

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Clemenceau Theophilus Acquaye  
(OI File No. 5-13-40236-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-64

Decision No. CR4653

Date: June 30, 2016

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Clemenceau Theophilus Acquaye, from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's convictions for criminal offenses related to the delivery of a health care item or service under Medicare or a state health care program and the neglect or abuse of a patient 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 four offenses, including Medicaid fraud, health care fraud, and the unlawful practice of medicine, that relate to the delivery of a health care item or service under the Medicaid program, and was also convicted of third degree criminal sexual conduct, which was a crime against a patient in connection with the delivery of a health care item or service. I affirm the 13-year exclusion period because the IG has proven one aggravating factor and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is August 20, 2015.

## I. Background

By letter dated July 31, 2015, the IG notified Petitioner that, pursuant to sections 1128(a)(1) and 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1), (2), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 13 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

This action is being taken under sections 1128(a)(1) and 1128(a)(2) of the Act (42 U.S.C. 1320a-7(a)) and is effective 20 days from the date of this letter. The section 1128(a)(1) exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the State of Michigan, 30<sup>th</sup> Judicial Circuit Court, Ingham County, of a criminal offense related to the delivery of an item or service under the 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 programs. The section 1128(a)(2) exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the same court, of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health care item or service, including any offense that the Office of Inspector General (OIG) concludes entailed, or resulted in, neglect or abuse of patients (the delivery of a health care item or service includes the provision of any item or service to an individual to meet his or her physical, mental, or emotional needs or wellbeing, whether or not reimbursed under Medicare, Medicaid, or any Federal health care program).

IG Ex. 1 at 1. The IG extended the exclusion period from the statutory minimum of five years to 13 years based on the presence of one aggravating factor. IG Ex. 1 at 1-2. As for the aggravating factor, the IG found that “[t]he sentence imposed by the court included incarceration. The court sentenced you to 36 to 180 months of incarceration.” IG Ex. 1 at 2; *see* 42 C.F.R. § 1001.102(b)(5). The IG did not consider any mitigating factors. IG Ex. 1; *see* 42 C.F.R. § 1001.102(c).

Petitioner, through counsel, timely filed a request for hearing before an administrative law judge that was dated September 29, 2015 and received on October 5, 2015. On December 2, 2015, 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 prehearing briefs and exhibits. The schedule and summary of the prehearing conference was memorialized in an Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated December 2, 2015.

Pursuant to the Order, the IG filed an informal brief (IG Br.) along with nine proposed exhibits (IG Exs. 1-9), and also filed a reply brief (IG Reply). Petitioner filed a lengthy handwritten informal brief<sup>1</sup> (P. Br.) and a separate response to the IG's brief.<sup>2</sup> Petitioner's brief included 15 exhibits. As nearly every exhibit includes handwritten notations and arguments, Petitioner's exhibits will not be separately admitted, but rather, will be admitted with his brief. While Petitioner has requested a live hearing, the

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<sup>1</sup> Petitioner does not make any cogent arguments supporting why he should not be excluded from Medicare, Medicaid, and all other federal health care programs, nor does he address with any specificity whether the 13-year length of the exclusion is unreasonable. For example, Petitioner argues that he had ineffective counsel and that it is unfair that he was convicted and incarcerated, whereas Dr. Elrington, his employer, fled the country and evaded prosecution. P. Br.; *see also* [www.oig.hhs.gov/fraud/fugitives/profiles.asp](http://www.oig.hhs.gov/fraud/fugitives/profiles.asp), last visited June 28, 2016 (listing Dr. Errol Elrington as a "WANTED" fugitive-at-large after he fled to Belize.). He further contends that he worked under abusive conditions and that Dr. Elrington was his "slave master." Petitioner challenges his conviction, arguing that evidence was planted, witnesses were coached and told lies under oath, prosecutors committed fraud, and that a polygraph examiner was "high on Marijuana when he conducted the polygraph examination." Petitioner argues that he "was refused admission to Graduate Medical Education for political reasons" and "refused to be trained by the State Department and then sent to Ghana to lead a coup d'état." Finally, Petitioner argues that he was a "Good Samaritan" and would "diagnose and treat conditions that Board-certified physicians fail[ed] to diagnose and treat." Petitioner's submissions also make references to a myriad of irrelevant topics, such as the Flint city water situation, opioid-related overdoses, the basis for United States invading Iraq, and shootings involving law enforcement officers.

<sup>2</sup> My Order directed that briefs should not be in excess of 25 typed pages. Due to the fact that Petitioner is incarcerated, I will presume that he does not readily have the means to submit typewritten filings. Because I am unable to equate hand-written pages to typewritten pages, and the IG has not objected to the lengthy submissions, I will admit his filings into the record. However, in a June 6, 2016 Order, I ordered redaction of Petitioner's submissions because he repeatedly identified the victim of a sexual assault for which he had been adjudicated guilty by name, and also submitted documentation regarding the victim's medical treatment. I permitted Petitioner an opportunity to file a written response if he objected to the redaction of the victim's name from the record so long as the response neither exceeded three pages in length nor identified the sexual assault victim. I further cautioned that I may impose sanctions if Petitioner submitted a noncompliant response. In a 14-page response dated June 15, 2016, Petitioner identified the sexual assault victim by name. Accordingly, on June 23, 2016, I issued an Order Sanctioning Petitioner and Striking Petitioner's Submission Dated June 15, 2016, in which I struck Petitioner's submission from the record as a sanction pursuant to 42 C.F.R. § 1005.14(a).

arguments in support of his request for a live hearing center on his attempt to essentially re-litigate his conviction and establish that his defense attorney “destroyed evidence” and was “a paid attorney but he worked for the prosecution.” P. Br. Petitioner *pleaded guilty* to the offenses for which he was convicted, and his guilty plea was accepted by the judge who presided over his criminal case. IG Ex. 7 at 1; *see* Michigan Court Rules, Rule 6.302 (Pleas of Guilty and Nolo Contendere) (“The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate.”)<sup>3</sup> A live hearing is therefore unnecessary because, pursuant to 42 C.F.R. § 2002.2007(d), Petitioner cannot re-litigate his conviction in this forum. Therefore, I will decide this case based on the written submissions and documentary evidence. *See* Order § V.

## II. Issues

Whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2).

## 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<sup>4</sup>

1. *Petitioner’s guilty plea to the offenses of Medicaid fraud (false claim), health care fraud (false claim), and committing the unauthorized practice of medicine resulted in convictions for criminal offenses related to the delivery of an item or service under a state health care program and an exclusion from Medicare, Medicaid, and all other federal health care programs for a minimum of five years is warranted.*

The Act requires the exclusion of any individual or entity from participation in all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG first relied on section 1320a-7(a)(1) as the legal basis to exclude Petitioner, which states:

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<sup>3</sup> The relevant section of the Michigan Court Rules was last updated in January 2015 and is available on the Michigan Courts website. <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/subchapters/Subchapter%206.300%20Pleas.pdf>, last visited June 28, 2016).

<sup>4</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

**(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) 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.

42 U.S.C. § 1320a-7(a)(1).

The IG argues that, pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner's exclusion is required based on his conviction for two counts of Medicaid fraud (false claim), one count of health care fraud (false claim), and one count of the unlawful practice of medicine. IG Br. at 5-7. Petitioner, in his various submissions, does not dispute that he pleaded guilty to the above-named offenses. As discussed below, I agree with the IG that exclusion is mandated.

In September 2013, the State of Michigan filed a nine-count felony complaint charging that Petitioner committed one count of conducting criminal enterprises, seven counts of Medicaid fraud with regard to false claims, and one count of the unauthorized practice of Medicine. IG Ex. 4. The following month, in October 2013, the State of Michigan filed an amended complaint charging Petitioner with 14 felony offenses, to include first degree criminal sexual conduct, one count of conducting a criminal enterprise, nine counts of Medicaid fraud (false claim), two counts of health care fraud (false claim), and one count of unauthorized practice in the health profession. IG Ex. 5. Nearly a year later, in September 2014, the State of Michigan filed a third amended information charging 15 felony offenses, to include the offenses that were charged in October 2013, along with an additional count of third degree felony criminal sexual conduct as an alternative to Count 1, first degree criminal sexual conduct. IG Ex. 6. Petitioner entered a guilty plea to Counts 4 and 5, pertaining to Medicaid fraud (false claim); Count 12, relating to health care fraud (false claim); Count 14, unlawful practice of medicine; and Count 15, third degree criminal sexual conduct.<sup>5</sup> IG Ex. 7 at 1. The remaining 10 counts were dismissed. IG Ex. 7 at 1. Petitioner was sentenced on September 24, 2014, and at the time of his sentencing, he had already been incarcerated for 369 days. IG Ex. 7 at 2. For Count 15, the sentencing judge ordered a minimum sentence of 36 months and a

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<sup>5</sup> Petitioner's offenses are listed in various sections of the Michigan Compiled Laws, specifically: § 400.6071 (Counts 4 and 5); § 752.10031 (Count 12); § 333.16294 (Count 14); and § 750.520D1B (Count 15).

maximum sentence of 180 months of incarceration. IG Ex. 7 at 2. The judge also imposed a minimum sentence of 24 months and a maximum sentence of 48 months of incarceration for Counts 4, 5, 12, and 14, with the sentences for all five counts to be served concurrently. IG Ex. 7 at 2.

Petitioner has not presented any arguments that his *guilty plea* to the charges discussed above does not mandate at a minimum a five-year exclusion. Petitioner, through his guilty plea, has been convicted of, pursuant to section 1128(a)(1) of the Act, “criminal offens[es] related to the delivery of an item or service under Medicare or a State Medicaid program.” IG Exs. 1, 6, citing 42 U.S.C. § 1320a-7(a)(1); *see* 42 U.S.C. § 1320a-7(h)(1) (stating Medicaid is a state health care program for purposes of the Act); 42 U.S.C. § 1320a-7(i)(3) (individual is “convicted” for purposes of an exclusion when he or she enters a plea of guilty that has been accepted by a federal, state, or local court). Specifically, Petitioner was convicted of Medicaid fraud and health care fraud, both of which involved the submission of false claims. Petitioner was also convicted of the unlawful practice of medicine, an offense that involved him treating patients and billing Medicaid as if Dr. Elrington had treated those patients. IG Exs. 2, 3, 6. Petitioner was unquestionably convicted of criminal offenses related to the delivery of a health care item or service under the Medicaid program. 42 U.S.C. § 1320a-7(a)(1).

***2. Petitioner’s guilty plea to the offense of third-degree criminal sexual conduct resulted in a conviction for a criminal offense relating to the abuse or neglect of patients in connection with the delivery of a health care item or service and an exclusion from Medicare, Medicaid, and all other federal health care programs for a minimum of five years is warranted.***

Section 1128(a)(2) of the Act requires that an individual or entity convicted of “a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service” be excluded from participation in federal health care programs. An individual who is excluded under section 1128(a)(2) must be excluded for a period of not less than five years. 42 U.S.C. § 1320a-7(c)(3)(B).

In addition to entering a plea of guilty to Medicaid fraud, health care fraud, and practicing medicine without a license, Petitioner was also convicted of third degree sexual assault on a patient. IG Ex. 7. The charge involved Petitioner, who held no medical license, performing digital pelvic examinations on a victim and performing a breast examination on the same victim “even when she was not being seen for a condition that she believed would have warranted a breast exam.” IG Ex. 9. The offense of third degree sexual conduct, which is punishable by up to 15 years of imprisonment, entails a person engaging “in sexual penetration with another person” and “force or coercion is used to accomplish the sexual penetration.” Mich. Comp. Laws § 750.520d(1)(b), (2). Petitioner posed as a doctor who was licensed to practice medicine, and employed this scheme in order to sexually penetrate the victim. Thus, at a minimum, a mandatory five-

year exclusion is warranted because Petitioner pleaded guilty to an offense involving the abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). *See Narendra M. Patel, M.D.*, DAB No. 1736 (2000) (concluding that a sexual battery conviction was a criminal offense relating to the abuse of a patient and warranted exclusion pursuant to section 1128(a)(2)).

**3. A 13-year exclusion is not unreasonable based on the presence of one aggravating factor and no mitigating factors.**

As previously discussed, 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). The IG increased the exclusion period from the minimum five years to 13 years based on his consideration of one aggravating factor. IG Ex. 1 at 1-2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102(b).

The IG asserts that the presence of one aggravating factor warrants an exclusion for 13 years, and neither the IG nor Petitioner has argued that there are any *regulatory* mitigating factors present that may be considered as a basis for reducing the period of exclusion to no less than five years. *See* 42 C.F.R. § 1001.102(a)-(c).<sup>6</sup>

Petitioner was sentenced to a period of incarceration for the offenses for which he was convicted. The period of incarceration, a minimum of three years up to a maximum of 15 years, is quite significant. IG Ex. 7; *see* IG Ex. 8 (printout from Michigan Department of Corrections website, showing an earliest potential release date of September 19, 2016 and a maximum discharge date of September 19, 2028). It is also noteworthy that Petitioner was incarcerated for 369 days pending his trial and ultimate conviction. IG Ex. 7 at 2. The IG properly considered the period of incarceration to be an aggravating factor in this case. *See Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (stating that a nine-month period of incarceration was “relatively substantial”); *Gary Alan Katz, R.Ph.*, DAB No. 1842 at 10 (2002) (“Incarceration for an indeterminate period with a minimum of one year and a maximum of seven is significant in and of itself and certainly justifies a longer period of exclusion than if there was no incarceration or incarceration of a lesser type or shorter period.”)

In summary, the 13-year period of Petitioner’s exclusion is not unreasonable based on the significant aggravating factor present in this case. Petitioner was ordered to be incarcerated for no less than three years, but up to 15 years. Petitioner committed Medicaid fraud, health care fraud, treated patients and billed Medicaid as a doctor when

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<sup>6</sup> I have reviewed each of the regulatory mitigating factors enumerated in 42 C.F.R. § 1001.102(c)(1)-(3) and I have determined the evidence does not indicate that any of those factors are applicable.

in fact he did not have a medical license, and committed a felonious sexual assault on a patient. Petitioner's conduct for which he pleaded guilty demonstrates his untrustworthiness and a lack of integrity in dealing with health care programs. I therefore conclude that the 13-year period of exclusion is not unreasonable. *See Jeremy Robinson*, DAB No. 1905 at 3 (2004) (ALJ review must reflect the deference accorded to the IG by the Secretary).

#### **V. Effective Date of Exclusion**

The effective date of the exclusion, August 20, 2015, 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 other federal health care programs for a period of 13 years, effective August 20, 2015.

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/s/  
Leslie C. Rogall  
Administrative Law Judge