

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

Dinesh Patel, M.D.
Docket No. A-13-105
Decision No. 2551
December 17, 2013

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

Dinesh Patel, M.D. (Petitioner) appeals the June 20, 2013 decision of an Administrative Law Judge (ALJ). *Dinesh Patel, M.D.*, DAB CR2838 (2013) (ALJ Decision). Based upon Petitioner's 2012 felony conviction for violating the federal Anti-Kickback statute by participating in a "cash-for-patients" scheme, the ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), thereby sustaining CMS's decision to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). That regulation authorizes CMS to revoke a physician's Medicare billing privileges if the physician has been convicted, within 10 years preceding enrollment or revalidation of enrollment, of a felony criminal offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. The ALJ concluded CMS had appropriately determined, through section 424.535(a)(3)(i)(D) of the regulation, that Petitioner's felony offense was detrimental to the Medicare program and its beneficiaries because it would result in a mandatory exclusion from participating in Medicare, Medicaid, and all federal health care programs for a minimum of five years under section 1128(a)(1) of the Social Security Act (Act).¹ The ALJ also sustained CMS's imposition of a three-year bar to re-enrollment bar in the Medicare program.

For the reasons discussed below, we affirm the ALJ Decision.

Applicable Law

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Act § 1811. Medicare is administered by CMS, a component of the Department of Health and Human Services (HHS). CMS in turn delegates program functions to private contractors. *See* Act §§ 1816, 1842, 1874A. In

¹ The current version of the Act can be found at www.ssa.gov/OPHome/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

order to participate in Medicare, “providers” and “suppliers” must enroll in the program.² 42 C. F. R. § 424.500. “Enrollment” in Medicare confers program “billing privileges” – that is, the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* at §§ 424.502, 424.505.

Section 1842(h)(8) of the Act gives the Secretary of HHS discretion to refuse to enter into an agreement or to terminate or refuse to renew an agreement with a physician or supplier who “has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries.”

The Secretary delegated the authority to revoke enrollment and billing privileges to CMS by regulation. *See* 42 C.F.R. § 424.535; *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008). CMS’s authority to revoke enrollment and billing privileges under certain circumstances is set forth (by regulation) in section 424.535, which provides in relevant part as follows:

- (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier’s 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, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.

- (i) Offenses include –

* * *

(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.

* * *

² “Providers” are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. “Suppliers” include physicians and other non-physician health care practitioners. *Id.* (stating that, unless the context indicates otherwise, “[s]upplier means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare”).

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

Section 1128(a)(1) of the Act in turn requires the Secretary to exclude an individual or entity from participation in all federal health care programs if that individual or entity “has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter [i.e., the Medicare statute] or under any State health care program.” The Secretary delegated her exclusion authority under section 1128 to the HHS Inspector General (I.G.) by regulation. *See, e.g.*, 42 C.F.R. § 1001.101(a); *Guy R. Seaton*, DAB No. 2465, at 1 (2012). An individual “is considered to have been ‘convicted’ of a criminal offense” within the scope of section 1128(a) of the Act whenever a guilty plea or plea of nolo contendere by the individual has been accepted by a federal, state, or local court. Act § 1128(i)(3); 42 C.F.R. § 1001.2. The minimum period for a mandatory exclusion is five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Revocation based on a felony conviction is effective on the date of the conviction. 42 C.F.R. § 424.535(g). If CMS revokes a provider’s or supplier’s billing privileges, the provider or supplier is “barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar.”³ *Id.* at § 424.535(c). The re-enrollment bar must last for a minimum of one year but may not exceed three years, “depending upon the severity of the basis for revocation.” *Id.*

Case Background⁴

The United States Attorney for the District of New Jersey filed an Information alleging that from at least in or about 2010 through at least in or about October 2011, Orange County MRI, an approved Medicare and Medicaid provider of diagnostic testing, made cash payments to Petitioner for each Medicare or Medicaid beneficiary that he referred for an MRI or CAT Scan. CMS Ex. 3, at 3-4, 6. On September 19, 2012, Petitioner pled guilty to a single felony count of violating the federal Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b)(1)(A). CMS Ex. 1, at 1; CMS Ex. 2.

As part of the plea agreement, Petitioner stipulated that the offense he committed “involved an improper benefit conferred that was greater than the value of the bribe and was more than \$10,000 but not more than \$30,000.” CMS Ex. 2, at 8. Petitioner further stipulated that his offense “involved the abuse of a position of public or private trust in a

³ The re-enrollment process set forth at 42 C.F.R. § 424.535(d) applies to a provider or supplier seeking to re-establish enrollment in the Medicare program after its billing privileges have been revoked.

⁴ The factual information in this section, unless otherwise indicated, is drawn from undisputed findings of fact set forth in the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ’s findings of fact or conclusions of law.

manner that significantly facilitated the commission or concealment of the offense.” *Id.* Petitioner was subsequently sentenced to three months’ imprisonment and two years of supervised release, fined \$30,000, and ordered to forfeit \$7,600 to the United States. CMS Ex. 1, at 2, 3, 6, 7; CMS Ex. 8.

In a letter dated October 5, 2012, Novitas, a Medicare Administrative Contractor on behalf of CMS, revoked the Medicare billing privileges of Petitioner pursuant to section 424.535(a)(3) and imposed a three-year re-enrollment bar, effective September 20, 2012, pursuant to sections 424.535(c) and 424.535(g), respectively. CMS Ex. 6. The notice letter did not cite to the specific subparagraph of section 424.535(a)(3) that it relied upon in revoking his privileges. Petitioner requested reconsideration of the revocation decision and submitted a letter in support of his request. Novitas’s Hearing Officer considered Petitioner’s request and denied it in a letter dated March 12, 2013. CMS Ex 7. The hearing officer concluded that Petitioner’s guilty plea “to participating in a cash-for-patients scheme” was “consistent with the rationale outlined in 42 C.F.R. § 424.535(a)(3)” and upheld the revocation of Petitioner’s Medicare billing privileges. CMS Ex. 7, at 2, 3. The reconsideration decision also did not cite to the specific subparagraph of section 424.535(a)(3) that it relied upon in revoking his privileges.

Petitioner then appealed the reconsideration decision to an ALJ, and CMS moved for summary judgment. In its brief supporting that motion, CMS more specifically contended that it revoked Petitioner’s billing privileges pursuant to section 424.535(a)(3)(i)(D) because his felony offense would result in a mandatory exclusion under section 1128(a)(1) of the Act. *See* Motion for Summary Judgment, Partial Motion for Dismissal, and Supporting Brief on Behalf of CMS at 1-2, 6-7, 9 (May 22, 2013). Petitioner responded to CMS’s position on the basis for revocation in his reply brief to CMS’s motion prior to the ALJ Decision. Petitioner’s Brief in Opposition to CMS’s Motion for Summary Judgment at 3 (June 11, 2013).

The ALJ found that there were no material facts in dispute and granted summary judgment in favor of CMS, thereby sustaining the revocation of Petitioner’s Medicare billing privileges and the imposition of a three-year re-enrollment bar. The ALJ concluded that Petitioner was, within the 10 years preceding his enrollment or the revalidation of his enrollment, convicted of a federal felony offense that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries, one of the reasons for such revocation established by regulation at section 424.535(a)(3). ALJ Decision at 3-4. Thus, the ALJ concluded that CMS, acting through Novitas, properly revoked Petitioner’s Medicare Part B enrollment and billing privileges. *Id.*

Petitioner timely filed the present appeal of the ALJ Decision on August 16, 2013.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Elant at Fishkill*, DAB No. 2468, at 5 (2012), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918, at 3-5 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997). In reviewing whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. *Kingsville Nursing & Rehab. Ctr.*, DAB No. 2234, at 3-4 (2009); *Madison Health Care, Inc.*, DAB No. 1927, at 3-5 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare and Medicaid Programs*, <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrol.html>; *Golden Age Skilled Nursing & Rehab. Ctr.*, DAB No. 2026, at 7 (2006).

Discussion

1. The ALJ Decision granting summary judgment in favor of CMS is free from legal error.

Petitioner has not identified any material facts that are in dispute in this appeal. The parties also do not dispute the applicability and meaning of the controlling regulation, section 424.535(a)(3). The Board has previously held that section 424.535(a)(3) permits CMS to revoke a supplier's Medicare billing privileges if the following conditions are met: (1) the supplier was convicted of a federal or state felony offense within 10 years of the supplier's enrollment or revalidation of enrollment in Medicare; and (2) CMS has determined that the supplier's felony offense is detrimental to the best interests of the Medicare program and its beneficiaries. *See Fady Fayad, M.D.*, DAB No. 2266, at 7 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Here, the ALJ concluded that both of the conditions required by section 424.535(a)(3) were met. ALJ Decision at 5. First, Petitioner acknowledged before the ALJ (and before us on appeal) that he had been convicted of a "federal felony." ALJ Decision at 5; Petitioner's Request for Review (RR) at 3, 4. The ALJ concluded that Petitioner had specifically been convicted of one felony count of violating the federal Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b)(1). ALJ Decision at 3, 5.

Second, the ALJ concluded that CMS had determined Petitioner's felony offense was detrimental to the best interests of Medicare and its beneficiaries because it would have resulted in a mandatory exclusion under section 1128(a)(1) of the Act. *Id.* at 4, 5. As the ALJ correctly observed, section 424.535(a)(3)(i) gives examples of certain offenses

already determined by CMS to be detrimental to the Medicare program. Any offense that would result in mandatory exclusion under section 1128(a)(1) of the Act is one such example listed under section 424.535(a)(3)(i)(D). ALJ Decision at 5; *see also Fayad* at 8; *Bussell*, at 9-10.

The essential elements necessary to support an exclusion under section 1128(a)(1) of the Act are also two-fold: (1) the individual to be excluded must have been convicted of a criminal offense, whether felony or misdemeanor; and (2) the criminal offense must be related to the delivery of an item or service under Medicare or any state health care program. As discussed above, Petitioner acknowledges that he was convicted of a federal felony offense, thus satisfying the first necessary element of exclusion under section 1128(a)(1).

The second element is met by the requirement set forth in the language of the Anti-Kickback statute itself. A violation of the Anti-Kickback statute occurs if an individual receives remuneration in return for furnishing or arranging the furnishing of an “item or service for which payment may be made in whole or in part under a Federal health care program.”⁵ 42 U.S.C. § 1320a-7b(b)(1)(A). Indeed, the Board has long recognized that a conviction for violating the federal Anti-Kickback statute is a program-related conviction that mandates exclusion from Medicare and Medicare pursuant to section 1128(a)(1) of the Act. *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Niranjana B. Parikh, M.D., et al.*, DAB No. 1334 (1992). Thus, Petitioner’s conviction for conduct in violation of the Anti-Kickback statute establishes per se that it was program-related and therefore, falls within the ambit of a mandatory exclusion under section 1128(a)(1) of the Act.⁶

Because Petitioner’s criminal conviction is for an offense that would result in a mandatory exclusion, it is an offense that the Secretary has determined to be detrimental to the Medicare program, and the ALJ correctly concluded there is a sufficient legal basis for CMS to revoke the billing privileges of Petitioner pursuant to section 424.535(a)(3)(i)(D).

⁵ 42 U.S.C. § 1320a-7b(b)(1)(A) provides in relevant part that:

Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind — (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

⁶ In any event, Petitioner pled guilty “to participating in a cash-for-patients scheme with a diagnostic facility in Orange, N.J.” and accepted “cash kickback payments . . . in exchange for his referral of Medicare and Medicaid patients.” CMS Ex. 5, at 5. Because a common sense nexus exists between Petitioner’s offense and the delivery of an item or service under the Medicare program, Petitioner’s conviction clearly is “program related” within the meaning of section 1128(a)(1). *See, e.g., Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992); *Niranjana B. Parikh, M.D.*

Thus, the ALJ Decision granting summary judgment in favor of CMS is free from legal error.

2. Petitioner's arguments are without merit.

Petitioner does not challenge the ALJ's conclusion that his felony offense "would [have] result[ed]" in a mandatory exclusion under section 1128(a)(1) of the Act and, therefore provides a basis for CMS to revoke his billing privileges pursuant to section 424.535(a)(3)(i)(D). Instead, Petitioner advances three arguments for why the revocation should not be upheld. First, Petitioner argues that he did not receive adequate notice that CMS relied upon section 424.535(a)(3)(i)(D) as the basis for revoking his billing privileges. RR at 3. Second, Petitioner contends that the ALJ erred in concluding that CMS had determined that his crime was detrimental to the interests of the program because CMS must have revoked his billing privileges under the "financial crimes" provision at section 424.535(a)(3)(i)(B), and not under the "mandatory exclusion" provision at section 424.535(a)(3)(i)(D). *Id.* at 2. Finally, Petitioner argues that CMS failed to consider any mitigating factors before deciding to revoke his billing privileges. As discussed below, each of these arguments is without merit.

A. Petitioner received timely and adequate notice that CMS relied on section 424.535(a)(3)(i)(D) as the basis for revoking his Medicare billing privileges.

Petitioner argues that CMS never relied upon section 424.535(a)(3)(i)(D) "as grounds that CMS has automatically demonstrated [his] conduct was detrimental to the Medicare and its beneficiaries" when making its determination to revoke his billing privileges because the revocation notice letter cites only broadly to section 424.535(a)(3). *See* RR at 3; CMS Ex. 6, at 1.⁷ In essence, Petitioner appears to contend that he did not have adequate notice of the basis for the revocation of his Medicare billing privileges because CMS did not identify the specific subparagraph of section 424.535(a)(3) on which it relied. This argument is without merit.

In our view, the October 5, 2012 notice letter from Novitas adequately informed Petitioner of the basis for the revocation. CMS Ex. 6. As noted, paragraph two of the notice letter identifies section 424.535(a)(3) as the applicable regulation authorizing the revocation of Petitioner's Medicare billing privileges. *Id.* at 1. The same paragraph of the notice letter also advises Petitioner that within the prescribed 10-year period preceding enrollment or revalidation of enrollment, he had been convicted of a federal felony offense that CMS had determined to be detrimental to the best interests of the Medicare program and its beneficiaries to continue his enrollment. Paragraph three of the

⁷ Similarly, the reconsideration decision dated March 12, 2013 cites only to section 424.535(a)(3) as the legal basis for revoking Petitioner's billing privileges. CMS Ex. 7, at 1, 3.

notice letter clearly identifies the nature of Petitioner's conviction that prompted the revocation, stating that "Petitioner pleaded guilty on September 20, 2012 to participating in a cash-for-patients [scheme] with a diagnostic facility in Orange, NJ." *Id.* Given the entirety of the factual circumstances surrounding Petitioner's conviction set forth in the notice letter, we conclude that Petitioner should have reasonably understood that CMS revoked his Medicare billing privileges pursuant to section 424.535(a)(3)(i)(D) because his felony conviction was for an offense that would constitute a basis for a mandatory exclusion under section 1128(a)(1). The plea documents (CMS Exs. 1-4) further demonstrate that Petitioner was aware that he was pleading guilty to a violation of the federal Anti-Kickback statute and, therefore, reasonably should have been aware that such a violation is a program-related crime subjecting the convicted individual to mandatory exclusion from Medicare pursuant to section 1128(a)(1) of the Act. For the reasons previously addressed, Petitioner also reasonably should have been aware that such convictions subject the individual to revocation of billing privileges, as provided in section 424.535(a)(3)(i)(D).

Even if Petitioner did not have adequate notice of the specific regulatory subsection authorizing CMS's revocation of his Medicare billing privileges, CMS cured any such notice deficiency during the ALJ proceeding. As we outlined in the Case Background section, CMS explained and clarified the legal basis for the revocation in briefs supporting its Motion for Summary Judgment. The Board has previously held that "a federal agency may clarify its reasons for a challenged determination, or assert new reasons for that determination, during the ALJ proceeding as long as the non-federal party has adequate notice of the reasons and a reasonable opportunity to respond during that proceeding." *Fayad* at 10-11, citing *Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008) (and cases cited therein). "The Board has also held that, even assuming inadequate notice [of the basis for a federal agency's determination], it will not find a due process violation absent a showing of resulting prejudice." *Id.* at 11.

We conclude here that there was no prejudice. Petitioner does not claim that the alleged notice deficiency impaired his ability to defend himself before either the ALJ or the Board. Indeed, Petitioner responded to CMS's brief supporting CMS's Motion for Summary Judgment, which adequately specified section 424.534(a)(3)(i)(D) as the basis for the revocation. *See* Petitioner's Brief in Opposition to CMS's Motion for Summary Judgment at 3. In his response, however, Petitioner did not identify any error in CMS's reliance on section 424.534(a)(3)(i)(D), and as pointed out above, has otherwise not done so before us on appeal.

- B. CMS's revocation of Petitioner's Medicare billing privileges was not based on the "financial crimes" provision set forth in section 424.535(a)(3)(i)(B).

Petitioner next argues that CMS must have instead based its revocation of his billing privileges on the commission of a "financial crime" as cited in section 424.535(a)(3)(i)(B) because CMS imposed only a three-year re-enrollment bar. RR at 2. If, says the Petitioner, CMS had instead relied on the mandatory exclusion provision cited in section 424.535(a)(3)(i)(D) as the basis for then revocation, then **CMS** would have been required to exclude Petitioner for a minimum period of five years under section 1128(c)(3)(B) of the Act and 42 C.F.R. § 1001.102(a), which CMS did not do here. Petitioner's argument is based upon an erroneous premise and, therefore, is without merit.

As the Board stated in *Ahmed*, "revocation under section 424.535 and exclusion under section 1128 are distinct remedial tools, each with its own set of prerequisites and consequences for the provider or supplier." *Ahmed* at 13. Revocation and exclusion are two separate and distinct types of administrative enforcement actions that two different agencies within HHS are responsible for carrying out. As previously discussed, the Secretary delegated the authority to impose a mandatory exclusion under section 1128 to the HHS I.G., who administers that program pursuant to 42 C.F.R. Parts 1001 and 1005. In contrast, the Secretary delegated the authority for revoking a provider or supplier's Medicare billing privileges to CMS under 42 C.F.R. Part 424.

Contrary to Petitioner's assertion in this case, CMS is not authorized to exclude a provider or supplier under section 1128 of the Act. Only the I.G. is authorized to do so under that statute. CMS is authorized to revoke Medicare billing privileges under section 424.535(a)(3)(i)(D) if it determines that a felony conviction "would result in [the imposition of] a mandatory exclusion [by the I.G.] under section 1128(a) of the Act." However, CMS's determination that a conviction would fall within the scope of section 1128(a) of the Act (for the purpose of revoking billing privileges under section 424.535(a)(3)(i)(D)) is not an actual decision to impose an exclusion under section 1128(a). Because the I.G, **not CMS**, has the sole authority to exclude individuals and entities under section 1128(a), the premise of Petitioner's argument that his revocation was actually pursuant to section 424.535(a)(3)(i)(B) is flawed.

Moreover, the fact that the I.G. has not yet excluded Petitioner provides no basis for us to infer that Petitioner's conviction falls outside the scope of the requirements for a mandatory exclusion under section 1128(a)(1) and therefore is not subject to revocation by CMS under section 424.535(a)(3)(i)(D). Indeed, as the ALJ properly noted, CMS's revocation of Petitioner's Medicare billing privileges does not preclude the I.G. from subsequently excluding Petitioner under section 1128(a)(1) of the Act. ALJ Decision at 6, citing *Gregory J. Salko, M.D.*, DAB No. 2437, at 7 (2012).

Thus, the ALJ's conclusion that CMS's revocation of Petitioner's Medicare billing privileges was based on section 424.535(a)(3)(i)(D), rather than section 424.535(a)(3)(i)(B), is free from legal error.

In any event, we also agree with the ALJ's conclusion that even if the revocation was based on a financial crime identified in section 424.535(a)(3)(i)(B), that provision would be an independent basis for revocation here. ALJ Decision at 6. As the ALJ correctly concluded, "[a]ny offense under section 424.535(a)(3)(i)(B) would be another example of an offense that CMS has already determined to be detrimental of the Medicare program[,] and it would still be within CMS's discretion to impose a re-enrollment bar of a minimum of one year but not more than three years." ALJ Decision at 6-7.

- C. CMS may revoke a supplier's Medicare billing privileges based solely on a qualifying felony conviction, without regard to equitable or other factors.

Finally, Petitioner argues that "it is inappropriate for CMS to cite and rely upon [section 1128(a)(1)] the mandatory exclusion provision, as grounds that CMS has automatically demonstrated [his] conduct was detrimental to Medicare and its beneficiaries." RR at 3. Petitioner also argues that CMS has failed to put forth any "aggravating factors" to demonstrate that his conduct was detrimental to Medicare and its beneficiaries. *Id.* at 3-4. Petitioner further argues that CMS has no right to revoke his Medicare billing privileges because "it was unable to articulate how or why [his] conduct was 'detrimental to Medicare and its beneficiaries' sufficient to warrant a revocation." *Id.* at 5. Rather, Petitioner believes that he has fully repaid his debt to society and been punished appropriately for his crime. *Id.* at 4. Petitioner represents that he is in compliance with all the conditions of his sentence. *Id.* For example, Petitioner represents that the federal government has been made whole in terms of the \$30,000 fine he paid and his forfeiture of \$7,600 along with the sentence he is currently serving. *Id.* Petitioner also contends that he has provided vital medical services to the underserved and elderly population in Newark, New Jersey. *Id.* He also claims that these Medicare beneficiaries have received excellent medical care, to which they would have otherwise not had access and at no point was patient care at issue, nor has any patient harm ever been attributed to, or even alleged, against him. *Id.* These contentions are without merit.

Petitioner presumes that CMS must make some additional showing that the conduct underlying his specific conviction was detrimental to the Medicare program and that the ALJ erred by not considering whether his alleged exemplary medical service to an underserved Medicare population outweighs his criminal conduct in accepting kickbacks for the referral of Medicare beneficiaries. RR at 6. However, Petitioner misstates CMS's burden. CMS does not have to quantify the harm a convicted individual has done to Medicare in order to revoke a provider's or supplier's Medicare billing privileges. Petitioner has not pointed to any provision in the Medicare regulations or statute, and indeed we are not aware of any such legal authority, that authorizes the Board or ALJs to

weigh a petitioner's alleged good deeds against his criminal conduct in determining whether there is a valid legal basis for CMS to revoke a provider's or supplier's Medicare billing privileges.

As we previously explained, the Secretary, by regulation, has determined that crimes that would result in a mandatory exclusion, such as the federal Anti-Kickback violation to which Petitioner pled guilty, are the type of felony offenses that are detrimental to the best interests of the Medicare program and its beneficiaries. 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. *Fayad* at 4, citing *Bussell* at 9-10.

The Board has also repeatedly held that its proper role in reviewing a revocation determination under section 424.535(a)(3) is “to decide whether CMS had sufficient legal grounds for that determination.” *Fayad* at 16, citing *Ahmed* at 17. The Board explained in *Fayad* that:

Under that regulation CMS “may” (in its discretion) revoke the billing privileges of a supplier that was convicted, within the prescribed ten-year period, of a felony crime that CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries. If CMS proves that the supplier was convicted of such a crime, 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 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.

Fayad at 16, citing *Ahmed* at 16-17, 19.

In this case, the record unequivocally establishes that CMS had a valid legal basis – namely, a qualifying conviction for a felony offense that the Secretary has determined to be detrimental to the Medicare program and its beneficiaries – to revoke the billing privileges of Petitioner. CMS's decision to revoke Petitioner's billing privileges based on the existence of that legal basis is a discretionary judgment that we may not review. *Fayad* at 16. Indeed, it is well established that the Board “may not substitute [its] discretion for that of CMS in determining whether revocation is appropriate under all the circumstances.” *Id.*, quoting *Ahmed* at 19. Thus, the ALJ did not err in rejecting

Petitioner's contention that CMS should have considered mitigating factors involving his medical services provided to Medicare beneficiaries in exercising its discretion to revoke his billing privileges.

We also note that even if CMS's judgment were subject to review, Petitioner has not explained how his alleged claims of exemplary medical service to an underserved Medicare population base and the lack of harm to his patients are relevant to CMS's exercise of its discretion. CMS does not dispute Petitioner's contributions to Medicare beneficiaries, and they may indeed be commendable. However, we also must point out that Petitioner stipulated in his plea agreement that his felony offense "involved the abuse of a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense." CMS Ex. 2, at 8. Under these circumstances, CMS could reasonably infer that Petitioner was not trustworthy and posed a threat to the integrity of the Medicare program and its beneficiaries. Accordingly, we would not find that CMS abused its discretion based on Petitioner's contentions.

Conclusion

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

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member