Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Barry Ray, M.D.
(NPI: 1083785232)
(PTAN: 093671, 093671C8X, 093671CNY, and 093671DNT),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-661

Decision No. CR3655

Date: February 20, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS), acting through its administrative contractor, Novitas Solutions, Inc. (Novitas), either denied the enrollment application that Petitioner, Barry Ray, M.D., submitted to reactivate his Medicare billing privileges or revoked Petitioner's billing privileges. CMS's action was based on Petitioner's felony conviction for possessing illegal ammunition within 10 years preceding enrollment or revalidation. Petitioner requested a hearing before an administrative law judge (ALJ). For the reasons stated below, I reverse CMS's denial/revocation.

I. Background and Procedural History

Petitioner is a physician licensed in the state of New Jersey. CMS Exhibit (Ex.) 2. On March 14, 2011, Petitioner pled guilty to the fourth degree crime in New Jersey of illegal possession of dum-dum bullets (N.J. Rev. Stat. § 2C: 39-3(f)). CMS Ex. 1, at 74. On December 13, 2011, the Superior Court of New Jersey, Monmouth County, entered a Judgment of Conviction against Petitioner based on his guilty plea and sentenced Petitioner to a suspended 18-month term in prison. CMS Ex. 1, at 74. The court also

ordered that Petitioner be: prohibited from writing prescriptions for ten years; subject to random drug screening for five years; and required to obtain psychiatric or psychological treatment for as long as ordered by the New Jersey State Board of Medical Examiners (Medical Board). CMS Ex. 1, at 74. Petitioner also had to pay fines and penalties in the amount of $155. CMS Ex. 1, at 75.

Based on his arrest, on September 14, 2010, Petitioner voluntarily consented to an interim surrender of his medical license in New Jersey. CMS Ex. 2, at 1. Following his conviction, on April 12, 2012, the Medical Board reinstated Petitioner's medical license, but ordered the following contingencies: suspension of Petitioner's license for four years, retroactive to September 14, 2010, two years of which was an active suspension and two years was stayed (i.e., probation); completion of a variety of remedial classes; continued enrollment in the Professional Assistance Program of New Jersey, including "[a]bsolute abstinence from psychoactive substances," regular attendance at Alcoholics Anonymous meetings, random drug testing, continued psychiatric treatment, and face-to-face meetings with Professional Assistance Program personnel; and, with limited exceptions, a ten-year restriction on prescription writing privileges. CMS Ex. 2, at 3-7.

On April 16, 2013, Petitioner signed a Medicare enrollment application (Form CMS-855I) and submitted it to Novitas seeking reactivation of his Medicare billing privileges.[1] CMS Ex. 1, at 15-41. In response to a question on the application as to whether Petitioner had ever had a final adverse legal action imposed against him, Petitioner responded that he received a fine for possession of prohibited ammunition, but did not mention the suspension of his medical license. CMS Ex. 1, at 28. After receiving the application, Novitas requested additional information from Petitioner related to his criminal conviction. CMS Ex. 1, at 42. Petitioner responded by submitting a copy of the Judgment of Conviction in the case. CMS Ex. 1, at 74-76. Petitioner explained in a written statement that he inherited the illegal ammunition along with firearms from his father, a former law enforcement officer who used the dum-dum bullets in his service weapon. CMS Ex. 1, at 73. Petitioner elaborated that the dum-dum ammunition is legal in Pennsylvania (the state in which Petitioner's father resided), but that he had not realized it was illegal in New Jersey. CMS Ex. 1, at 73. Petitioner stated that the final resolution to his criminal case was a $157 fine. CMS Ex. 1, at 73.

On June 11, 2013, Novitas issued two initial determination letters in which Novitas denied Petitioner's reactivation enrollment application and/or revoked his billing

---

[1] The record does not include any information related to Petitioner's initial enrollment in the Medicare program or the date and reason Petitioner's Medicare billing privileges were deactivated.

privileges. One letter indicated that Novitas based the denial on 42 C.F.R. § 424.530(a)(3) stating the following:

> Barry Ray was, within the 10 years preceding enrollment or revalidation of enrollment, 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 Ex. 1, at 77. The second letter indicated that Novitas denied Petitioner's enrollment application under 42 C.F.R. § 424.530(a)(1) for failing to meet enrollment requirements, but also indicated that Petitioner's billing privileges were being revoked due to an adverse legal action. Request for Hearing (RFH), Enclosure B.

On July 23, 2013, Petitioner filed, through counsel, a timely request for reconsideration in which he disputed that his conviction was a basis to deny his enrollment application, although in doing so, Petitioner quoted the revocation provision in 42 C.F.R. § 424.535(a)(3) at length. CMS Ex. 1, at 10-13. On August 26, 2013, Petitioner submitted supplemental information to further support his reconsideration request. CMS Ex. 1, at 7-9.

On December 11, 2013, a Novitas hearing officer issued a reconsidered determination entitled "Revocation of Medicare Billing Number" in which she upheld the denial of Petitioner's enrollment application based on 42 C.F.R. § 424.530(a)(3). CMS Ex. 1, at 1-4. The Novitas hearing officer factually premised the denial "on a September 22, 2011 guilty plea to possession of dum dum bullets, a fourth degree felony." CMS Ex. 1, at 2. In response to Petitioner's arguments in his reconsideration request, the Novitas hearing officer stated: "Novitas Solutions is unable to process the application to enroll Barry Ray, MD, as he is within 10 years of his felony conviction. This is regardless of the seriousness of a fourth degree crime, nonetheless a felony." CMS Ex. 1, at 2.

On February 6, 2014, Petitioner filed, through counsel, a RFH with two enclosures (RFH Enclosures A and B) in which he sought review of the revocation of his Medicare billing number, although Petitioner cited the regulations related to the denial of an enrollment application. In response to my February 27, 2014 Acknowledgment and Pre-Hearing Order (Order), CMS filed a Pre-Hearing Brief and Motion for Summary Disposition (CMS Br.) and two exhibits (CMS Exs. 1 and 2). Petitioner submitted a brief in opposition to CMS's Motion for Summary Judgment (P. Br.) and did not file any exhibits. CMS filed a reply brief (CMS Reply Br.), to which Petitioner filed an objection (P. Objection).

After considering the parties' submissions, I made a number of rulings. I admitted CMS Exs. 1 and 2 into the record without objection from Petitioner.[2] I also denied CMS's motion for summary judgment. Finally, I denied Petitioner's objection to the CMS reply brief because the regulations authorize a party to file "a rebuttal statement" within 20 days of the filing of a brief by the other party. 42 C.F.R. § 498.17(b).

I also decided to remand this case to CMS to consider new issues. Specifically, I wanted CMS to clarify whether it was denying Petitioner's reactivation enrollment application or revoking his billing privileges. Although citation and discussion of denial of the enrollment application appeared more often, revocation is present in most of the documents as well. CMS's action was particularly unclear because the mere denial of a reactivation application simply means that Petitioner would remain deactivated, but potentially able to bill for services rendered while deactivated after later being reactivated.[3] Therefore, CMS's position, that Petitioner was convicted of a felony detrimental to the Medicare program and its beneficiaries, would make it more likely that CMS revoked rather than denied reactivation. Perhaps CMS did both, but the hearing officer failed to cite the revocation regulation in the reconsidered determination. In any event, I remanded this case for CMS to definitively clarify which action it had taken.

Because CMS had applied the denial regulations (42 C.F.R. § 424.530(a)(3)) in the reconsidered determination, I also remanded this case for CMS to consider an issue it failed to consider in the reconsidered determination. Specifically, CMS "considers the severity of the underlying offense" before denying an enrollment application under 42 C.F.R. § 424.530(a)(3). However, in this case, CMS failed to consider the severity of the underlying offense before apparently denying Petitioner's enrollment application. Specifically, in response to Petitioner's arguments as to severity, the hearing officer stated:

---

[2] CMS's Ex. 1 is composed of numerous documents totaling 79 pages in length. Review of this case has been made difficult because CMS did not assign separate exhibit numbers to each discrete document in CMS Ex. 1.

[3] Medicare Program Integrity Manual § 15.27.1.2 states that "[i]f the contractor approves a provider or supplier's reactivation application or reactivation certification package (RCP), the reactivation effective date shall be the provider or supplier's date of deactivation. (If the contractor determines that the provider or supplier fell out of – yet came back into- compliance with enrollment requirements during the period of deactivation, it shall contact its PEOG BFL for guidance as to how the situation should be handled.)

> The Hearing Officer (HO) has reviewed all of the documentation. Novitas Solutions is unable to process the application to enroll [Petitioner] as he is within 10 years of his felony conviction. This is **regardless of the seriousness** of a fourth degree crime, nonetheless a felony.

CMS Ex. 1, at 2 (emphasis added). I considered it error for the hearing officer to expressly refuse to consider the severity of the offense because, if CMS was denying the enrollment application, the regulations required CMS to consider the severity of the offense. Therefore, I thought it necessary for CMS to consider this new issue as required by the regulations. Further, after reviewing the record, I believed that CMS would have to reevaluate its determination in this case, so I specifically ordered CMS to render a new determination.

However, subsequent to the remand order, the Departmental Appeals Board (DAB) questioned ALJs' authority to remand cases under 42 C.F.R. § 498.56(d) for CMS to consider new issues, and indicated that whether CMS denied or revoked a supplier is not an issue. At the least, the DAB believes such remand authority is extremely narrow and indicated that ALJs should issue decisions rather than remand cases. This came after a recent line of DAB cases signaling that the DAB now narrowly interprets the regulations governing proceedings involving supplier enrollment and revocation cases.[4] In an effort

---

[4] Supplier enrollment and revocation cases often involve initial and reconsidered determinations that have ambiguous findings, technical legal defects, and/or fail to fully consider the evidence involved in the case. This is possibly due to the fact that non-attorney contractors are largely responsible for issuing these determinations. It may not be until the hearing level that CMS counsel or an ALJ discovers various problems with these determinations. Previously, the DAB has permitted CMS counsel to clarify the reasons or assert new reasons for a determination in de novo proceedings before an ALJ. *Fady Fayad*, DAB No. 2266, at 10-11 (2008), *aff'd Fayad v. Sebelius*, 803 F.Supp. 2d 699 (E.D. Mich. 2011); *see also Dinesh Patel, M.D.*, DAB No. 2551, at 8 (2013); *Luis E. Zepeda, MD*, DAB CR2895, at 12-14 (2013) (ALJ interpreting *Fayad* to permit CMS to change the basis for revocation at the hearing stage of the appeals process). Further, the procedural regulations in 42 C.F.R. Part 498, unlike the procedural regulations in 42 C.F.R. Part 1005, contemplate that ALJs will have an active role in cases to ensure that they are fully and correctly decided. For example, while suppliers are precluded from submitting new evidence to an ALJ, an ALJ still has the authority and *duty*, to "fully inquire into all matters at issue," and "[i]f the ALJ believes that there is relevant and material evidence available which has not been presented at the hearing, he may, at any time before mailing of notice of the decision, reopen the hearing to receive that evidence." 42 C.F.R. § 498.60(b). To assist in complying with this duty, the regulations

to comply with the DAB's articulated concerns over remands and its expressed interest in ALJs issuing decisions rather than remands, I exercised my authority under 42 C.F.R. § 498.56(d) to reassume jurisdiction over this case to issue a decision. In doing so, I gave the parties an opportunity to file comments or objections. The parties sought additional time to discuss settlement or submit its comments, which I granted. However, the parties ultimately decided not to settle this case or submit anything further.

Neither party in this case submitted written direct testimony for any proposed witnesses. Order ¶ 8. Consequently, there are no witnesses for the parties to cross-examine at a hearing. Order ¶¶ 9-10. Therefore, I issue this decision on the basis of the written record. *Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

II. Issue

Whether CMS has a legitimate basis to deny Petitioner's enrollment application seeking reactivation of billing privileges under 42 C.F.R. § 424.530(a)(3) and/or revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(3) based on Petitioner's conviction for a fourth degree crime of illegally possessing dum-dum bullets.

---

authorize an ALJ, on his own motion, to "issue subpoenas if they are reasonably necessary for the full presentation of the case." 42 C.F.R. § 498.58(a). As a basic rule, an ALJ may, on his own motion, "provide a hearing on new issues that impinge the rights of the affected party." 42 C.F.R. § 498.56(a)(1). Although the regulations, which are ambiguous, may restrict an ALJ from considering new issues in supplier enrollment cases, 42 C.F.R. § 498.56(a)(2), those regulations permit an ALJ on his own motion to remand a case for CMS to consider the new issue and render a new determination. 42 C.F.R. § 498.56(a)(2), (d). If ordered to render a new determination, CMS would necessarily be at liberty to consider issues beyond those in the remand order because the supplier would then have notice of those matters and be able to dispute them through the appeal process. The DAB has recently cast doubt on the authority of ALJs to issue such remands; however, the DAB indicated that the ambiguous nature of the regulatory text in 42 C.F.R. § 498.56(a)(2) makes the application of that provision unclear. Until recently, ALJs could remand supplier enrollment cases to CMS. *See Victor Alvarez, M.D.*, DAB No. 2325, at 11-12 (2010) ("we conclude that the ALJ appropriately remanded the case for reconsideration."). However, the DAB has adopted a more restrictive reading of those regulations and, based on that new reading, I render this decision based solely on a review of the issues in the reconsidered determination that CMS issued.

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 or Fact, Conclusions of Law, and Analysis[5]

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

After being enrolled, CMS may deactivate Medicare billing privileges for a variety of reasons. 42 C.F.R. § 424.540(a). Deactivation is an action that is meant to protect the supplier from misuse of the supplier's billing number and the Medicare Trust Fund from making overpayments. 42 C.F.R. § 424.540(c). However, "deactivation of Medicare billing privileges does not have any effect on a . . . supplier's participation agreement or any condition of participation." 42 C.F.R. § 424.540(c); *see also* 42 C.F.R. § 424.502 ("*Deactivate* means that the . . . supplier's billing privileges were stopped, but can be restored upon submission of updated information."). In certain circumstances, the regulations require a deactivated supplier to submit a new enrollment application to reactivate the supplier's Medicare billing privileges. 42 C.F.R. § 424.540(b)(1).

CMS may also revoke the Medicare billing privileges of an enrolled supplier. "*Revoke/Revocation* means that the . . . supplier's billing privileges are terminated." 42 C.F.R. § 424.502. CMS may revoke billing privileges for any reason stated in 42 C.F.R. § 424.535.

One of the specific reasons to deny enrollment or revoke Medicare billing privileges is when a supplier is: (1) convicted of a federal or state felony offense; (2) within ten years preceding enrollment or revalidation of enrollment; and (3) the felony offense is one that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. §§ 424.530(a)(3), 424.535(a)(3). The regulations provide for a non-exhaustive list of the types of felony offenses that CMS considers detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. §§ 424.530(a)(3)(i)(A)-(D), 424.535(a)(3)(i)(A)-(D). Relevant to the current case, it is detrimental to the best interests of the program and its beneficiaries for a supplier to be convicted of "[a]ny

---

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

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)." 42 C.F.R. §§ 424.530(a)(3)(i)(C), 424.535(a)(3)(i)(C).

1. On September 22, 2011, Petitioner pled guilty to the fourth degree crime in New Jersey of illegal possession of dum-dum bullets (N.J. Rev. Stat. § 2C: 39-3(f)) and, on December 13, 2011, the Superior Court of New Jersey, Monmouth County, entered a Judgment of Conviction against Petitioner based on his guilty plea.

On August 27, 2010, Petitioner was arrested and charged with a number of offenses, including possession of dum-dum (i.e., hollow point) bullets. CMS Ex. 1, at 74. On February 7, 2011, Petitioner was indicted on those charges. CMS Ex. 1, at 74; CMS Ex. 2, at 1-2. On September 22, 2011, Petitioner pled guilty to the fourth degree crime in New Jersey of illegal possession of dum-dum bullets (N.J. Rev. Stat. § 2C: 39-3(f)). CMS Ex. 1, at 74. On December 13, 2011, the Superior Court of New Jersey, Monmouth County, entered a Judgment of Conviction against Petitioner based on his guilty plea and sentenced Petitioner to a suspended 18-month term in prison. CMS Ex. 1, at 74-76. The court also ordered that Petitioner be: prohibited from writing prescriptions for ten years; subject to random drug screening for five years; and required to obtain psychiatric or psychological treatment for as long as ordered by the Medical Board. CMS Ex. 1, at 74. Further, the court ordered Petitioner to pay total fines and penalties of $155. CMS Ex. 1, at 75. The court dismissed the other charges against Petitioner. CMS Ex. 1, at 74; *see also* CMS Ex. 2, at 2.

2. Petitioner, having been convicted of committing a fourth degree crime in New Jersey, has been convicted of a felony for purposes of 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3).

Petitioner argues that New Jersey's criminal statutes do not classify crimes as felonies. *See* N.J. Rev. Stat. § 2C: 1-4(a) (establishing crimes as first degree through fourth degree). Petitioner was convicted under N.J. Rev. Stat. § 2C: 39-3(f), which states that a person violating the provisions of that statute "is guilty of a crime in the fourth degree." New Jersey law states that "high misdemeanors" are crimes in the first through third degrees and "the term 'misdemeanor' shall mean all crimes." N.J. Rev. Stat. § 2C: 1-4(d).

The DAB has previously concluded that a New Jersey crime in the third degree is a felony for purposes of supplier enrollment and revocation cases. *Amir Tadros*, DAB No. 2550, at 6-7 (2013). This decision was based on New Jersey case law establishing the principle that any New Jersey offense punishable by more than one year in state prison is the equivalent of a common law felony. *Id.* at 7.

Although a fourth degree crime in New Jersey is statutorily considered a "misdemeanor," New Jersey courts have consistently interpreted a fourth degree crime to be a felony when a crime needs to be categorized for purposes outside the scope of the state criminal statutes. *In the Matter of Rettschlag*, 2008 WL 1787466 (N.J. Super. App. Div. Apr. 22, 2008); *Zaborowski v. N.J. Div. of State Police*, 2007 WL 935603 (N.J. Super. App. Div. Mar. 30, 2007); *see also Serio v. Allstate Ins. Co.*, 509 A.2d 273, 277 n.1 (1986). This is because a person convicted of a fourth degree crime in New Jersey may be sentenced to imprisonment for a term not to exceed 18 months. N.J. Rev. Stat. § 2C: 43-6(4). Significantly, the United States Court of Appeals for the Third Circuit has accepted the New Jersey courts' determination that a fourth degree crime is properly categorized as a felony. *See Philadelphia Indemnity Ins. Co. v. Healy*, 156 F.App'x 472, 476 (3d Cir. 2005).

Therefore, consistent with the cases cited above, I conclude that Petitioner was convicted of a felony for purposes of 42 U.S.C. §§ 424.530(a)(3) and 424.535(a)(3).

3. Petitioner was convicted of a felony offense within 10 years preceding enrollment or revalidation of enrollment.

On December 13, 2011, the Superior Court of New Jersey, Monmouth County, entered a Judgment of Conviction against Petitioner for illegal possession of dum-dum bullets. CMS Ex. 1, at 74-76. As explained above, this was a felony offense. On April 16, 2013, Petitioner signed a Medicare enrollment application (Form CMS-855I) and submitted it to Novitas seeking reactivation of his Medicare billing privileges. CMS Ex. 1, at 15-41. On June 11, 2013, Novitas issued two initial determination letters in which it denied Petitioner's enrollment application and/or revoked his billing privileges. On December 11, 2013, a Novitas hearing officer issued a reconsidered determination entitled "Revocation of Medicare Billing Number" in which she upheld the denial of Petitioner's enrollment application based on 42 C.F.R. § 424.530(a)(3). CMS Ex. 1, at 1-4.

CMS asserts that Petitioner was convicted of a felony offense within 10 years of his reactivation application, noting that the regulations require, in certain instances, that a deactivated supplier must file an enrollment application to be reactivated. *See* CMS Br. at 1, 4-5. Petitioner's brief does not dispute this issue.

I conclude that whether CMS denied Petitioner's reactivation enrollment application or revoked his Medicare billing privileges, it was done within ten years of the date preceding Petitioner's filing of his enrollment application for reactivation. CMS's action was precipitated by a review of Petitioner's enrollment application, thus making the action CMS took part of the enrollment process. *Ahmed v. Sebelius*, 710 F. Supp. 2d 167, 176-177 (D. Mass. 2010); *Robert F. Tzeng, M.D.*, DAB No. 2169, at 8-12 (2008).

4. Petitioner was not convicted of a felony that CMS had determined is detrimental to the best interests of the Medicare program or its beneficiaries under 42 C.F.R. § 424.530(a)(3)(i)(C) or 42 C.F.R. § 424.535(a)(3)(i)(C).

CMS denied Petitioner's reactivation enrollment application and/or revoked his Medicare billing privileges based on his conviction of a fourth degree crime in New Jersey of possessing dum-dum bullets. CMS Ex. 1, at 1-3. The reconsidered determination states that Petitioner, "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 to continue enrollment," but did not specify whether this felony is one of those listed in the regulations at 42 C.F.R. §§ 424.530(a)(3)(i)(A)-(D), 424.535(a)(3)(i)(A)-(D). CMS Ex. 1, at 1. The determination also failed to provide any explanation as to why the felony would be detrimental to the best interests of the program or its beneficiaries.

In this proceeding, CMS argues that "Petitioner's crime falls within the category set forth in [42 C.F.R §] 424.530(a)(3)(i)(C), which sets forth a broad category of offense of '[a]ny 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).'" CMS Br. at 10. As support, CMS cites a number of sources on the internet about dum-dum bullets and the number of deaths through gunfire in the United States. CMS Br. at 11. Although CMS provided that information in its brief, CMS only did so "for the sake of argument," because "CMS contends that it is beyond the scope of the ALJ's authority to look behind CMS's determination that the felony placed the program or its beneficiaries at risk . . . ." CMS Br. at 11.

Petitioner disputes that his conviction for possession of dum-dum bullets created an immediate risk to the Medicare program or its beneficiaries. Petitioner asserts that the example of an immediate risk provided in the regulations (i.e., conviction for criminal neglect or misconduct related to malpractice) is clear; however, CMS has "failed to show **how** or **why** possession of Dum Dum ammunition creates an 'immediate risk.'" P. Br. at 11. Petitioner asserts that "[t]he record is totally devoid of any evidence that petitioner used or intended to use the ammunition, let alone use it in a manner th[at] would place beneficiaries at risk." *Id*. Petitioner claims that: "the Dum Dum ammunition was contained in its original packaging and within a box of his late father's belongings (unbeknownst to the petitioner). The ammunition was not found in a pistol's chamber or magazine, nor was the conviction the result of a reduced plea to a gun violence charge." P. Br. at 12. Petitioner also disputes the internet sources CMS cited in its brief concerning gun violence for a variety of reasons. P. Br. at 12-13. Finally, Petitioner makes the point that New Jersey does not categorically prohibit possession of dum-dum bullets and that:

> Petitioner was not convicted of any offense involving the possession, use, or discharge of a weapon; it was possession of ammunition only. In the case of petitioner, once he pled guilty to the 4th degree offense, the police returned to him the very ammunition for which he pled guilty to possessing.

P. Br. at 13.

ALJ review of denials and revocations under 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3) appear to be different than denials or revocations based on other grounds because sections 424.530(a)(3) and 424.535(a)(3) state that CMS may deny or revoke if the supplier was convicted of a felony "that CMS has determined" to be detrimental to the best interests of the Medicare program and program beneficiaries. Further, it is worth noting that those sections set forth a non-exhaustive list of four general classes of offenses that are detrimental to the program and beneficiaries (felony crimes against persons, financial crimes, any felony that placed the Medicare program or its beneficiaries at immediate risk, and any felonies that would result in mandatory exclusion under section 1128(a) of the Social Security Act). Three of these general categories in the regulation provide specific examples of offenses that are detrimental to the program and its beneficiaries.

As an initial matter, it has been long settled that CMS has discretion to deny or revoke a supplier and that discretionary decision is not reviewable. *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) ("the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke . . . not to substitute the ALJ's discretion about whether to revoke."). Rather, "[t]he ALJ's review of CMS's revocation . . . is thus limited to whether CMS had established a legal basis for its actions." *Id.* Review of CMS's discretionary act to deny or revoke must be distinguished from CMS's determination that a felony offense committed by a supplier is detrimental to 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).

Review of cases involving sections 424.530(a)(3) and 424.535(a)(3) reveals that a different analysis is utilized depending on whether the crime for which a supplier was convicted (1) is specifically listed in the regulations, (2) is similar to a crime listed in the regulations, or (3) has been determined to be detrimental through a case-by-case analysis. The DAB has recognized three different levels of review that may take place when CMS denies or revokes a supplier under 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3).

The most deferential standard is applied when CMS takes such action against a supplier who was convicted of a crime specifically listed as an example of a crime that is considered to be detrimental to the Medicare program and its beneficiaries. Such crimes are detrimental per se. *Bussell*, DAB No. 2196, at 9 ("When section 424.535(a)(3) is

considered in the context of the preamble, it is clear that CMS has determined that income tax evasion by a provider is detrimental per se to the program and its beneficiaries."). This is because the regulations, which were published through the notice and comment rulemaking procedure, embody the types of crimes that the Secretary of Health and Human Services (Secretary) has determined are detrimental to the program and its beneficiaries. *Id.* at 12. Significantly, "[o]nce the Secretary . . . has exercised that authority by regulation as to a class of felonies, an ALJ cannot revisit that determination in an individual case where the conviction of an offense in the class is undisputed." *Id.* at 13 n.13.

The second most deferential level of review involves cases where a supplier has been convicted of a felony that is a similar one to the listed examples in the regulations. However, because the felony is not specifically mentioned in the regulatory list of crimes considered to be detrimental per se to the program or its beneficiaries, an ALJ reviewing such a case must look to circumstances surrounding the conviction to determine if the felony conviction is similar to one of the offenses listed in the regulations.

> Moreover, the ALJ committed no error when he considered the conduct and circumstances underlying Petitioner's guilty plea in deciding whether Petitioner's offense was similar to insurance fraud. The regulations prescribe no method or criteria for judging whether an offense is similar to one of the financial crimes named in section 424.535(a)(3)(i)(B). Absent explicit regulatory guidance to the contrary, and given section 424.535(a)(3)'s remedial purpose to protect the Medicare program and beneficiaries from disreputable actors, it is reasonable to conclude that a supplier's offense of conviction is similar to a financial crime when the facts and circumstances that are admitted to be the basis for the conviction would appear to satisfy one or more elements of a named financial crime.

Abdul Razzaque Ahmed, M.D., DAB No. 2261, at 11 (2009), *aff'd Ahmed v. Sebelius*, 710 F.Supp. 2d 167 (D. Mass. 2010). However, even if a criminal offense is not similar to one of the listed crimes in the regulations, it still may be found to be detrimental to the program and program beneficiaries if it is one that falls into one of the four general categories of crimes listed in the regulations (e.g., felony crimes against persons, financial crimes, any felony that placed the Medicare program or its beneficiaries at immediate risk, and any felonies that would result in mandatory exclusion under section 1128(a) of the Social Security Act).

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

Ahmed, DAB No. 2261, at 10. If an analysis of the basis of a guilty plea confirms that the felony for which a supplier was convicted is similar to one of the general categories of crimes in the regulatory list, then that supplier was convicted of crime that is detrimental to the program and program beneficiaries. *Id*. at 12 ("Here, there is no dispute that Petitioner's offense is detrimental to Medicare if, in fact, it is a financial crime within the meaning of section 424.535(a)(3)(i)(B).").

The final type of review involves cases in which CMS has determined, on a case-by-case basis, that an individual was convicted of an offense that CMS determines to be detrimental to the best interests of the program and its beneficiaries. CMS is permitted to make such individualized analyses (*Fayad v. Sebelius*, 803 F.Supp. 2d. 699, 704 (E.D. Mich. 2011); however, "the administrative burden of doing so would be substantial." *Bussell*, DAB No. 2196, at 12-13.

As indicated above, CMS argues in this case that 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). However, CMS cites no case showing that the DAB has endorsed such a narrow view of its authority to review denials or revocations under 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3). Petitioner argued in response that CMS has misinterpreted *Bussell* in an attempt to "handcuff the ALJ." P. Br. at 8-9.

The DAB has stated the following on this issue:

> The ALJ held that CMS's determination that Petitioner's felony was detrimental to Medicare was beyond the scope of his review. . . . . We find it unnecessary to examine that jurisdictional statement because Petitioner does not dispute that his conspiracy offense was detrimental to the best interests of Medicare. In any event, we would affirm CMS's

> determination that Petitioner's crime was detrimental to Medicare because it evidenced a lack of trustworthiness in his dealings with the federal government. The record indicates that Petitioner assisted in the submission of six to 24 false medical waivers, suggesting deep involvement in the conspiracy. . . . . CMS could reasonably infer from Petitioner's willingness to assist in the submission of false medical information on federal immigration forms that he posed a threat to the Medicare program.

Fady Fayad, M.D., DAB No. 2266, at 16-17 (citations omitted).

CMS cites no authority that expressly states that I should abdicate review of CMS's determination of whether a criminal offense is detrimental to the best interests of the program or its beneficiaries. To the contrary, the DAB, as discussed above, has laid out precise rules for considering whether a felony conviction meets or is similar to one of the types of felonies provided in the regulations. It would be inconsistent for the DAB to provide for review and analysis when a felony is allegedly the same or similar to one listed in the regulation, but find there is no review when CMS makes a determination on a case-by-case basis. Otherwise, CMS could make all its determinations on a case-by-case basis and effectively foreclose any ALJ or DAB review whatsoever.

Further, CMS's argument also overlooks that suppliers who have been denied enrollment have a statutory right to a hearing to dispute the denial. 42 U.S.C. § 1395cc(j)(8). The regulations expressly state that suppliers have a right to seek ALJ and DAB review of the denial of enrollment or revocation of billing privileges. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2)-(3). Based on this authority, it would seem unlikely that the Secretary would make unreviewable an element of CMS's basis for denying enrollment, as that would appear to contradict the statute that provides hearing rights. If the Secretary had done so, the Secretary would likely have stated this clearly in the Federal Register notice publishing 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3). However, no such statement appears. 71 Fed. Reg. 20,754, 20,760, 20,766, 20,768 (Apr. 21, 2006).[6]

---

[6] A recent regulatory amendment provides that CMS may revoke billing privileges of a supplier when "CMS determines that the provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements." 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014) (to be codified at 42 C.F.R. § 424.535(a)(8)(ii)). Unanswered in the preamble to the final rule is whether the use of the phrase "CMS determines" in this regulation means that neither an ALJ nor the DAB could review whether the record actually showed a pattern or practice of submitting claims that failed to meet Medicare requirements. Would, as CMS argues in this case, an ALJ and the DAB merely need to

The DAB has indicated that it is the ALJ's responsibility to ascertain whether CMS had a legal basis (i.e., authority) for the denial or revocation. *Bussell*, DAB No. 2196, at 13. This review includes determining whether CMS properly applied the facts of a case to the regulatory provision in question and not simply looking at whether the reconsidered determination states, formulaically, that it has determined that the offense in question is detrimental to the best interests of the program and program beneficiaries. In the *Fayad* quote above, the DAB indicated that it would have upheld CMS's case-by-case detrimental determination because it could reasonably infer the reason that CMS would have decided that the crime in question was detrimental to best interests of the program and its beneficiaries. DAB No. 2266, at 17. Although this language is dictum, in the absence of controlling authority, a reasonableness test appears most appropriate when reviewing a denial or revocation made on a case-by-case basis. Such a test is still deferential, but provides basic, meaningful review. *Cf. Fayad*, 803 F.Supp. 2d. at 704 (upholding CMS's case-by-case detrimental determination because it was a reasonable interpretation of 42 C.F.R. § 424.535(a)(3) that is supported by the record).

Below I consider whether CMS had a legal basis for its denial or revocation of Petitioner based on the DAB's methods for conducting such review.

a. Petitioner was not convicted of a criminal offense that is per se detrimental to the best interests of the Medicare program or its beneficiaries.

As stated above, CMS argues that Petitioner's criminal offense was one that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries because it was one that placed the Medicare program or its beneficiaries at an immediate risk. 42 C.F.R. §§ 424.530(a)(3)(i)(C), 424.535(a)(3)(i)(C). Petitioner disputes that his conviction for possessing dum-dum bullets is enumerated in the regulations as a conviction that is per se detrimental to the Medicare program and its beneficiaries. Although CMS argues that Petitioner's felony offense was for a crime that poses an immediate risk to the program and program beneficiaries, CMS agrees that "Petitioner's felony is not one of those specified in the regulation . . . ." CMS Br. at 10 n.4.

---

confirm that the reconsidered determination says, without explanation, that CMS made such a determination in order to uphold the revocation? Since the phrase "CMS determines" could potentially be added to every basis for denial or revocation in the regulations, the interpretation of this phrase could significantly impact the rights of suppliers to obtain meaningful review of CMS's denials and revocations.

I agree with both parties that Petitioner's conviction is not expressly listed in 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3) and is not one that specifically implicates an immediate risk to the program or a beneficiary.[7] Therefore, I cannot conclude that Petitioner was convicted of an offense that is per se detrimental to the Medicare program or its beneficiaries.

b. The record does not support the conclusion that Petitioner's criminal offense should be categorized as one that placed the Medicare program or its beneficiaries at an immediate risk nor is it similar to the regulatory example of a criminal offense that placed the program or program beneficiaries at an immediate risk.

Although Petitioner's crime is not one that is per se detrimental to the Medicare program or its beneficiaries, it is necessary to consider whether it generally fits under the category of a criminal offense that placed the Medicare program or its beneficiaries at an immediate risk. As indicated above, the DAB has endorsed looking at the circumstances surrounding the guilty plea and the conviction in cases where a criminal offense is not considered per se detrimental. *Ahmed*, DAB No. 2261, at 11.

After evaluating the record in this case and applying it to the regulations, I cannot conclude that Petitioner's mere possession of dum-dum bullets is an offense that created an immediate risk to the Medicare program or its beneficiaries. The record does not indicate that Petitioner's possession of illegal ammunition created an *immediate* risk to anyone. In its brief in this case, CMS summarizes information from internet websites concerning the number of deaths in the United States from gunfire, as well as the reason dum-dum bullets create more damage to the human body than a regular bullet, and that the American Medical Association believes that dum-dum bullets "heighten[] the risk of multiple gunshot wounds and severe penetrating trauma, resulting in more critical injuries

---

[7] CMS does not cite any DAB cases in which the felony offense committed by a supplier or a provider was consider per se detrimental to the best interests of the program or its beneficiaries because it placed the Medicare program or its beneficiaries at immediate risk. However, I assume that such an offense would have to be the same as the example provided in 42 C.F.R. §§ 424.530(a)(3)(i)(C) or 424.535(a)(3)(i)(C) (guilty of criminal misconduct or neglect arising from malpractice) or perhaps would include language such as the following: "A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury." Tex. Penal Code Ann. § 22.05(a). In the present case, Petitioner's criminal offense is neither related to criminal misconduct or neglect arising from malpractice nor does it include an element to the offense indicating that someone was placed in imminent danger or harm.

and deaths." CMS Br. at 11. Further, The Hague Convention apparently outlawed use of dum-dum bullets in war. CMS Br. at 12.

Petitioner objects to the information on the internet CMS cites. P. Br. at 3. Further, Petitioner points out that one of the internet sources discusses deaths by gun violence generally, not by dum-dum bullets. P. Br. at 11. In addition to disputing the statistics used in the article, Petitioner points out that it is not relevant to the present case because: "In the case of petitioner, however, the Dum Dum ammunition was contained in its original packaging and within a box of his late father's belongings (unbeknownst to the petitioner). The ammunition was not found in a pistol's chamber or magazine . . . ." P. Br. at 11-12. Petitioner also quotes from one of the internet sources CMS cites (Wikipedia) that indicates that dum-dum bullets are one of the most common types of bullets used by civilians and police because there is a reduced risk of bystanders being hit because such bullets have a reduced risk of over-penetrating or ricocheting. The Wikipedia entry also indicates that New Jersey permits dum-dum bullets to be possessed at an individual's dwelling or on the individual's land. P. Br. at 3. Petitioner sums up his argument on this issue by stating:

> CMS again misses the point as Petitioner was not convicted of any offense involving the possession, use, or discharge of a weapon; it was possession of ammunition only. In the case of petitioner, once he pled guilty to the 4th degree offense, the police returned to him the very ammunition for which he pled guilty to possessing.

P. Br. at 13.

Without minimizing how dangerous firearms are or the damage that dum-dum bullets can do when they hit an individual, I believe that Petitioner is correct that the internet sources cited by CMS are not directly relevant to show that the felony offense Petitioner committed presented an immediate risk to the Medicare program or its beneficiaries. On its face, mere possession of illegal ammunition does not appear to create an immediate risk to anyone, without surrounding circumstances that show there was an immediate risk. Further, it is significant that CMS's Wikipedia entry appears to indicate that New Jersey is the only state in the United States to make possession of dum-dum bullets illegal.

In reviewing the facts surrounding Petitioner's conviction, I note that the parties did not offer any witness testimony. However, Petitioner provided an uncontroverted statement

with his enrollment application regarding the circumstances surrounding his possession of the dum-dum ammunition.[8] He stated:

> I was convicted of possession of dum dum bullets. These are hollow point bullets, which are prohibited under certain circumstances. No one including law officers could indicate what circumstances. My father was a law enforcement officer for the Pennsylvania Game Commission for 35 years. He used these bullets in his service weapon. When he died in 2005, all of his guns and ammunition were willed to me. Later in 2005 I moved to New Jersey and took his guns and ammunition. I am also an avid gun collector. All of my guns are registered in New Jersey. Coming from Pennsylvania, it didn't occur to me to consider ammunition. The final outcome of this bullet conviction was $157 fine that I paid that day. Ironically when the guns and ammunition were returned to me by the prosecutor's office the same hollow point bullets were included.

CMS Ex. 1, at 73.

The only other detailed statement concerning Petitioner's criminal case is in the Final Consent Order issued by the Medical Board. The relevant passages are as follows:

> The Interim Consent Order was entered into following Dr. Ray's arrest on August 27, 2010, on charges of indiscriminant prescribing of controlled substances ("C.D.S.") and possession of prohibited hollow point bullets. The arrest was a result of an investigation in which it was revealed that Dr. Ray was unlawfully issuing prescriptions for oxycodone during meetings with an informant at a restaurant in Neptune, New Jersey.

---

[8] Petitioner's statement was included with the enrollment application he filed following CMS's request for more information related to his criminal conviction. CMS Ex. 1, at 43-76. Petitioner signed the certification on the enrollment application as to the truth of the information in the application after being informed of the criminal penalties that could be imposed for false statements. CMS Ex. 1, at 68-71. Therefore, I accept his statement as having been certified by him, even though the actual page containing the statement does not include his signature. *See Dr. S.A. Brooks, DPM*, DAB No. 2615, at 16 (2015).

> On February 7, 2011, Dr. Ray was indicted on charges of conspiracy to distribute C.D.S., falsification of records relating to medical care, possession of C.D.S. (cocaine), and possession of hollow point bullets. On December 13, 2011, a judgment of conviction was entered as a result of a plea agreement, in which Dr. Ray pled guilty to possession of the illegal bullets and the conspiracy and drug charges were dismissed. Dr. Ray was ordered to serve an eighteen month suspended sentence (non-custodial), five years of random urine testing, psychiatric treatment, and "Medical Board restrictions -10 year prescription suspension: defendant to be monitored by Medical Board," plus miscellaneous court costs and fees. He entered the Professional Assistance Program of New Jersey ("P.A.P") in October 2010, and has been compliant with treatment for cocaine and opiate abuse. He attends psychiatric therapy with James P. O'Neill, M.D., as well as meetings with Louis E. Baxter, M.D., Executive Medical Director of P.A.P.
>
> On February 22, 2012, Dr. Ray appeared with Alton D. Kenney, Esq., and David I. Canavan, M.D., of P.A.P., before a Preliminary Evaluation Committee of the Board to discuss his request for reinstatement of licensure. Proofs submitted to the Board by the P.A.P. on Dr. Ray's behalf, along with testimony by Dr. Ray and Dr. Canavan, demonstrated that since entering P.A.P., he has had no instances of drug abuse and has complied with all requirements of P.A.P. treatment and monitoring. Dr. Ray acknowledged his responsibility and error in unlawfully writing prescriptions for several acquaintances without having performed proper physical examinations or maintaining proper patient records. However, [he] believes that he is now effectively resolving the personal psychiatric issues that led him to engage in such behavior in the first place. Upon reinstatement, Dr. Ray will seek to return to a strictly hospital-based anesthesiology practice and continue with P.A.P. monitoring. The Committee was satisfied that Dr. Ray's misconduct was not likely to recur.

CMS Ex. 2, at 1-3.

The judgment of conviction entered against Petitioner confirms the Final Consent Order's assertions that Petitioner had been charged with a variety of offenses related to controlled substances and alteration of medical records, in addition to the charge of possessing dum-dum bullets. It also confirms that Petitioner was only convicted of the charge related to the dum-dum bullets. CMS Ex. 1, at 74.

These three documents referenced above are the only ones in the record that provide information as to the circumstances surrounding the plea and conviction. Based on the facts stated in the record, along with a review of the statute Petitioner was convicted of violating (N.J. Rev. Stat. § 2C: 39-3(f)), I conclude that the offense Petitioner was convicted of committing (illegal possession of dum-dum bullets) did not create an immediate risk to the Medicare program or its beneficiaries. Without any evidence that Petitioner's conviction was related to a situation where individuals were put at risk, (such as illegally carrying a firearm in public with the dum-dum bullets loaded in it), any risk to the program or program beneficiaries was, at best, theoretical, rather than immediate. The example in 42 C.F.R. §§ 424.530(a)(3)(i)(C) and 424.535(a)(3)(i)(C) of an immediate risk is of a supplier who committed medical malpractice that ultimately results in a conviction for criminal misconduct or neglect. The risk based on the offense for which Petitioner was convicted is significantly more remote than that example. Therefore, I conclude that Petitioner was not convicted of an offense that placed the Medicare program or its beneficiaries at immediate risk.

c. There is no evidence that CMS conducted a case-by-case assessment that Petitioner's felony offense was detrimental to the best interests of the Medicare program or its beneficiaries and CMS does not assert it made one.

As discussed above, the regulatory list of offenses that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries is not exhaustive. CMS may deny or revoke a supplier by making a case-by-case evaluation of the felony offense to determine whether it is detrimental to the best interests of the Medicare program or its beneficiaries.

In the present case, CMS does not argue it made a case-by-case analysis in the present matter. Rather, CMS argues that its determination as to whether Petitioner's felony offense was detrimental to the best interests of the Medicare program and its beneficiaries is unreviewable. In the alternative, CMS argues that the denial or revocation should be upheld because Petitioner's felony offense could be categorized as one that CMS has determined, through rulemaking, to be detrimental to the best interests of the program and its beneficiaries. Having rejected those arguments above, I consider whether CMS's denial or revocation can be upheld as a case-by-case determination that Petitioner's felony offense is detrimental to the best interests of the program or its beneficiaries.

The initial determination in this case merely makes a conclusory statement:

> Barry Ray was, within the 10 years preceding enrollment or revalidation of enrollment, 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 Ex. 1, at 77. The reconsidered determination provides a little more information but is essentially the same conclusory statement:

> Specifically, on June 11, 2013, Novitas Solutions denied your application based on a September 22, 2011 guilty plea to possession of dum dum bullets, a fourth degree felony.
>
> . . . .
>
> The Hearing Officer (HO) has reviewed all of the documentation. Novitas Solutions is unable to process the application to enroll Barry Ray, MD, as he is within 10 years of his felony conviction. This is regardless of the seriousness of a fourth degree crime, nonetheless a felony.

CMS Ex. 1, at 1-2. CMS did explain why documents submitted by Petitioner with the reconsideration request were not helpful; however, this discussion still did not include a case-by-case analysis of the felony offense.

I am limited to reviewing the bases for a denial or revocation as 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 reason given in the reconsidered determination in the present case for upholding the denial/revocation was simply that Petitioner was convicted of a felony within 10 years of his submission of an enrollment application. The reconsidered determination expressly declined to consider the seriousness of Petitioner's crime. It is possible that the reconsidered determination meets the basic requirements in the regulations; however, it does not evidence that there was a case-by-case determination that Petitioner's felony conviction was detrimental to the best interests of the Medicare program or its beneficiaries. *Cf. Dr. S.A. Brooks, DPM*, DAB No. 2615, at 11 (2015) ("In this case, however, given the reasons for initial denial of the request and the ambiguity in the reconsideration determination, it is not clear that any case-by-case review of Petitioners

claims was made."). When the DAB indicated that making case-by-case determinations would involve a substantial "administrative burden" (*Bussell*, DAB No. 2196, at 12-13), I believe it envisioned that CMS would have to articulate some basis for that case-by-case determination.

Although not directly implicated in this case, I find useful the Secretary's statements in the preamble responding to public comments concerning recent modifications to 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3). The Secretary stated twice that not all felony convictions will result in a denial or revocation. 79 Fed. Reg. 72,500, 72,510, 72,512 (Dec. 5, 2014). Rather, "[e]ach case will be carefully reviewed on its own merits and . . . we will act judiciously and with reasonableness in our determinations." *Id*. at 72,510. In regard to a conviction of a non-violent firearm felony, the Secretary responded: "The determination of whether a particular conviction will or will not result in the revocation or denial of Medicare enrollment will depend upon the specific facts of each individual situation." *Id*. at 72,512.

In the present case, the reconsidered determination did not consider the specific facts related to Petitioner's non-violent ammunition possession offense. I cannot reasonably infer, from the facts in the record, why such an offense is detrimental to the best interests of the Medicare program or its beneficiaries. Therefore, I cannot affirm CMS's denial/revocation as a case-by-case determination that Petitioner's felony offense was detrimental to the Medicare program and its beneficiaries.

For purposes of the present case, the serious charges against Petitioner, which Petitioner appears to have admitted, were dismissed in the criminal case and cannot serve as a basis to substantiate a determination that Petitioner's felony offense is detrimental to the best interests of the Medicare program or its beneficiaries. This is because the regulation expressly requires that Petitioner had to be convicted of the felony offense in question in order for it to be detrimental to the best interests of the Medicare program or its beneficiaries.[9] 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3).

---

[9] I distinguish the analysis in this case from the analysis used in exclusion cases arising under 42 U.S.C. § 1320a-7(a) in which exclusion is based on a petitioner's criminal conviction. That statute uses the terms "related to," "relating to," and "in connection with" to specify what the criminal offense must involve in order for it to require exclusion (e.g., section 1320a-7(a)(1) requires that the criminal offense be related to the delivery of an item or service under the Medicare or any state health care program). The DAB has interpreted these terms to mean that there only needs to be a common sense connection or nexus between the crime and underlying forbidden conduct. *See e.g., Charice D. Curtis*, DAB No. 2430, at 5 (2011). It is important to note that 42 C.F.R. §§ 424.530(a)(3) and 424.535(a)(3) do not include the phrases "related to," "relating to,"

To the extent that CMS has concerns about Petitioner serving as an enrolled supplier in the Medicare program based on issues not directly related to the offense for which Petitioner was convicted, I share them. However, I must issue this decision based on the confines of the reconsidered determination; a determination that I now reverse.

V. Conclusion

I reverse CMS's determination to deny Petitioner's enrollment application for reactivation and/or revoke Petitioner's Medicare billing privileges.

/s/
Scott Anderson
Administrative Law Judge

"in connection with," or similar signaling language. Therefore, my analysis in this case is limited to the specific offense for which Petitioner was convicted.