Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Mark B. Kabins, M.D.
Docket No. A-11-91
Decision No. 2410
September 1, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Mark B. Kabins, M.D., appealed the May 23, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel sustaining the determination of the Inspector General (I.G.) to exclude Dr. Kabins from participating in Medicare and other federally-funded health care programs for five years. *Mark B. Kabins, M.D.*, DAB CR2373 (2011) (ALJ Decision). Dr. Kabins pled guilty to felony misprision. On appeal, he argues that the crime of which he was convicted does not fall within those categories for which exclusion is mandatory because the elements of the offense do not include a connection with the delivery of a health care item or service. Dr. Kabins asserts that, even if we look to the facts of his crime, we should find that he was not himself convicted of fraud or financial misconduct but only of concealing the fraud of other persons. He further argues that the ALJ should have considered evidence that he provided competent medical care and that he is a trustworthy provider who is still licensed to practice medicine.

The ALJ found that Dr. Kabins pled guilty to covering up a scheme to defraud one of his patients whom he believed might have a viable malpractice suit against him growing out of a surgical operation that left her a paraplegic. The admitted scheme involved Dr. Kabins providing a letter concealing facts surrounding the surgery to the patient's attorney to use in possible suits against other health care providers and using a medical consultant to induce the attorney not to proceed against Dr. Kabins. The sentence imposed included payment of $3,500,000 in restitution to the patient.

For the reasons explained below, we affirm the ALJ Decision.

Applicable legal authority

Section 1128(a)(3) of the Social Security Act (Act)[1] requires, as relevant here, the exclusion of any individual convicted "under Federal or State law, in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." *See also* 42 C.F.R. § 1000.101(c).

ALJ Decision

The ALJ received exhibits from both parties. He excluded Petitioner's Exhibits 2-7 and 13-45 as irrelevant to the issues properly before him and I.G. Exhibit 6 as cumulative. ALJ Decision at 2. He determined that all testimony Dr. Kabins proposed to present was irrelevant to the issues he could decide and therefore found no basis to convene an in-person hearing. *Id.* at 3.

The ALJ then laid out the factual underpinnings of Dr. Kabins's conviction based on the plea agreement and criminal information. *Id.* at 3-5, citing I.G. Exs. 2, 3. Our brief summary is intended to provide context for the reader and does not modify or supplement the ALJ's findings.

In short, Dr. Kabins assisted at surgery on a patient (to whom we will refer as Ms. S.) in 2000, after which she developed serious complications, ultimately including paraplegia. Ms. S. retained counsel for a possible malpractice action. Dr. Kabins was concerned that Ms. S. could bring a viable lawsuit against him and that medical experts could opine that his failure to meet the standard of care contributed to her injury. Dr. Kabins went to a medical consultant (referred to here as Mr. A.) who had both referred patients to Dr. Kabins and referred patients from Dr. Kabins and other physicians to attorneys who might bring personal injury claims. Dr. Kabins asked Mr. A. to intervene with Ms. S.'s attorneys to persuade them not to sue Dr. Kabins using the influence of the income stream the attorneys might receive from possible referrals.

Although Ms. S.'s attorneys told Dr. Kabins that an expert was prepared to testify that his care of Ms. S. was substandard, Dr. Kabins was not sued and believed that Mr. A. successfully influenced the attorneys on his behalf. Dr. Kabins wrote a letter to be used

[1] The current version of the Social Security Act is at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

in suing other providers who treated Ms. S. but omitting material information about his own role. Mr. A. then sent the letter across state lines to Ms. S.'s attorneys.

The gravamen of the crime of misprision of felony is that the defendant knew of the commission of a felony and concealed it or failed to make it known to proper authorities. 18 U.S.C. § 4. Under the plea agreement, Dr. Kabins admitted that he knew that Ms. S.'s attorneys and Mr. A committed a crime of wire or mail fraud and that his letter constituted an affirmative act of concealment. I.G. Ex. 2.

The ALJ rejected Dr. Kabins' contentions that his conviction was not connected to delivery of a health care item or service and did not relate to fraud or financial misconduct by him (as opposed to others). ALJ Decision at 5-9. He found irrelevant Dr. Kabins' proffer of evidence that he is a competent professional who did not actually provide substandard care to Ms. S. or others. *Id.* at 9-10.

Finally, the ALJ upheld the length of the exclusion because it was for the minimum period required by law. *Id.* at 10; Act § 1128(a)(3)(B).

Dr. Kabins' Exceptions to the ALJ Decision

Dr. Kabins alleges two procedural errors by the ALJ. First, he argues that the ALJ should not have excluded his exhibits because they either relate to the quality of the care he provided to Ms. S. or demonstrate inequitable treatment of Dr. Kabins by the I.G. in comparison to other physicians. Kabins Br. at 7. Second, he argues that the ALJ should have held a hearing to receive testimony from Dr. Kabins and from Ms. S. that Dr. Kabins was trustworthy. *Id.* at 9.

Dr. Kabins further argues on appeal that his conviction was not "in connection with" the delivery of a health care item or service. *Id.* at 12. He contends that the ALJ should have looked only at the elements of the offense of misprision (while acknowledging that Board precedent is to the contrary). *Id.* at 14. Even if the specific conduct involved in the offense is reviewed, according to Dr. Kabins, his actions do not bear a common sense nexus to health care delivery and the evidence does not establish that the services Dr. Kabins provided to Ms. S. were deficient. *Id.* at 16. Dr. Kabins also reiterates on appeal his position that the I.G. has previously interpreted the mandatory exclusion provisions not to apply to situations similar to his, based on examples of "recent felony convictions . . . in some remote way connected to the delivery of a health care item or service" that did not result in exclusions. *Id.* at 27.

Dr. Kabins further excepts to the ALJ's conclusion that his offense was "related to" fraud, theft, embezzlement, breach of fiduciary duty or other financial misconduct. *Id.* at

31. In addition to again asserting that the review should be limited to the legal elements of the offense, Dr. Kabins denies that his particular crime actually involved any financial misconduct on his part. *Id.* at 36.

Finally, Dr. Kabins contends that the ALJ should not have concluded that, as a matter of law, Dr. Kabins was untrustworthy. *Id.* at 37. Instead, according to Dr. Kabins, the ALJ should have received testimony and resolved the issue of trustworthiness as a question of fact.

Standard of review

The Board's standard of review on a disputed issue of fact is whether the ALJ's decision is supported by substantial evidence on the whole record. 42 C.F.R. § 1005.21(h). Our standard of review with respect to a disputed issue of law is whether the ALJ's decision is erroneous. *Id.*

Analysis

1. The ALJ did not err in his procedural rulings.

   a. The ALJ did not err in excluding Dr. Kabins' proposed exhibits.

The proposed exhibits excluded by the ALJ consisted of - -

- two handwritten notes, two letters, and a sworn affidavit from Ms. S. all to the effect that she did not sue Dr. Kabins because she did not blame him for her paralysis, believed his care was excellent, and supported him in all legal proceedings because she did not feel he did anything wrong (P. Exs 2 - 6);

- transcribed testimony of a neurosurgeon from the criminal trial of Ms. S.'s former attorney and nine letters and/or affidavits of other physician experts evaluating the events surrounding Ms. S.'s surgery and subsequent development of paralysis (P. Exs. 7, 13-21); and

- documents relating to the felony convictions of other individuals, accompanied by printouts from the I.G. exclusions website indicating that the names of those individuals were not found (P. Exs. 23-45).

In this case, as discussed in detail later, the nexus to health care delivery is based on the admissions that Dr. Kabins covered up his knowledge of a scheme to dissuade Ms. S.'s attorneys from proceeding against Dr. Kabins for alleged malpractice in the health care services he delivered to Ms. S. by steering referrals to them. Dr. Kabins expressly

admitted as part of his guilty plea that he believed Ms. S.'s attorneys could obtain expert testimony supporting a viable suit against him based on his care of Ms. S. which motivated him to involve the medical consultant in an attempt to forestall such suit. I.G. Ex. 2, at 9. The facts admitted as part of the guilty plea show this nexus whether or not Dr. Kabins' services were actually at fault for the harm to Ms. S. Nothing in section 1128(a)(3) suggests that the underlying conviction must demonstrate the provision of substandard or negligent medical care in order to require exclusion.

Therefore, the documents purporting to prove that Dr. Kabins did not cause Ms. S.'s paralysis or that he provided satisfactory medical services to her do not address an issue relevant to the exclusion matter. It follows that the ALJ could properly exclude Petitioner's Exhibits 2-7, and 13-21 as irrelevant.

The documentation about other individuals convicted of unrelated felonies similarly fails to provide evidence probative on any issue properly before the ALJ. The issue before the ALJ was whether Dr. Kabins' criminal conviction mandated his exclusion. No inquiry into whether the I.G. has taken action to exclude others whose crimes may or may not bear any similarity to Dr. Kabins' offense sheds light on that question.

Dr. Kabins suggests on appeal that these documents somehow demonstrate that the I.G. has advanced a novel "interpretation" of the exclusion statute in proceeding against him. Kabins Br. at 9, 27-31. Dr. Kabins does not explain specifically what I.G. "interpretation" of which language in the statute is illuminated by these documents. In any case, we do not see how a selection of felons whose names are not currently on the exclusion list can prove that the I.G. has not previously excluded individuals based on the interpretation of the statute applied to Dr. Kabins in this proceeding. Nor do we find the assertion that the I.G. has not, as yet, imposed an exclusion on the medical consultant involved in the fraud sufficient (even if true) to conclude that the mandatory exclusion of Dr. Kabins is somehow arbitrary or capricious. *Id.* at 30. As explained below, we find the application of the statute here to be entirely consistent with long-standing interpretations by the Board.

b. *The ALJ did not err in declining to convene an in-person hearing.*

Dr. Kabin argues that he should have been permitted to present testimony to show that, as a factual matter, he is trustworthy. Kabins Br. at 9. He further suggests that testimony would have established that, although he believed Ms. S. could bring a "viable" suit against him, such as a suit would not have been "successful." *Id.* at 10. He concedes, however, that the evidence he proffers would not be "necessary" if the I.G. agreed to factual findings that Dr. Kabins is trustworthy and that his care of Ms. S. did not harm her. *Id.* at 10 n.3.

The exclusion here does not depend on factual findings as to either Dr. Kabins' trustworthiness or the quality of his care of Ms. S. By mandating the exclusion of any individual convicted of a qualifying crime, Congress implicitly determined that every such individual is to be considered too untrustworthy to participate in the federal health care programs for at least the minimum period set by law. Since the I.G. did not seek to impose any additional period of exclusion beyond the mandatory minimum, the ALJ correctly concluded that Dr. Kabins was untrustworthy as a matter of law. As already noted, whether Dr. Kabins' care caused Ms. S.'s injury has no bearing on whether the crime to which he pled guilty requires exclusion.

The ALJ therefore correctly concluded that an in-person hearing would serve no purpose where neither party proffered any testimony related to any issue properly before him. *See Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).

2. The ALJ did not err in concluding that Dr. Kabins was convicted of a felony "in connection with" delivery of a health care item or service.

a. The ALJ properly looked to the individual circumstances of the crime rather than the generic definition of the offense under state law.

Dr. Kabins first argues that, notwithstanding Board precedent to the contrary, the question of whether his conviction was in connection with the delivery of a health care item or service should be resolved only by reference to the elements of the crime of misprision, which do not mention "health care." Kabins Br. at 14-16; *but see, e.g., Lyle Kai, R. Ph.*, DAB No. 1979, at 5 (2005), *aff'd, Kai v. Leavitt,* No. 05-00514 BMK (D. Haw. July 17, 2006) ("In determining whether an offense is related to the delivery of an item or service under a covered program such as Medicaid, '[i]t is not the labeling of the offense under the state statute which determines whether the offense is program-related.' *Berton Siegel, D.O.*, DAB No. 1467, at 7 (1994)."); *Narendra M. Patel, M.D.*, DAB No. 1736 (2000), *aff'd, Patel v. Thompson,* 319 F.3d 1317 (11th Cir. 2003)(extrinsic evidence of circumstances of crime relevant); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000). The Board, as Dr. Kabins admits, has long rejected attempts to constrain review of the nature of the crime for which an individual was convicted to the bare elements of the offense embodied in state law. In *Patel*, the Board explained that such a constraint would be inconsistent with congressional intent in the mandatory exclusion law:

> We thus see nothing in section 1128(a)(2) that requires that the necessary elements of the criminal offense must mirror the elements of the exclusion authority, nor that all statutory elements required for an exclusion must be

> contained in the findings or record of the state criminal court. We see no reason to assume that Congress intended to narrowly proscribe the I.G.'s exclusion authority by dependence on the vagaries of state criminal law definitions or record development. On the contrary, the statutory language says nothing about what evidence of the nature of and circumstances surrounding the offense itself may be considered to determine if the individual's criminal conduct included the elements necessary for a mandatory exclusion.

DAB No. 1736, at 10.

Dr. Kabins suggests that this analysis is inconsistent with several Supreme Court cases, although he admits that none of them involve exclusions. Kabins Br. at 14. In three cases, Dr. Kabins asserts, the Supreme Court looked narrowly at the category of an offense, rather than the particular crime in determining whether an offense qualifies as a "violent felony" for purposes of sentence enhancement. *Begay v. U.S.,* 553 U.S. 137, 141 (2008); *James v. U.S.,* 550 U.S. 192, 202 (2007); *Taylor v. U.S.,* 495 U.S. 575, 602 (1990). Dr. Kabins recognizes, nonetheless, that the Supreme Court also has said that statutory references to an "offense" may refer either to the elements of a crime or the specific facts of a particular crime. Kabins Br. at 14, citing *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009).

The *Begay* case is inapposite. *Begay* involved a question of whether driving under the influence of alcohol (DUI) constituted a "violent felony," which was defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 553 U.S. at 141, citing 18 U.S.C. § 924(e)(2)(B) (2000 ed.). The Supreme Court took as given that the elements of DUI did not meet the first prong of the statutory definition and determined that, while a DUI might indeed seriously endanger others, such a conviction was too unlike the other crimes listed (burglary, arson, extortion or use of explosives) to be considered similar in nature to the named examples, especially in that DUI is a "strict liability" crime while the others involve more aggressive, purposeful behavior. *Id.* at 141, 146. Nothing in this decision or the others relied on by Dr. Kabins remotely suggests that the I.G.'s authority to exclude for an offense "in connection with" health care delivery must be based on the four corners of the underlying state criminal statute. Although the Supreme Court did state that it used a "categorical approach," looking at how the offense is defined in statute to determine if DUI was a "violent felony" rather than whether the individual committed a violent crime, the Court said nothing suggesting that such an approach was required in the context of determining the scope of a remedial administrative exclusion.

Indeed, the Supreme Court's subsequent decision in *Nijhawan* supports the contrary conclusion. That case involved administrative deportation proceedings in which deportation depended on whether the alien was convicted of an "aggravated felony," defined by reference to an offense involving "fraud and deceit in which the loss to the victim or victims exceeds $10,000." 129 S.Ct. at 2297, quoting 8 U.S.C. § 1101(a)(43)(M)(i). The Supreme Court concluded that the context of that statute called for a "circumstance-specific" approach, looking beyond the generic definition of an offense, and even beyond charging documents, court colloquies and plea agreement, to extrinsic evidence of the circumstances of the crime. 129 S.Ct. at 2301-03. In so holding, the Court pointed out that administrative proceedings have a lower burden of proof than criminal proceedings and that the prior criminal conviction itself was not to be relitigated. *Id.* at 2303. In these respects, we find *Nijhawan* more analogous to the exclusion context than the *Begay* line of cases.

We conclude that the ALJ did not err in looking beyond the generic definition of the offense to determine whether Dr. Kabins was convicted of a crime in connection with the delivery of a health care item of service.

> *b. The determination of whether an offense was committed "in connection with" health care delivery turns on a common sense consideration of the nexus between the offense and the health care delivery.*

The Board has long held, as Dr. Kabins acknowledges, that determination that a particular offense is related to delivery of a health care item or service under a covered program (under section 1128(a)(1) of the Act) focuses on a common sense evaluation of the nexus between the offense and the delivery of a health care item or service. Thus, the Board explained as follows:

> Based on the plain meaning of the word "related," the Board has repeatedly held that an offense is "related to" the delivery of an item or service under a covered program if there is a common sense connection or nexus between the offense and the delivery of an item or service under the program. *See, e.g., Berton Siegel, D.O.,* DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992); *Niranjana B. Parikh*, M.D., DAB No. 1334 (1992). Therefore, the Board has determined that an offense committed by someone providing billing or accounting services was related, *Jack W. Greene*, DAB No. 1078 (1989), *aff'd*, *Green 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) and *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); that no showing of harm to a protected program was necessary in order for an offense to be related, *Neil*

> *R. Hirsch, M.D.*, DAB No. 1550 (1995), *aff'd, Hirsch v. Shalala*, No. 96-4008 (C.D. Ill. Nov. 4, 1996); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); that an offense could be related even if the services were actually provided by an entity different from the individual being excluded, *Napoleon S. Maminta, M.D.*, DAB No. 1135, at 7 (1990); that an offense could be related even if no service or item was actually delivered, *Francis Shaenboen, R.Ph.*, DAB No. 1249, at 4 (1991); that an offense could be related even if it did not directly involve the delivery of items or services, *Salvacion Lee, M.D.*, DAB No. 1850 (2002); and that an offense could be related even if the individual did not personally engage in the scheme or was not aware of the scheme that resulted in the delivery of the mislabeled pharmaceuticals under a covered program, *Lyle Kai, R.Ph.*, DAB No. 1979 (2005), *aff'd, Kai v. Leavitt,* Civ. No. 05-00514 BMK (D. Haw. 2006)

Scott D. Augustine, DAB No. 2043, at 5-6 (2006).

Dr. Kabins argues that the standard should be different for the I.G. to show that an offense was committed "in connection with" health care delivery, as required by section 1128(a)(3), than to show that an offense "related to" health care delivery, as required by section 1128(a)(1), in order to give effect to Congress's choice to use different wording in different sections. Kabins Br. at 14 n.4. Dr. Kabins then asserts (without citation to authority) that "in connection with" is "commonly understood to require a direct proximate cause" unlike "related to." *Id.* Dr. Kabins also suggests (also with no citation to any authority) that the connection to health care delivery must be a "temporal" one between the delivery of the health care service and the felonious actions. *Id.* at 17.

The Board has previously rejected a claim that the use of "related to" in some parts of the exclusion statute and "in connection with" in other parts should mean the terms are to be interpreted differently. *Chander Kachoria, R.Ph.*, DAB No. 1380, at 4-5 (1993); *see also Kenneth M. Behr*, DAB No. 1997, at 7 n.5 (2005). *Kachoria* involved the permissive exclusion provision at section 1128(b)(1), which used the same phrase ("in connection with") used in the provision at issue in the present case. The Board examined section 1128 of the Act as a whole and concluded that "Congress intended no difference" in meaning between the two phrases. DAB No. 1380, at 5. The Board noted, for example, that Congress chose to phrase the subheading of section 1128(b)(2) as "CONVICTION RELATING TO OBSTRUCTION OF AN INVESTIGATION," but the text of the same provision speaks of an individual convicted "in connection with the . . . obstruction of any investigation . . . ." *Id.* Furthermore, the Board found nothing in the legislative history to indicate that Congress intended a difference in interpretation. *Id.*

Similarly, we conclude here that Dr. Kabins has given us no reason to understand the phrase "in connection with" in section 1128(a)(3) in any different manner or to depart from our approach of looking to whether a common sense nexus exists between the offense and health care delivery. We specifically decline to read into the phrase "in connection with" a requirement to prove direct or proximate causation.

c. Substantial evidence in the record supports the ALJ's finding that Dr. Kabin was convicted of a crime in connection with health care delivery.

Dr. Kabins argues that the ALJ based the conclusion that Dr. Kabins' offense was "in connection with" health care delivery on an incorrect finding that Dr. Kabins acted in the belief that Ms. S. could bring a "successful" malpractice suit against him. Kabins Br. at 12-13, citing ALJ Decision at 4. Dr. Kabins argues that the fact that experts could opine that a suit might be "viable," as he admitted in his guilty plea, did not demonstrate a belief that the suit would ultimately be successful. Kabins Br. at 13; I.G. Ex. 2, at 9. This argument is a red herring. The plea agreement expressly describes the crime as committed "in connection with [Dr. Kabins'] treatment" of Ms. S. I.G. Ex. 2, at 9-10. Whether his crime was motivated by the desire to avoid a merely viable suit rather than by a certainty that such a suit would be successful is irrelevant to the plain reality that the offense was committed to avoid potential consequences arising from the delivery of health care services.

Dr. Kabins also argues that the ALJ used, in considering Dr. Kabins' offense, a "but for" standard that is "directly contrary" to the requirement of a common sense nexus which is "not intended to be some remote, circuitous chain of events connection." Kabins Br. at 17. The ALJ actually found that the "foundation" of Dr. Kabins's crime was "the surgery he performed on" Ms. S., hardly a remote or circuitous connection. The ALJ did state that the potential lawsuit against Dr. Kabins which motivated his criminal actions would not have been contemplated but for the surgical care. We see no error in this observation and agree with the ALJ that, under the circumstances established in this record, a "direct relationship" exists between the delivery of surgical care and the felony of which Dr. Kabins was convicted.

We find no merit in Dr. Kabins's contention that we should attend only to a "select few" of the facts to which he admitted in the plea agreement and charging documents. Kabins Br. at 18. This argument is merely a backdoor approach to restrict the review to only those facts essential to the elements of the felony rather to the full context of the criminal activity that took place. The only facts which Dr. Kabins would have us consider are: (1) the underlying felony was that of the lawyer and consultant using mail/wire fraud to deprive Ms. S. of "honest legal services," and (2) Dr. Kabins did fail to denounce them to the authorities. *Id.* at 18-19. Dr. Kabins argues that the underlying felony might not be

valid under a later Supreme Court case requiring evidence of "bribes and kickbacks" in such cases. *Id.* at 19, citing *Skilling v. U.S.,* 130 S.Ct. 2896 (2010). Besides, says Dr. Kabins, the underlying fraud concerned delivery of legal services not medical services. Kabins Br. at 19.

We need not consider whether the course of dealing among the lawyer, consultant and Dr. Kabins included bribes or kickbacks, since this argument, as the ALJ correctly held and despite Dr. Kabins' insistence to the contrary, amounts to an impermissible collateral attack on the validity of Dr. Kabins' conviction. What is relevant here is not whether the crime which Dr. Kabins pled guilty to concealing would constitute a crime under current law but whether Dr. Kabins' own cover-up was committed in connection with health care delivery.

Dr. Kabins further objects to the ALJ's discussion of the Board's decision in *Andrew Anello*, DAB No. 1803 (2001), upholding an exclusion for misprision of a felony. Kabins Br. at 21. The ALJ did not rely on *Anello*. Instead, he rejected the claim that Dr. Kabins could not be excluded because his crime, unlike that in *Anello*, did not target Medicare. ALJ Decision at 7. As the ALJ explained, the exclusion provision applied in *Anello* involves program-related crime, which is not a required showing for a mandatory exclusion under section 1128(a)(3). *Id.* at 8. We are also unpersuaded by Dr. Kabins' claim that other ALJ cases upholding exclusions based on misprision of felony demonstrate that he cannot be excluded because he views the connection to health care delivery as more direct in those cases. Kabins Br. at 23, and cases cited therein. Nothing supports the idea that the cited cases exhausted the circumstances under which misprision of felony might be committed "in connection with" health care delivery.

Dr. Kabins next seeks to redefine the test for whether his crime occurred "in connection with" health care delivery to require a showing that the crime "was likely to have in any fashion affected the quality or availability of delivered health care or its reimbursement." *Id.* at 21. Again, Dr. Kabins provides no statutory or case law authority for his addition of such a required showing. He offers an argument ad absurdum that a doctor convicted for reckless driving after leaving his office might otherwise be required to be excluded because he would not have been driving "but for" providing health care in his office that day. *Id.* The example would be inapposite even were we applying a "but for" test because the accident would have occurred regardless of what kind of work the driver was doing before leaving his office, unlike a medical malpractice suit (and efforts to avoid it). In any case, neither we nor the ALJ relied on an attenuated "but for" analysis but rather found the central force driving Dr. Kabins' felony was evasion of potential legal consequences arising from his health care activities. Furthermore, we see nothing in the statute requiring that the connection to health care delivery involve poor quality or lack of access to care or reimbursement.

Finally, Dr. Kabins argues that the Board should not infer from the $3,500,000 restitution that he was required to pay to Ms. S. that he provided substandard care to her because he proffered evidence to the contrary. Kabins Br. at 24-26. We agree with the ALJ that it is unnecessary to address the payment of restitution in detail because Dr. Kabins' conviction meets the criteria for exclusion under section 1128(a)(3) without regard to the restitution.[2] That disciplinary action considered by the American Medical Association, as well as the States of Nevada, Iowa and Arizona, did not result in barring Dr. Kabins from practicing medicine is also irrelevant to our inquiry. *Id. citing* P. Ex. 10; *see also* P. Ex. 11; I.G. Ex. 5 (Nevada Board of Medical Examiners did impose other restrictions). Furthermore, the "record evidence" to which Dr. Kabins cites to assert that the patient and various opinion witnesses prove that his care was not the cause of Ms. S.'s injuries is based on exhibits which, as we have explained, the ALJ properly excluded as irrelevant. Kabins Br. at 25-26.

We conclude that the finding that Dr. Kabins was convicted of a felony offense in connection with the delivery of a health care item or services is free of legal error and supported by substantial evidence.

3. The ALJ did not err in concluding that Dr. Kabins was convicted of a felony "related to" fraud, theft, embezzlement, breach of fiduciary duty or other financial misconduct.

Dr. Kabins argues again that the evaluation of whether his crime was "related to" the statutory categories should be based solely on the elements of misprision which do not include "fraud" or any of the other categories. Kabins Br. at 32. We summarily reject this legal argument for the reasons discussed in relation to his similar claim as to the analysis of the phrase "in connection with" in the statute. We note, however, that one of the elements of misprision in the Ninth Circuit as cited by Dr. Kabins himself is that the perpetrator "took an affirmative step to conceal the principal's crime," which might be considered, while not itself fraudulent, related in nature to fraud. Kabins Br. at 32, citing *U.S. v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1985).

Dr. Kabins contends that fraud should not be "bootstrapped" into his crime based on the nature of the crime which he concealed. Kabins Br. at 32-33. The only support Dr. Kabins offers for the proposition that the nature of the concealed criminal act cannot be considered in evaluating whether the misprision related to fraud is an unappealed 2009 ALJ decision. *Id.* at 33, *citing Stephen Klass, M.D.*, DAB CR1986 (2009). ALJ

[2] We do note that the plea agreement expressly ties the restitution to a waiver of Ms. S.'s claims "relating to injuries she sustained" during the period of time when she was in the hospital under Dr. Kabins' care. I.G. Ex. 2, at 2. Nevertheless, the connection to health care delivery does not depend on the restitution order.

decisions do not have precedential weight and are not binding authority for the Board. Dr. Klass was convicted of aiding and abetting the distribution of multiple samples of Viagra to a patient in the Mafia knowing the pills would be given or sold to persons without proper prescriptions. DAB CR1986, at 5. The ALJ concluded that his crime was in connection with health care but was not related to fraud. *Id.* at 6-7. The facts bear no relationship to the circumstances of the present case. The ALJ did not err in concluding that the "essence" of the crime here was "to conceal a fraud that was being perpetrated" against Ms. S. ALJ Decision at 9. Dr. Kabins provides no basis for us to refuse to recognize the criminal concealment of fraud as being "related to" fraud.

Dr. Kabins also raises the idea that the language of the statute referring to "other financial misconduct" is intended to limit the types of fraud to which section 1128(a)(3) applies to those with a financial aspect. Kabins Br. at 36. As Kabins admits, the Board expressly rejected such a constrictive reading as incompatible with "the structure and context of the statutory language as a whole because it would, in effect, change the commonly accepted meaning of 'fraud' to be limited only to those criminal offenses where the individual has a corrupt motive to effectuate a substantial pecuniary gain." *Breton Lee Morgan, M.D.*, DAB No. 2264, at 6-8 (2009). Dr. Kabins offers no argument that would change our view that his proposed reading would undermine the "statutory purposes of protecting federal funds and program beneficiaries from untrustworthy individuals and deterring health care fraud." *Id.*

Conclusion

We conclude that section 1128(a)(3) of the Act mandates the exclusion of Dr. Kabins. The exclusion imposed by the I.G. is for the minimum period required by law. We affirm the ALJ Decision and sustain the exclusion.

/s/
Judith A. Ballard

/s/
Stephen M. Godek

/s/
Leslie A. Sussan
Presiding Board Member