at 5. Even without taking into account CMS's post-hoc rationale for the reconsidered determination, it is unquestionable that the reconsidered determination denied enrollment without addressing whether the offense was detrimental to the best interests of the Medicare program and its beneficiaries. In doing so, despite CMS's assurance in its rulemaking that "[e]ach case will be carefully reviewed on its own merits and . . . we will act judiciously and with reasonableness in our determinations," there was no specific determination regarding whether the offense was detrimental to the best interests of the Medicare program. 79 Fed. Reg. at 72510.

I am limited in my review of the bases for a denial of enrollment to the bases that are stated in the reconsidered determination. *See e.g.*, *Neb Group of Arizona LLC*, DAB No. 2573 at 7 (2014). The regulations require that the reconsidered determination "give[] the reasons for the determination" and "[i]f the determination is adverse, the notice specifies the conditions or requirements of law or regulations that the affected party fails to meet . . . ." 42 C.F.R. § 498.25(a). The reconsidered determination's denial of enrollment, if CMS's assertions are accepted as true, was premised on a legal error in which the hearing officer felt that an exclusion under section 1128(b)(2) warranted a *per se* denial of enrollment. The same reconsidered determination makes no finding that the offense was detrimental to the best interests of the Medicare program and its beneficiaries, and CMS, in its briefs, has not advanced any arguments, with either legal or factual support, that the offense was detrimental to the best interests of the Medicare program and its beneficiaries.

The reason given in the reconsidered determination for upholding the denial of enrollment was simply that Petitioner had a felony conviction within 10 years of his submission of an enrollment application. In such an instance in which a felony conviction did not fall under the enumerated offenses listed in 42 C.F.R. § 424.530(a)(3)(A)-(D), CMS did not fulfill its obligation to "determine" whether the offense was "detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.530(a)(3). I cannot determine in the first instance, and based on the limited evidence before me, that this offense was detrimental to the best interests of the *Medicare program or its beneficiaries*. I therefore do not affirm CMS's denial of Petitioner's enrollment in the Medicare program.[9]

While I find that CMS improperly denied enrollment based on its application of 42 C.F.R. § 424.530(a)(3), I limit my review to only this aspect of the enrollment application. CMS, or its contractor, must issue a new determination regarding Petitioner's enrollment application.

## V. Conclusion

I reverse CMS's denial of Petitioner's enrollment application for Medicare billing privileges.

/s/
Leslie C. Rogall
Administrative Law Judge

[9] For example, the record before me does not indicate whether any Medicare beneficiaries or funds were involved in the FDA investigation that preceded Petitioner's guilty plea to making false statements to an FDA agent. As I have previously noted, CMS, in its briefs, has not explained how the offense was detrimental to the best interests of the Medicare program and its beneficiaries.