Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John Everett Crews, III, M.D.,
(OI File No.: H-13-42746-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1007

Decision No. CR3468

Date: November 19, 2014

DECISION

Petitioner, John Everett Crews, III, M.D., appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)) for a period of five years. For the reasons explained below, I find that there is a legitimate basis for the I.G. to exclude Petitioner, and an exclusion for the minimum period of five years is mandatory.

I. Background and Procedural History

By letter dated February 28, 2014, and amended by letter May 28, 2014, the I.G. notified Petitioner that he was being excluded, effective 20 days from the date of the I.G.'s letter, from participating in Medicare, Medicaid and other federal health care programs for a period of five years. As a basis for the exclusion, the I.G. cited Petitioner's felony conviction in the United States District Court for the Eastern District of Virginia, Richmond Division, of a criminal 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.

On April 23, 2014, Petitioner filed a timely request for a hearing, and the case was assigned to me. I ordered the parties to file briefs and their proposed exhibits including the written direct testimony of any proposed witnesses. The I.G. filed a brief together with six exhibits identified as I.G. Ex. 1 - I.G. Ex. 6. Petitioner filed a brief and one exhibit identified as P. Ex. 1. Absent objections, I admit all of the exhibits into the record. Both parties indicated that an in-person hearing was not necessary and agreed that that I may decide this matter based upon the parties' written submissions. P. Br. at 4; I.G. Br. at 13.

II. Issue

The sole issue in this case is whether there is a legitimate basis under section 1128(a)(3) of the Act for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs.

III. Discussion

A. Findings of Fact and Conclusions of Law

The following are some of the facts that Petitioner stipulated to as true as part of a plea agreement:

- Petitioner operated a business that sold five handicapped-accessible vehicles to the Virginia Birth-Related Neurological Injury Compensation Program, also known as the Birth Injury Fund, for use by the program's beneficiaries and their families;

- The Birth Injury Fund program provides medical benefits and services to claimants and was created for the benefit of infants who incurred a neurological injury resulting in permanent injury during the birthing process;

- The Birth Injury Fund program is a "health care benefits program" within the meaning of title 18 of the United States Code section 24(b)[1]; and

[1] Title 18 of the United States Code, section 24, *Definitions relating to Federal health care offense*, subsection (b), defines the term "health care benefit program" as any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

- Petitioner's business provided the vehicles in response to beneficiary claims to the program for vehicles equipped to accommodate wheelchairs.

I.G. Ex. 3.

Petitioner pled guilty to Count 4 of his indictment, and on May 23, 2012, the U.S. District Court for the Eastern Division of Virginia adjudicated Petitioner guilty of the felony offense, *Theft or embezzlement in connection with health care,* in violation of 18 U.S.C. § 669. Count 4 of the Indictment provided that:

> Beginning on or about June 15, 2006, and continuing through July 11, 2006, . . . JOHN E. CREWS, knowingly and willfully embezzled, stole, and converted without authority to his own personal use, funds valued at approximately $18,340.00, which was the property of the Virginia Birth-Related Neurological Injury Compensation Program, a health care benefit program as defined in Title 18, United States Code, Section 24(b).

I.G. Ex. 4 at 3. Petitioner was sentenced to one month of incarceration and three years of supervised release (with the stipulation that the first 150 days of that supervised release be subject to a home confinement program), and he was required to pay restitution of $64,109.14 to the Birth Injury Fund program. I.G. Ex. 6 at 2-5.

1. The I.G. had a legitimate basis for excluding Petitioner under section 1128(a)(3) of the Act.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *See also* 42 C.F.R. § 1001.101(c).

Petitioner does not dispute three of the essential elements: that he was convicted of a felony offense; the felony offense is based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct; and the felonious conduct occurred after August 21, 1996. Petitioner only disputes that his

felony offense was in connection with the delivery of a health care item or service and that his felony offense was with respect to a health care program operated by or financed in whole or in part by any federal, state, or local government agency.

a. Petitioner's offense was in connection with the delivery of a health care item or service.

For an offense to be "in connection with the delivery of a healthcare item or service," there needs to be only a "common sense connection" or "nexus" between the underlying facts and circumstances of the offense and the delivery of health care items or services. *See, e.g., Ellen L. Morand,* DAB No. 2436 (2012); *Charice D. Curtis,* DAB No. 2430 (2011); *Kevin J. Bowers,* DAB No. 2143 (2008), *aff'd Bowers v. Inspector General of the Dep't of Health & Human Servs.*, No. 1:08-CV-159, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008). The "in connection with" language has been interpreted broadly. In *Morand,* the Board rejected a petitioner's argument that her theft of money from the evening deposits of her employer, a pharmacy, did not occur "in connection with the delivery of a health care item or service." DAB No. 2436. The Board explained that "the conduct underlying the criminal offense does not necessarily have to involve the actual delivery (or the interruption of same) of a health care item or service to the patient or beneficiary" for the Secretary to exclude an individual under section 1128(a)(3). *Id.* at 9, *citing Curtis,* DAB No. 2430 at 5. The Board concluded that the fact that the petitioner had "diverted money that could have otherwise been used [to furnish] health care items or services" was "sufficient to demonstrate a common-sense connection between" the offense and the "delivery of a health care item or service." DAB No. 2436 at 10.

Here, Petitioner was convicted of a felony under a section of the Unites States Code titled *Theft or embezzlement in connection with health care*. *See* 18 U.S.C. § 669. The title and nature of his offense support a rational connection to the delivery of a health care item or service. Petitioner's participation in the scheme involving false invoices and charging almost double the cost of the handicapped-accessible vehicles provided to the Birth Injury Fund resulted in his guilty plea to theft and embezzlement of funds from a health care program and its beneficiaries. *See* I.G. Ex. 3.

The plea agreement acknowledged that he "knowingly and willfully embezzled, stole, and converted without authority to his own personal use, funds . . . which were the property of the Virginia Birth-Related Neurological Injury Compensation Program, a health benefit program as defined in Title 18, United States Code, Section 24(b)." I.G. Ex. 4. That statute defined a health care benefit program, for purposes of health care offenses under title 18 of the United States Code, as a plan under which any medical benefit, item, or service is provided to any individual and includes any individual or entity who is providing such benefit, item or service for which payment may be made under the plan. I.G. Ex. 3. Petitioner cannot now contend otherwise in this exclusion action.

Further, I do not find persuasive Petitioner's arguments that the I.G. has exceeded his statutory and constitutional authority by promulgating a regulation defining "delivery of a health care item or service" to include "the provision of any item or service to an individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid or any Federal health care program." P. Br. at 2; 42 C.F.R. § 1001.101(b). I am bound by extant regulations, and I find the modified vehicles that Petitioner provided to meet the special needs of the Birth Injury Fund beneficiaries constitute the delivery of health care items to individuals for exclusion purposes.

Moreover, the theft of money from the Birth Injury Fund program under Petitioner's scheme diverted money that the program could have otherwise used for other health care items or services. That is also sufficient to demonstrate a common-sense connection between the felony offense and the "delivery of a health care item or service."

b. I do not need to resolve whether Petitioner's offense involved a health care program operated by a state government agency.

The third essential element of a section 1128(a)(3) exclusion has two prongs, either of which if satisfied would support an exclusion. Petitioner contended that his offense did not involve a health care program operated by a state government agency and alleged the Birth Injury Fund program is not operated, or funded, by the State of Virginia. Considering I have found that the I.G. handily established that Petitioner's offense was in connection with the delivery of a health care item or service, I do not need to resolve that issue.

2. An exclusion of at least five years is mandatory.

The I.G. is required by law to exclude any individual who is convicted of a felony that is described in section 1128(a)(3) of the Act. By law, the minimum length of a mandatory exclusion is at least five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). The I.G. excluded Petitioner for five years, the minimum mandatory exclusion period. Therefore, the length of the exclusion is reasonable as a matter of law.

/s/
Joseph Grow
Administrative Law Judge