Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John Spencer Chikeziem Archinihu, M.D.
(OI File No. H-16-40152-9),

Petitioner

v.

The Inspector General.

Docket No. C-16-642

Decision No. CR4726

Date: October 27, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, John Spencer Chikeziem Archinihu, M.D., from participation in Medicare, Medicaid, and all federal health care programs based on Petitioner's conviction of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of operating a nonregistered pain management clinic, a felony offense that is related to fraud in connection with the delivery of a health care item or service. I affirm the mandatory five-year exclusion, and I also affirm that the effective date of Petitioner's exclusion is May 19, 2016.

I. Background

By letter dated April 29, 2016, the IG notified Petitioner that, pursuant to section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs

for a minimum period of five years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1.[1] In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

> This exclusion is due to your felony conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, of an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated or financed by, or financed in whole or in part, by any Federal, State, or local Government agency.

IG Ex. 1 at 1. The IG informed Petitioner that the exclusion period would be for the statutory minimum period of five years. I.G. Ex. 1 at 1.

Petitioner, through counsel, timely filed a request for hearing before an administrative law judge on June 16, 2016. On July 6, 2016, I convened a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which I clarified the issues of the case and established a schedule for the submission of pre-hearing briefs and exhibits. I memorialized the schedule and summary of the pre-hearing conference in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated July 6, 2016.

Pursuant to the Order, the IG filed an informal brief (IG Br.) along with 11 proposed exhibits (IG Exs. 1-11). Petitioner thereafter filed his informal brief (P. Br.). The IG then filed a reply brief (IG Reply). In the absence of any objections, I admit the parties' submissions and exhibits into the record.

Petitioner asserts that an in-person hearing is necessary, and the IG has argued against the necessity of an in-person hearing. In my July 6, 2016 Order, I offered the parties an opportunity to submit written direct testimony and I explained that I would not accept direct testimony given for the purpose of attacking "any underlying conviction, civil judgment imposing liability, determination by another government agency, or any prior determination where the facts were determined and a final decision was made, if the

[1] The instant exclusion followed Petitioner's application for reinstatement following a previous exclusion pursuant to section 1128(b)(4) of the Act, 42 U.S.C. § 1320a-7(b)(4), based on the suspension of Petitioner's Florida medical license. *See* IG Exs. 2, 3, 9, 10.

conviction, judgment, or determination is the basis for the exclusion." Order, § 5(b.). In my Order, I informed the parties of the following with respect to direct testimony:

> Direct testimony must be marked as an exhibit and submitted with a party's documentary exhibits. 42 C.F.R. § 1005.16(b). Any written direct testimony must be in the form of an affidavit or declaration that complies with 28 U.S.C. § 1746. A live hearing will only be held for cross-examination of a witness or witnesses who provided direct testimony, if it is deemed necessary. Any request for cross-examination should be submitted no later than the date the IG's reply brief is due, as stated in Section 5(c)(iii) of this Order. I strongly caution that if written direct testimony is submitted, the submitting party should be fully cognizant that written direct testimony will not be accepted for the purpose of being a collateral attack on any underlying conviction, civil judgment imposing liability, determination by another government agency, or any prior determination where the facts were determined and a final decision was made, if the conviction, judgment, or determination is the basis for the exclusion. 42 C.F .R § 1001.2007(d). If a live hearing is not necessary, then I will proceed to issue my written decision.[2]

Order, § 5(b.). Petitioner contends that he would testify "as to the facts underlying the offense, including the most significant issue, whether the conduct leading to the finding of a violation of [Florida Statute] § 458.327(1)(f) involved fraud." P. Br. at 8. However, in presenting such testimony, Petitioner, in essence, would be essentially re-litigating the basis for his conviction for operating a nonregistered pain management clinic. A hearing is not warranted for such testimony, because the essential elements of Petitioner's criminal offense, regardless of the facts and "intent" Petitioner wishes to present through testimony, support a determination that Petitioner's offense was related to fraud in the delivery of a health care item or services. 42 C.F.R § 1001.2007(d). Further, while not dispositive, Petitioner has not availed himself of the opportunity to provide written direct testimony. I will decide this case on the written submissions and documentary evidence. *See* Order, § 5(b).

[2] I recognize that the blank short-form brief that accompanied my Order asked Petitioner to indicate whether he desired an in-person hearing. Therefore, despite the directive in my Order regarding the submission of written direct testimony, I have considered whether a live hearing is necessary for the presentation of direct testimony.

II. Issues

The issue in this case is whether there is a basis for exclusion; if so, I must uphold the five-year minimum period of exclusion. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(1).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

1. Petitioner's conviction for operating a nonregistered pain management clinic requires his exclusion from Medicare, Medicaid, and all federal health care programs for a minimum of five years.

The Act requires the exclusion of any individual or entity from participation in Medicare, Medicaid, and all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG relied on section 1320a-7(a)(3) as the legal basis to exclude Petitioner, which states:

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b(f) of this title):
>
> * * *
>
> (3) Felony conviction relating to health care fraud
>
> Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

[3] My findings of fact and conclusions of law are set forth in italics and bold font.

42 U.S.C. § 1320a-7(a)(3).

The IG argues that Petitioner's exclusion is required based on his conviction for operating a nonregistered pain management clinic because it is related to fraud, and was committed in connection with the delivery of a health care item or service.[4] IG Br. at 9-12; IG Reply at 5-8. Petitioner does not dispute that, for purposes of the Act, he has a "conviction" for operating a nonregistered pain management clinic.[5] P. Br. at 1-2; 42 U.S.C. § 1320a-7(i)(3), (4). However, Petitioner argues, as relevant to the discussion herein, that his felony conviction does not mandate exclusion because it is not related to fraud nor was it committed in connection with the delivery of a health care item or service. P. Br. at 2-8. As explained below, I reject Petitioner's arguments and I conclude that Petitioner's conviction for operating a nonregistered pain management clinic requires his exclusion.

On April 23, 2013, the State of Florida Department of Health (DOH) filed an administrative complaint (IG Ex. 9 at 54-94) in which it charged Petitioner with numerous violations of Florida law. Among the charges, the DOH alleged that Petitioner had repeatedly violated section 458.331(1)(q) of the Florida Statutes by prescribing controlled substances "excessively and inappropriately." IG Ex. 3 at 92. In an amended administrative complaint filed on November 6, 2013 (IG Ex. 9 at 16-53), the DOH charged, among other violations, that Petitioner owned and operated a nonregistered pain management clinic beginning in August 2012. IG Ex. 3 at 17. The two administrative complaints included a combined 32 counts detailing allegations of specific violations committed by Petitioner. P. Ex. 3 at 16-94.

Petitioner, with the benefit and advice of counsel, entered into a settlement agreement with the DOH in August 2014. IG Ex. 3 at 1-15. Petitioner admitted that the facts alleged with respect to specific allegations, if proven, would constitute violations of various laws cited in the administrative complaints. IG Ex. 3 at 5-6. In particular,

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[4] The IG also argued that Petitioner's offense related to a breach of his fiduciary duty to the State of Florida and his patients. Because I am upholding Petitioner's exclusion based on the aforementioned reason, I will not address the IG's alternative arguments for exclusion based on section 1128(a)(3).

[5] Petitioner correctly recognized that although he entered a no contest plea and the presiding judge accepted the plea and withheld adjudication, he has a conviction for purposes of the Act. P. Br. at 2; *see* 42 U.S.C. § 1320a-7(i)(3), (4); 42 C.F.R. § 1001.2 (stating that for purposes of an exclusion, an individual is convicted if he or she has entered a *nolo contendere* plea that has been accepted by a state or local court, even if judgment of conviction has been withheld).

Petitioner did not dispute the allegations contained in Count One of the revised administrative complaint, which charged, in pertinent part:

> 54. Section 458.3265(2)(a), Florida Statutes (2011-2012) prohibits a physician from practicing medicine in a pain-management clinic if the pain-management clinic is not registered with the department as required by Section 458.3265, Florida Statutes.
>
> 55. Respondent violated Section 458.331(1)(nn), Florida Statutes (2011-2012), by violating Section 458.327(1)(e), Florida Statutes (2011-2012), by practicing medicine at an unregistered pain management clinic by prescribing the majority of patients seen during the month of November 2012, opioids, benzodiazepines, barbiturates, or carisoprodol for the treatment of chronic non-malignant pain.

IG Ex. 3 at 26-27. Petitioner also did not contest allegations that, in violation of Florida Statutes (F.S.) § 458.331(1)(m), and with respect to a specific patients, he failed to do the following: document the medical justification for treatment, including the use of controlled substances; document any consultation with specialists; obtain a complete history; document the results of complete physical examinations; and document the results of treatment. [6] IG Ex. 3 at 34-40. Petitioner also did not contest several charges that he failed to keep adequate medical records as required by F.S. § 458.331(1)(m).[7] IG Ex. 3 at 64, 70, 77, 84, 91. The stipulated disposition included a reprimand, a fine of $50,000, an order to reimburse DOH $17,726.87 in costs, a suspension of Petitioner's

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[6] The Florida Statutes state that "[k]nowingly operating, owning, or managing a nonregistered pain-management clinic that is required to be registered with the Department of Health pursuant to [§] 458.3265(1)" is a felony of the third degree. F.S. § 458.327(1)(e). The sentence of incarceration for a third degree felony may not exceed five years. F.S. § 775.082(3)(e).

[7] The revised administrative complaint states, in pertinent part: "Section 458.331(1)(m), Florida Statutes (2011-2012), subjects a physician to discipline for failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician by name and professional title who is responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations." IG Ex. 3 at 34-35.

license to practice medicine for 18 months, a permanent license restriction barring Petitioner from prescribing certain controlled substances, and restrictions barring Petitioner from treating patients for "chronic nonmalignant pain" or "operat[ing] . . . a 'Pain Management Clinic' as that term is defined in Section 458.2365, Florida Statutes (2011-2013)." IG Ex. 3 at 6-9.

Nearly contemporaneous with the DOH's filing of its first administrative complaint, the State Attorney for the Ninth Judicial Circuit of Florida filed a criminal information on April 12, 2013, charging that Petitioner "between the 12th day of September, 2011 and the 11th day of January, 2013 . . . did, in violation of Florida Statute 458.327(1)(e), knowingly operate, own or manage a nonregistered pain-management clinic that is required to be registered with the Department of Health pursuant to [§] 458.3265(1)." IG Ex. 6. An affidavit in support of an arrest warrant, executed March 8, 2013, cites to data showing that from September 20, 2011 through September 17, 2012, Petitioner issued **7,629** prescriptions for controlled substances and prescribed a total of **675,656** tablets of controlled substances during that time period.[8] IG Ex. 5 at 3-4. The arrest warrant further cites data showing that during the six-month period from July 1, 2012 through January 11, 2013, Petitioner issued **4,945** prescriptions for controlled substances, for a total of **429,179** controlled substance tablets prescribed during that time period. IG Ex. 5 at 4-5. The affidavit reported that Petitioner prescribed 399,661 oxycodone pills during the one-year period from September 20, 2011 through September 17, 2012, and prescribed 199,764 oxycodone pills between July 1, 2012 and January 11, 2013. IG Ex. 5 at 5. The arrest warrant stated, in summary, that "[t]he pharmacy profiles reflect that [Petitioner] prescribes controlled prescription medication consistent with the type of prescribing associated with that of a "pill mill" (a high volume prescriber of controlled

[8] For purposes of illustrating the amount of controlled substances prescribed by Petitioner, I have calculated that Petitioner's patients, over the 195-day period from July 1, 2012 through January 11, 2013, and based on the assumption that they took their medications as prescribed, were collectively taking on average, *2,200 tablets of controlled substances per day.* I.G. Ex. 5 at 5-6. The total number of prescriptions for controlled substances, divided over 195 days (including weekends and holidays), yields a calculation that Petitioner issued, on average, more than 25 prescriptions for controlled substances each day, even though Petitioner was purportedly operating a primary care practice, and not a pain management clinic. Even more remarkable is that the number of tablets per prescription averaged nearly 90 tablets per prescription, which certainly does not evidence that Petitioner issued prescriptions for controlled substances to primary medicine patients who were seeking relief of short-term episodes of acute pain. IG Ex. 5 at 3-4. While Petitioner states that he was "working on a part time basis [at] other, licensed pain management clinics" and that the aforementioned data in the affidavit was "skewed," Petitioner has not submitted any evidence to refute the data contained in the arrest warrant affidavit. P. Br. at 5-6.

substances), with [Petitioner] prescribing multiple patients for the same exact pattern of medication combinations on the same date, with the same strength dosage and multiple duplicate medications, with most drugs prescribed being a narcotic, along with a benzodiazepine." IG Ex. 5 at 10.

On January 5, 2015, and with the assistance of counsel, Petitioner entered a plea of *nolo contendere* to the charge that he did, "in violation of Florida Statue 458.327(1)(e), knowingly operate, own or manage a nonregistered pain-management clinic that is required to be registered with the Department of Health pursuant to [§] 458.3265(1)." IG Exs. 6, 7.

Petitioner primarily argues that "the definition of excludable offenses does not comport with the specific offense to which [Petitioner] entered a plea and is therefore not an offense involving fraud, or a financial crime, but relates to an application for licensure." P. Br. at 2-3. Petitioner further contends that "his intention was to have a primary care medicine practice and not a pain management clinic, although he did intend and did see patients from his prior pain management practice." P. Br. at 4. Petitioner acknowledged that "[t]he application for an occupational license application made for [Petitioner's] practice, Diamond Medical Center, was for operating a primary care clinic." P. Br. at 5. Petitioner argues that "[t]he failure to obtain a registration . . . is a licensure violation, not an offense related to fraud, theft, embezzlement, breach of a fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service." P. Br. at 6.

Petitioner has admitted that he previously operated a pain management practice and explained that although his "intention was to have a primary care medicine practice and not a pain management clinic," he continued to see patients from his prior pain management practice. P. Br. at 4. As a former operator of a pain management clinic, Petitioner was presumably knowledgeable about the State of Florida's registration requirement for pain management clinics. P. Br. at 4; *see* IG Ex. 4 at 3-4 (July 26, 2011 filing amending the name of Petitioner's medical practice from "Diamond Urgent Care and Pain Clinic Corporation" to "Diamond Urgent Care Corporation"); IG Ex. 5 at 2 (affidavit in support of arrest warrant explaining that on August 1, 2011, Petitioner had "closed out the Pain Management Clinic Registration with the State. . . "). Florida law sets forth numerous conditions for pain management clinics, to include specific requirements relating to clinic registration and approval, physician responsibilities, state inspections, recordkeeping, and patient data reporting. F.S. § 458.3265. Further, the State of Florida may levy fines against a pain management clinic for noncompliance with requirements and may also, if warranted, revoke or deny a pain management clinic's registration. F.S. § 458.3265(5). Additionally, Florida law contains criminal penalties for individuals who own, operate, or manage a nonregistered pain management clinic that is required to be registered. F.S. § 458.327(1)(e). Even though Petitioner, as a previous operator of a pain management clinic, would have been familiar with the registration

requirement for pain management clinics and knew that he had been prescribing controlled substances in such a quantity that mandated his clinic's registration as a pain management clinic (i.e., issuing 7,629 prescriptions totaling 675,656 tablets of controlled substances in a one-year period), Petitioner falsely operated his practice as a primary care clinic when in reality it was a pain management clinic. By continuing to operate as a primary care clinic, Petitioner avoided the state registration process and was able to operate with less scrutiny than if he had operated as a state-registered pain management clinic.[9] *See* F.S. § 458.3265; *see also* F.S. Chapter 458 (Medical Practice).

Petitioner may be correct in his belief that the requirement to register a pain management clinic is a "licensure requirement," but he fails to appreciate the importance of this state-mandated requirement. The State of Florida has determined that the requirement to register a pain management clinic is so important that it allows for criminal penalties, specifically a third degree felony conviction, for anyone who is convicted of failing to comply with this requirement. *See* F.S. § 458.327(1) (listing six specific medical practice violations that can result in a felony conviction, to include the aforementioned offense involving operating, owning, or managing a nonregistered pain management clinic, along with: practicing or attempting to practice medicine without a license; practicing or attempting to practice with a revoked or suspended license; obtaining or attempting to obtain a license to practice medicine by knowing misrepresentation; obtaining or attempting to obtain a position as a medical practitioner or resident in a clinic or hospital through knowing misrepresentation of education, training, or experience; and, the dispensing of a controlled substance in violation of F.S. § 465.0276). Petitioner is incorrect in his assertion that his failure to register his clinic as a pain management clinic is simply the failure to meet a licensure requirement; rather, Petitioner misrepresented the nature of his practice, and he deliberately shirked the requirement to comply with state law. As such, Petitioner's felony criminal offense is related to fraud.

The plain language of the Act clearly states that an exclusion is mandated when the underlying conviction is for a felony "relating to" fraud, meaning that the conviction need not have been based on the actual commission of fraud, but rather, have only been *related to fraud*. Petitioner entered a no contest plea to the charge that he operated a nonregistered pain management clinic, and he has been convicted of operating a nonregistered pain management clinic. Petitioner gave the State of Florida the false impression that he was operating a primary care practice, when in fact he was operating a

[9] Further, it is uncertain whether the State of Florida and/or the local county would have approved any attempt by Petitioner to operate a pain management clinic had he complied with the registration requirements set forth in F.S. § 458.3265(1). *See* IG Ex. 5 at 2 (affidavit reporting that Orange County had revoked Petitioner's occupational license to operate his previous pain management clinic based on "issues of falsifying the affidavit to the [county's] Business Tax Receipt Office").

nonregistered pain management clinic. In fact, Petitioner admits that he did not advertise his practice as a pain management clinic and his "intention was to have a primary care medicine practice . . . . " P. Br. at 4. Simply said, Petitioner's failure to register his pain management clinic *as* a pain management clinic, despite his knowledge that he was in essence operating as a pain management clinic and had previously operated a pain management clinic, was deceptive, and at a minimum, is "related to fraud." By failing to report the true nature of his medical practice, Petitioner avoided the requirement to comply with the heightened compliance requirements for pain management clinics set forth under Florida law. Even more concerning, by failing to register as a pain management clinic, Petitioner's patients did not benefit from the greater protection they would have received if they had been treated at a lawfully registered pain management clinic.[10] While the term "fraud" is not defined by statute or regulation for purposes of exclusion, Petitioner's operation of a nonregistered pain medication clinic is fraud under commonly accepted principles of fraud. *See Black's Law Dictionary*, 10th ed. (2014), referencing John Willard, *A Treatise on Equity Jurisprudence* 147 (Platt Potter ed., 1879) in defining fraud ("Fraud has been defined to be, any kind of artifice by which another is deceived.") (emphasis omitted); *see Universal Health Svcs., Inc., v. Escobar*, 136 S. Ct. 1989, 1999 (2016) (explaining that "misrepresentations by omission" can constitute fraud); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 8-9 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010) (stating that under the common law, "fraud generally requires a false statement or misrepresentation of material fact that the defendant makes with knowledge of its falsity and with the intent or purpose that it induce action or forbearance by anther."). In summary, Petitioner, after previously operating a pain management clinic, opened a new primary care practice. He then proceeded to operate as a pain management clinic, prescribing hundreds of thousands, if not more than a million, tablets of controlled substances over the period of time addressed in the arrest warrant affidavit. IG Ex. 5 at 3-5. Petitioner knowingly failed to register his practice as a pain management clinic despite the requirement to do so, and he thereby avoided numerous compliance requirements, to include inspections, recordkeeping, and reporting requirements. Petitioner's purported operation of a primary care practice was a misrepresentation, and his criminal action was certainly "related to fraud" as contemplated by section 1128(a)(3).

[10] By not registering as a pain management clinic, Petitioner avoided compliance with numerous requirements that presumably exist to prevent fraud and ensure quality of care for pain management patients. For example, Florida law requires pain management clinics to comply with quality assurance requirements and data collection and reporting requirements such as reporting adverse incidents, the number of patients treated whose domicile is outside of the state, and the number of new and repeat patients who are prescribed controlled substances for the treatment of chronic, nonmalignant pain. *See* F.S. § 458.3265(2)(i), (j).

Additionally, Petitioner committed his criminal offense in connection with the delivery of a health care item or service. The statute states that an exclusion is warranted when the conviction is for an offense "in connection with" the delivery of a health care item or service, meaning that a criminal offense warranting exclusion is not limited only to the actual delivery or provision of such an item or service. 42 U.S.C. § 1320a-7(a)(3); *see Charice D. Curtis*, DAB No. 2430 at 4 (2011) ("[T]he plain language of section 1128(a)(3) encompasses felonies 'relating to' fraud . . . not just to felonies that constitute fraud or one of the other listed offenses."). The Departmental Appeals Board (Board) has also explained that an ALJ does not need to limit review to the elements of an offense, but may consider the extrinsic evidence surrounding the conviction to determine whether it is "relating to" fraud and done "in connection with" the delivery of a health care item or service. *See Narendra M. Patel, M.D.*, DAB No. 1736 at 6 (2000), *aff'd*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003). While Petitioner argues to the contrary, the Act does not require that Petitioner's offense be related to a health care program. *Ellen L. Morand*, DAB No. 2436 at 9 (2012), citing *Breton Lee Morgan, M.D.*, DAB No. 2264 at 6 (2009) (stating that the use of the disjunctive word "or" in section 1128(a)(3) means that exclusion is mandated "for either a crime committed 'in connection with the delivery of a health care item or service' or a crime that involved an act or omission in a government-funded health care program."). The Board has also explained that there should be a "common sense connection" between the underlying crime and the delivery of a health care item or service in order to meet the statutory basis for exclusion. *Erik D. DeSimone, R.Ph.*, DAB No. 1932 at 5 (2004). When applying a common sense analysis to the underlying facts of this case, I conclude that Petitioner's operation of a nonregistered pain management clinic was "in connection with" the delivery of such health care services to Petitioner's patients. The crux of Petitioner's criminal offense was that he was prescribing large amounts of controlled substances to his patients in a manner contrary to law; thereby, his offense was related to the delivery of a health care item or service.

Based on the foregoing analysis, I conclude that Petitioner's felony criminal conviction for operating a nonregistered pain medicine clinic mandates his exclusion from all federal health care programs. 42 U.S.C. § 1320a-7(a)(3).

2. A 5-year minimum exclusion is mandated.

The Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). In this case, exclusion is required under section 1320a-7(a)(3); therefore, Petitioner must be excluded for a minimum of five years.

Petitioner contends that, due to the exclusion, his "substantial work in restoring his [medical] license is for naught and this exclusion will also operate as denial of his ability to practice his profession in any manner" because the State of Florida will not renew the

medical license of an individual who has been excluded. P. Br. at 8-9. The only relevant matter before me is whether exclusion is mandated pursuant to section 1128(a)(3) of the Act, and if exclusion is mandated, I have no discretion to shorten the mandatory 5-year length of the exclusion. Any collateral or downstream state licensure issues are irrelevant to my consideration of whether an exclusion is mandated for a minimum period of time. It is clear that Petitioner has received lenient treatment by both the criminal justice system and his state medical board, and as a result, the State of Florida has allowed him to retain his medical license. Such leniency is not relevant to my consideration of whether exclusion for a period of five years is mandated. *See Henry L. Gupton*, DAB No. 2058 at 7 (2007) (explaining that while an IG exclusion aims to protect beneficiaries of health care programs and the federal fisc, a criminal law proceeding involves "punishment, rehabilitation, and the deterrence of future misconduct"); *see also Henry L. Gupton*, DAB Ruling 2007-1 at 4 (2007) (Board stating, in denying reconsideration of its previous *Gupton* decision, that the "federal exclusion law aims to protect beneficiaries of health care programs and the federal fisc through remedial actions such as exclusions").

V. Effective Date of Exclusion

The effective date of the exclusion, May 19, 2016, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years.

/s/
Leslie C. Rogall
Administrative Law Judge