**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Tonya Rushing
(O.I. File No. L-08-40057-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-2

Decision No. CR4535

Date: February 25, 2016

# DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Tonya Rushing (Ms. Rushing or Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1) based on her criminal conviction of conspiracy to commit health care fraud. Petitioner requested a hearing before an administrative law judge (ALJ) to dispute the exclusion, arguing that the federal judge who sentenced Ms. Rushing specifically ordered that Ms. Rushing would not be subject to employment restrictions. I affirm the IG's exclusion because section 1320a-7(a)(1) requires that the IG impose such an exclusion on Ms. Rushing for a minimum of five years.

## I. Background

In a July 31, 2015 notice, the IG informed Ms. Rushing that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The IG indicated that the legal basis for the exclusion was 42 U.S.C. § 1320a-7(a)(1). The IG stated that he was taking this action based on Ms. Rushing's conviction in the

United States District Court for the District of Nevada (District Court) of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. IG Exhibit (Ex.) 1.

On September 29, 2015, Petitioner, through counsel, timely requested a hearing. Petitioner asserted that the District Court and the United States Probation Office, "in connection with Ms. Rushing's federal charges (Case No.: 2:11-CR-166-LRH-CWH) specifically precluded any 'employment restrictions' with respect to Ms. Rushing's 'employment, consulting, or association with any medical business.'" Therefore, Petitioner argued, the IG's exclusion "runs contrary" to the District Court's order and must be lifted.

In an October 16, 2015 letter, the Civil Remedies Division acknowledged receipt of Petitioner's hearing request and set a date for a prehearing conference. Included with the letter was a copy of the Civil Remedies Division Procedures (CRDP). On November 17, 2015, I convened a prehearing conference by telephone, the substance of which is summarized in my November 20, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order). That Order incorporated the CRDP by reference. Order ¶ 7; *see also* CRDP § 1.

In accordance with the Order, the IG filed a brief (IG Br.) and four exhibits (IG Exs. 1-4). Petitioner filed a response brief (P. Br.) with five exhibits (P. Exs. A-E). The IG filed a reply brief.

## II. Decision on the Record

Neither party objected to any of the proposed exhibits. Therefore, I admit them all into the record. *See* Order ¶ 3; CRDP § 14(e).

At the prehearing conference, I ordered the parties to complete and submit short-form briefs with their prehearing exchanges. Order ¶ 1. I provided a copy of Petitioner's short-form brief with my Order. Order ¶ 1. The short-form brief requires, in relevant part, that each party indicate whether a hearing is necessary and whether the party would like to provide any testimony at the hearing. If a party answers those questions in the affirmative, the party must provide the names of the proposed witnesses, a description of the testimony expected from the proposed witnesses, and an explanation as to how the proposed testimony will not duplicate information contained in the documentary exhibits. I also expressly included these requirements in my Order. Order ¶ 4.

The IG indicated on its short-form brief that a hearing was unnecessary. IG Br. at 7. Petitioner indicated on her short-form brief that a hearing was necessary and that there

was testimony she wanted to offer at the hearing. However, Petitioner did not provide any further information. In essence, Petitioner did not provide a witness list. P. Br. at 4.

In these proceedings, "[a] party must file, as part of its prehearing exchange, a list of its proposed witnesses that includes the last known address of each witness, sufficient information to identify the relationship of the witness to the case, and a brief summary of the testimony that the party anticipates the witness will provide." CRDP § 16(a). An ALJ does not have to receive testimony from a witness who is not identified in a party's prehearing exchange. CRDP § 16(c). Rather, "[t]he ALJ may determine that an oral hearing is unnecessary and not in the overall interest of judicial economy if the parties do not identify any proposed witnesses . . . . Under these circumstances, the ALJ may decide the case based on the written record." CRDP § 19(d).

Because Petitioner did not comply with my Order, the CRDP, or the instructions on the short-form brief to provide the names of proposed witnesses and a brief summary of the witness' expected testimony, I deny Petitioner's request for an in-person hearing and decide this case on the basis of the written record.

## III. Issue

Whether the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

## IV. Jurisdiction

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

## V. Findings of Fact, Conclusions of Law, and Analysis[1]

The IG indicated that 42 U.S.C. § 1320a-7(a)(1) was the basis for Petitioner's mandatory exclusion. IG Ex. 1. The statute provides:

> (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):

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

> (1) Conviction of program-related crimes
>
> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program.

Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(1) in this case are: (1) Petitioner was convicted of a criminal offense, and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a State health care program.

### *A. Petitioner pled guilty to one count of conspiracy to commit health care fraud, and the District Court sentenced her to one year and a day in prison as well as payment of a $10,000 fine, an $8,100,000 forfeiture, and $50,000 in restitution to Medicare, Medicaid, and private insurers.*

On April 27, 2011, a federal grand jury indicted Dipak Desai, M.D. and Petitioner on one count of conspiracy to commit health care fraud and twenty-five counts of health care fraud. IG Ex. 2. The Indictment also sought a forfeiture of $8,100,000 from Dr. Desai and Petitioner. IG Ex. 2 at 11.

On May 12, 2014, Petitioner signed a plea agreement in which she agreed to plead guilty to Count One of the Indictment, which was "Conspiracy to Commit Health Care Fraud, in violation of Title 18, United States Code, Section 371." IG Ex. 3 at 2. Petitioner agreed that the following facts were true:

> Between in or about January 2005 and in or about February 2008, Dipak Desai ("Desai"), a physician and the owner of the Endoscopy Center of Southern Nevada ("ECOSN"), knowingly and willfully conspired, confederated, and agreed with [Petitioner], his Chief Operating Officer, and others, to systematically overcharge the federal Medicare program, the State of Nevada Medicaid program, and other private health insurance companies (the "Private Insurers") for anesthesia billing. Desai and [Petitioner] caused ECOSN to overstate significantly the amount of time its certified registered nurse anesthetists ("CRNAs") spent with patients on a given procedure.
>
> . . . .

> Beginning in or about January 2005, Desai and [Petitioner] caused fraudulent bills to be submitted to Medicare, Medicaid and the Private Insurers that falsely inflated the amount of anesthesia time spent by the CRNAs on the procedures performed at ECOSN. [Petitioner] was aware that Desai had a "standing order" that all CRNAs should list at least thirty minutes of anesthesia time in their Anesthesia Record, regardless of the amount of anesthesia time actually spent. [Petitioner] enforced this order. She directly instructed at least one CRNA to list more than thirty minutes on the Anesthesia Record they maintained for each procedure, even though the CRNAs did not spend close to that amount of face-to-face time with the patient. She also instructed her employees responsible for insurance billing to rely upon the CRNAs Anesthesia Record – the medical record that Desai and [Petitioner] had instructed the CRNAs to falsify – when preparing claims for reimbursement to be submitted to Medicare, Medicaid and the Private Insurers.
>
> . . . .
>
> During the relevant period of time, [Petitioner], actually received approximately $1.3 million as her share of the inflated anesthesia billing scheme.

IG Ex. 3 at 4-5. As part of the plea agreement, Petitioner agreed to pay $50,000 in restitution and not to contest an $8,100,000 forfeiture. IG Ex. 3 at 10; P. Ex. C at 6.

In May 2015, the District Court accepted Petitioner's guilty plea, adjudged her guilty of violating 18 U.S.C. § 371 (Conspiracy to Commit Health Care Fraud), and sentenced Petitioner to one year and a day in prison, and to pay a $10,000 fine, an $8,100,000 forfeiture, and $50,000 in restitution. IG Ex. 4 at 1, 2, 5; P. Ex. C at 34-35, 39. Included in the list of entities due restitution were the Medicare Program Safeguard Contractor and the Nevada Division of Healthcare Financing and Policy. IG Ex. 4 at 6.

### *B. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).*

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense" before she can be excluded. An individual is considered "convicted" when a judgment of conviction has been entered by a federal, state, or local court, or a plea of guilty or no contest has been accepted in a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(1), (3). In the present matter, Petitioner entered a guilty plea and, based on that guilty plea,

the District Court adjudicated Petitioner guilty of violating 18 U.S.C. § 371. Based on these facts, I conclude that Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(1).

### *C. Petitioner's criminal offense of conspiracy to commit health care fraud on the Medicare and Medicaid programs is an offense related to the delivery of an item or service under Medicare and a state health care program (i.e., Medicaid).*

An individual must be excluded from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R § 1001.101(a). A state health care program includes a state's Medicaid program. 42 C.F.R. § 1001.2 (definition of *State health care program*).

It is significant that the term "related to" simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F.Supp.2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted).

In the present case, there can be no doubt that Petitioner's criminal conduct directly related to the delivery of services under the Medicare and Medicaid programs. Count One of the Indictment, which Petitioner was convicted of committing, alleged:

> From in or about January 2005 and continuing through on or about February 2008, in the state and federal District of Nevada, DIPAK DESAI, M.D., and [Petitioner], defendants herein, knowingly and willfully conspired, confederated, and agreed with each other, and others known and unknown to the Grand Jury, to devise and participate in a scheme and artifice to defraud a health care benefit program, that is, Medicare, Medicaid and the Private Insurers, and to obtain by means of materially false and fraudulent pretenses, representations, and promises, money owned by and under the custody and control of Medicare, Medicaid and the Private Insurers, in connection with the delivery of, and payment for, health care benefits, items and services.

IG Ex. 2 at 5. Count One also alleged that Petitioner instructed individuals under her supervision to submit Medicare and Medicaid claims based on falsified medical records. IG Ex. 2 at 6. Petitioner admitted to conspiring to "systematically overcharge the federal Medicare program, the State of Nevada Medicaid program . . . for anesthesia billing." IG Ex. 3 at 4.

Based on the facts in this case, Petitioner's conviction, involving filing false claims with the Medicare and Medicaid programs, was "related" to the delivery of an item or service under Medicare or a state health care program. *Jack W. Greene*, DAB No. 1078 (1989), *aff'd, Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff'd, Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992), *aff'd, Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).

### *D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).*

Because I have concluded that a basis exists to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Petitioner argues that the District Court's decision not to impose employment restrictions on Petitioner precludes the IG from excluding her. P. Br. at 2-4. The record in this case shows that the District Court did not include such a restriction as part of her criminal judgment. IG. Ex. 4 at 4; P. Ex. B at 2. The District Court stated the following during sentencing:

> I'm not going to impose the employment restriction from business involving medical billing. She has shown herself to be a competent and valued person in that industry. And the success she's shown since this whole case broke in a community which would have known her involvement from the Desai relationship speaks well to her. I'm not going to restrict that employment.

P. Ex. C. at 36. Although Petitioner argues that the District Court's decision not to impose employment restrictions amounts to an order that precludes the IG from excluding Petitioner, such is not the case.

It is clear from the District Court's statement, quoted above, that the District Court was exercising discretion under its authority to criminally sentence a defendant. The District Court neither referenced 42 U.S.C. § 1320a-7 nor ordered the IG not to exclude Petitioner.

This was appropriate since exclusions under section 1320a-7 are administrative sanctions, which have a remedial purpose (i.e., protecting Medicare beneficiaries from abusers of the program). *Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992); *Westin v. Shalala*, 845 F. Supp. 1446, 1453-54 (D. Kan 1994). Further, the exclusion under section 1320a-7(a)(1) is mandatory. *Travers*, 20 F.3d at 998 (9th Cir. 1994) ("The language—'[t]he Secretary shall exclude'—is mandatory, not discretionary."). Although it is possible that a federal district court may eventually review the decision to exclude Petitioner, that proceeding will be separate from Petitioner's criminal case. *See* 42 U.S.C. §§ 405(b), (g), 1320a-7(f)(3). However, at sentencing in Petitioner's criminal case, the District Court did not have the authority to prohibit the IG from imposing an exclusion based on Petitioner's conviction for conspiracy to commit health care fraud.

Although absent from the IG's exclusion notice, the IG imposed the minimum five-year length of exclusion even though the record shows that four aggravating factors are present in this case. *See* 42 C.F.R. § 1001.102(b)(1), (2), (5), (7). Perhaps the IG considered Petitioner's cooperation with state prosecutors, which resulted in the conviction of Dr. Desai (P. Ex. C at 25-28), to mitigate those aggravating factors. *See* 42 C.F.R. § 1001.102(c)(3). However, Petitioner was instrumental in overbilling $8,100,000 in medical services and personally profited by taking $1.3 million of those fraudulently obtained proceeds. Even the District Court, which was favorably impressed with Petitioner, stated that "[t]he loss of $8 million total is absolutely astounding." P. Ex. C at 31. A five-year exclusion may be insufficient to protect the Medicare and Medicaid programs from someone who had no qualms with stealing so much money from programs meant to provide health care to the aged, disabled, and poor.

## V. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period under 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

/s/
Scott Anderson
Administrative Law Judge