

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Bakul Desai, M.D.  
(O.I. File No. 2-06-40580-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-34

Decision No. CR2806

Date: May 30, 2013

**DECISION**

The Inspector General (I.G.) of the Department of Health and Human Services (HHS) notified Bakul Desai, M.D. (Petitioner) that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for the statutory minimum mandatory period of five years. Petitioner appealed. For the reasons stated below, I affirm the five-year exclusion imposed on Petitioner.

**I. Background**

In an August 31, 2012 letter, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for a period of five years under 42 U.S.C. § 1320a-7(a)(3). The I.G. stated that the basis for exclusion was Petitioner's conviction in the United States District Court, District of New Jersey (District Court) 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. I.G. Exhibit (Ex.) 1.

Petitioner, through counsel, timely filed a request for hearing (RFH) before an administrative law judge. On November 7, 2012, I held a telephonic prehearing

conference, the substance of which I summarized in my November 8, 2012 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the I.G. filed a brief (I.G. Br.) and four exhibits (I.G. Exs. 1-4), and Petitioner filed a brief (P. Br.) and two exhibits (P. Exs. 1, 2). The I.G. also filed a reply brief (I.G. Reply).

## II. Evidentiary Rulings

Both parties filed evidentiary objections. For the reasons stated below, I overrule all of the objections and admit into the record I.G. Exs. 1 – 4 and P. Exs. 1, 2.

The I.G. objected to P. Ex. 2 on grounds of relevancy. I.G. Reply at 4. That exhibit is a letter from National Government Services (NGS), a contractor for the Centers for Medicare and Medicaid Services (CMS), advising Petitioner that his national provider identifier (NPI) was being revoked under 42 C.F.R. § 424.535(a)(3). I conclude that the exhibit is relevant to Petitioner's argument concerning the effective date of his exclusion.

Petitioner objects to I.G. Ex. 3 (the Information in Petitioner's criminal case) and I.G. Ex. 4 (the plea agreement in Petitioner's criminal case, which Petitioner signed on January 31, 2008),<sup>1</sup> arguing that these two exhibits "are not reliable indicators of the exact conduct or omission which formed the factual basis for acceptance of petitioner's guilty plea." P. Br. at 10. However, extrinsic evidence, such as information found in an indictment or a plea agreement, is probative to determine the circumstances that form the basis for the criminal offense underlying a conviction. *See e.g., Emem Dominic Ukpong*, DAB No. 2220, at 2-3 (2008).<sup>2</sup> Therefore, I will not exclude these exhibits.

## III. Decision on the Record

In his brief, Petitioner indicated that he wanted to testify in this proceeding. P. Br. at 8-9. I ordered Petitioner to submit written testimony. *See* 42 C.F.R. § 1005.16(b). On March 20, 2013, Petitioner filed an affidavit (P. Aff.), which I admit into the record. Because the I.G. indicated that he will not seek to cross-examine Petitioner, I issue this decision based on the written record.

## IV. Issue

The only issue in this case is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five

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<sup>1</sup> Petitioner previously submitted a copy of the documents in I.G. Ex. 4. RFH at 16-23.

<sup>2</sup> The decisions of HHS's Departmental Appeals Board may be found at <http://www.hhs.gov/dab/decisions/index.html>.

years under 42 U.S.C. § 1320a-7(a)(3). If I decide that the I.G. has a basis to exclude Petitioner, then I must uphold the length of the exclusion because it is the minimum period of exclusion mandated by law. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(1)-(2).

## V. Findings of Fact, Conclusions of Law, and Analysis<sup>3</sup>

The Social Security Act requires HHS to exclude from participation in Medicare, Medicaid, and all other federal health care programs:

[a]ny 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 [section 1320a-7(a)(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.

42 U.S.C. § 1320a-7(a)(3). The I.G. argues that he excluded Petitioner under this statute based on Petitioner's conviction of a criminal offense relating to fraudulent conduct, occurring after 1996, which is in connection with the delivery of a health care item or service. I.G. Br. at 2-4. Petitioner primarily disputes that his crime was in connection with the delivery of health care items or services. P. Br. at 4-6.

***A. Petitioner was convicted of one count of felonious conduct, which occurred from January 2003 through November 2006, and involved obtaining approximately \$590,000 through theft, embezzlement, or fraud from an organization receiving federal funds.***

The District Court convicted Petitioner of violating 18 U.S.C. § 666, an offense that the District Court described as "THEFT KNOWINGLY AND INTENTIONALLY EMBEZZLED, STOLE, OBTAINED BY FRAUD-CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS." I.G. Ex. 2, at 1; P. Ex. 1, at 1. Based on this description, Petitioner's offense was a violation of 18 U.S.C. § 666(a)(1)(A). Petitioner was convicted as a principal in the crime under 18 U.S.C. § 2. I.G. Ex. 2, at 1; P. Ex. 1, at 1. This conviction was based on a plea agreement that Petitioner signed on January 31, 2008, in which Petitioner agreed to plead guilty to:

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<sup>3</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

a one-count Information, which will charge that from in or around January 2003 to in or around November 22, 2006, [Petitioner] knowingly and intentionally embezzled, stole, obtained by fraud, and misapplied property under the custody and control of University of Medicine and Dentistry of New Jersey, in violation Title 18, United States Code, Section 666, and Title 18, United States Code, Section 2.

CMS Ex. 4, at 1, 5.

The Information that Petitioner pled guilty to provides the following details related to Petitioner's criminal offense. Petitioner is a physician specializing in internal medicine and cardiology, and owns the Heart Center of New Jersey, P.A., LLC. I.G. Ex. 3, at 1. In or about January 2003, Petitioner entered into an employment contract with the University of Medicine and Dentistry of New Jersey (UMDNJ) to serve as a faculty cardiologist in the Clinical Assistant Professor program. The employment contract provided that Petitioner would serve as an Assistant Clinical Professor, be paid approximately \$150,000 per year, and would commit 48% of his time (approximately 20 hours a week) to performing teaching, research and patient care activities, which were to include:

1. Providing on-call coverage 13 weeks a year for certain diagnostic procedures;
2. Teaching fellows in the cardiac catheterization lab;
3. Interpreting hospital electrocardiograms;
4. Attending weekly cardiology conferences;
5. Conducting a physical diagnosis course for second year medical students;
6. Providing office-based teaching;
7. Lecturing in areas of special expertise;
8. Supporting research efforts; and
9. Completing Medicare time studies and other forms to document the services provided under the contract to ensure appropriate Medicare payments were made to UMDNJ.

I.G. Ex. 3, at 5-6.

The Information stated that UMDNJ had an accredited cardiology fellowship program and UMDNJ's hospital had a Level I Trauma Center license. I.G. Ex. 3, at 2. However, from at least 1995, UMDNJ failed to perform the requisite number of cardiac procedures to satisfy the requirements for a Level I Trauma Center license. In order to increase the number of cardiac patients, UMDNJ established a program to enter into part-time employment contracts with community cardiologists who had "significant numbers of patients they could refer to [UMDNJ]." I.G. Ex. 3, at 4. It is this program that Petitioner joined when he became an Assistant Clinical Professor at UMDNJ.

The Information charges, however, that from in or about January 2003 through November 2006, Petitioner failed to perform the services enumerated in the employment contract. The only service he performed for UMDNJ was to refer patients from his private cardiology practice to UMDNJ's hospital for cardiac-related procedures. I.G. Ex. 3, at 6. UMDNJ's hospital was a Medicare provider and billed Medicare for more than \$10,000 a year for services rendered to Medicare beneficiaries. I.G. Ex. 3, at 3. UMDNJ paid Petitioner approximately \$590,000. I.G. Ex. 3, at 6.

Petitioner provided testimony that is in agreement with I.G. Exs. 2-4. P. Aff. ¶¶ 1-3. However, Petitioner indicated that he had a relationship with UMDNJ's hospital before his part-time clinical professorship, that he did not refer patients there based on the part-time professorship, that his agreement with UMDNJ was only to teach, and that he was never charged with kickbacks, health care fraud, or providing deficient care. P. Aff. ¶¶ 5, 6, 8-9, 11, 16-18. Petitioner's testimony does not detract from the finding of fact made above and is addressed further below.

***B. Petitioner was convicted of a felony for the purposes of 42 U.S.C. § 1320a-7(a)(3).***

Under 42 U.S.C. § 1320a-7(a)(3), Petitioner must be "convicted . . . of a criminal offense consisting of a felony . . ." before he can be excluded. The statute defines "convicted" to include "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged." 42 U.S.C. § 1320a-7(i)(1). Here, the U.S. District Court entered a Judgment in a Criminal Case in which that court "adjudicated that the defendant is guilty" of violating 18 U.S.C. § 666. I.G. Ex. 2, at 1. Petitioner concedes that he was convicted of a criminal offense that was committed after August 21, 1996. P. Br. at 1.

Further, because 18 U.S.C. § 666 provides for a ten-year maximum term of imprisonment, Petitioner's offense is a Class C felony. *See* 18 U.S.C. § 3559(a)(3). Petitioner concedes that he was convicted of a felony. P. Br. at 2. Therefore, I conclude that Petitioner was convicted of a felony for purposes of 42 U.S.C. § 1320a-7(a)(3).

***C. Petitioner’s felony conviction requires exclusion under 42 U.S.C. § 1320a-7(a)(3) because it involves theft, embezzlement, or fraud in connection with the delivery of a health care item or service.***

In order for Petitioner to be excluded under section 1320a-7(a)(3), his conviction must involve fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct “in connection with the delivery of a health care item or service.” For a variety of reasons, Petitioner disputes that his criminal conduct had any connection to the delivery of a health care item or service. Petitioner also argues that the I.G. seeks to give the phrase “in connection with the delivery of a health care item or service” as broad an interpretation as possible, which is a “slippery slope” because such an expanded definition renders the phrase “unconstitutional vague and overbroad.” P. Br. at 6

Although Petitioner urges a narrow interpretation of the statute, this is not consistent with previous cases. Rather, “the conduct underlying the criminal offense does not necessarily have to involve actual delivery (or the interruption of same) of a health care item or service to the patient or beneficiary.” *Ellen L. Morand*, DAB No. 2436, at 9 (2012). This is because section 1320a-7(a)(3) “broadly covers offenses ‘in connection with the delivery of a health care item or service.’” *Charice D. Curtis*, DAB No. 2430, at 5 (2011) (emphasis in original). Thus, there only needs to be a nexus “between the offense of which a petitioner was convicted and the delivery of a health care item or service.” *Kenneth M. Behr*, DAB No. 1997 (2005).

In the present case, Petitioner was convicted of theft for knowingly and intentionally embezzling, stealing, and obtaining by fraud \$590,000 for services he did not perform as a Clinical Assistant Professor. I.G. Exs. 2, 3. According to the Information that Petitioner pled guilty to, the services Petitioner failed to perform involved cardiology services, which included providing on-call coverage for diagnostic procedures, interpreting electrocardiograms, attending weekly cardiology conferences, conducting a physical diagnosis course, providing office-based teaching, and completing Medicare paperwork to ensure appropriate payments were made to UMDNJ. I.G. Ex. 3, at 5-6. Despite the detailed list of medical services he was to provide as part of his agreement with UMDNJ, Petitioner testified that the only duties he agreed to perform at UMDNJ involved teaching. P. Aff. ¶¶ 8-9.

Petitioner’s argument that he was only convicted for the failure to perform teaching services in a way that is unrelated to health care services is not convincing and is inconsistent with both his guilty plea to the Information and his other testimony. Petitioner testified that UMDNJ’s hospital is “a teaching hospital” and that his position was a “part-time clinical associate professorship.” P. Aff. ¶¶ 5, 15 (emphasis added). Petitioner’s clinical teaching duties clearly involved care related to actual patients, as described in the Information. Accordingly, I find that the required nexus exists between

Petitioner's conviction for theft, embezzlement, or fraud and his failure to deliver his cardiology services to UMDNJ.<sup>4</sup>

Petitioner also argues that his guilty plea was not for embezzling from a federal health care program, for health care fraud, or for a violation of any health care statute or the anti-kickback statute. P. Br. at 4, 5; P. Aff. ¶¶ 17, 18. However, section 1320a-7(a)(3) does not require a conviction for health care fraud. *Morand*, DAB No. 2436, at 7.

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<sup>4</sup> The Information asserts that UMDNJ paid Petitioner to provide patient referrals to its hospital. I.G. Ex. 3, at 4, 6. Petitioner denies this. Petitioner states that he had a relationship with UMDNJ's hospital before becoming a Clinical Assistant Professor because he accepted fellows from UMDNJ into his practice. P. Aff. ¶ 6. Petitioner also asserts that he recommended patients to UMDNJ's hospital due to the quality of its surgeons and its "stellar reputation," and because its location made it accessible to his patients. P. Aff. ¶ 5. Petitioner further states that he decided to seek the part-time position with UMDNJ because he believed it would enhance his ability to provide the "greatest and most convenient care possible" to his patients and that UMDNJ would help Petitioner "develop a community healthcare program." P. Aff. ¶ 10. Petitioner admits that "[a]fter I entered into the program, it became apparent that the program's expectations were low, that is, a teaching schedule was never established and with the exception of one cardiologist, no one was ever scheduled to lecture or perform research." P. Aff. ¶ 12. Petitioner asserts that the only duties he agreed to perform at UMDNJ involved teaching and that his professorship did not impact his referral pattern because he already had a relationship with UMDNJ. P. Aff. ¶¶ 8-9, 11, 16. Despite his protestations, Petitioner disclosed that he agreed to pay nearly 1.5 million dollars to settle a civil law suit with the U.S Department of Justice related to this issue, noting that he did not admit liability in the law suit. P. Aff. ¶ 20; RFH at 31-43. At a minimum, Petitioner's payment of a sum equal to three times his aggregate salary as a part-time professor shows that Petitioner did not simply fail to teach some courses at an educational institution. It could also be viewed as another nexus between Petitioner's conduct and the delivery of health care services because an illegal scheme for referring patients to UMDNJ's hospital would necessarily result in UMDNJ providing such services. *Cf. James O. Boothe*, DAB CR2770, at 9 (2013) (nexus based on conviction for a fraudulent Medicaid marketing plan because submission of the plan allowed a health maintenance organization (HMO) to obtain new enrollees to bill Medicaid for items and services); *Sabina E. Acquah*, DAB CR480 (1997) (nexus based on conviction for illegally obtaining names of Medicaid beneficiaries with the intent to market an HMO to those beneficiaries and thus bill Medicaid for items and services); *ViNita R. Warren*, DAB CR423, at 6-7 (1996) (nexus based on conviction for accepting a bribe to provide names of Medicaid beneficiaries so that Medicaid HMO could obtain new enrollees and bill Medicaid for the delivery of items of services).

Petitioner further argues that the corresponding regulatory provision to section 1320a-7(a)(3) indicates that this exclusion does not apply to him because his conviction is not in connection with the direct delivery of a health care item or service. Petitioner asserts that only those persons specifically engaged in the management or administration of health care items or services are brought within the category of mandatory exclusion under section 1320a-7(a)(3). *See* 42 C.F.R. § 1001.101(c)(1). Thus, a conviction that relates only to the failure to perform teaching services, which is not the management or administration of health care services, cannot form a basis for the mandatory exclusion. P. Br. at 5. However, just because 42 C.F.R. § 1001.101(c)(1) interprets section 1320a-7(a)(3) to include “the performance of management or administrative services relating to the delivery of such items or services,” does not mean that section 1320a-7(a)(3) only applies to management or administrative services. 42 C.F.R. § 1001.101(c)(1).

***D. Petitioner must be excluded for a minimum of five years.***

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B).

***E. I do not have the authority to change the effective date of the exclusion.***

Petitioner argues that if I find a basis for his exclusion, Petitioner should be given a “credit relating to the length of the exclusion due to the suspension of his billing privileges.” P. Br. at 6. This argument arises from the fact that CMS revoked Petitioner’s Medicare billing privileges following Petitioner’s guilty plea in 2008. P. Ex. 2. Petitioner argues that “[i]t is improper and unlawful to [su]spend a physician’s billing privileges under 42 C.F.R. § 424.535(a)(3) before the actual conviction takes place. Petitioner submits that the [administrative law judge] is not without authority to correct a fundamental violation of governmental authority and a clear injustice.” P. Br. at 7. I interpret this argument as a request that I change the effective date of the exclusion so that it runs concurrently with Petitioner’s revocation of Medicare billing privileges.

The revocation of Medicare billing privileges and an exclusion from participating in all federal health care programs are separate and distinct remedial actions that HHS may take against individuals and entities. The revocation of Medicare billing privileges is a discretionary act by CMS that is limited to precluding enrolled Medicare providers and suppliers from billing Medicare for items and services provided to Medicare beneficiaries. *See* 42 C.F.R. §§ 424.505, 424.535. In contrast, exclusions are significantly broader in scope than revocations because they preclude reimbursement for furnished items or services under all federal health care programs, including state administered programs such as Medicaid. *See* 42 U.S.C. §§ 1320a-7(a), (h), 1320a-7b(f);



42 C.F.R. § 1001.2 (definition of *Exclusion*). Further, exclusions are administered by the I.G. and, depending on the facts of a given case, may be mandatory or discretionary. 42 U.S.C. § 1320a-7(a)-(b). Finally, while an individual or entity may be subject to revocation and exclusion based on the same set of circumstances, this is not always true and, even when this happens, the legal standard for imposing revocations and exclusions is usually not the same. *Compare* 42 U.S.C. § 1320a-7(a)-(b) *with* 42 C.F.R. § 424.535(a).

Although Petitioner requests that, as an administrative judge, I take action to ensure that there is no injustice related to the alleged illegal revocation of Petitioner's Medicare billing privileges, Petitioner already had the opportunity to fully litigate the revocation of his Medicare billing privileges before another administrative law judge. *See Bakul Desai, M.D.*, DAB CR1899 (2009). That administrative law judge explained that a guilty plea was sufficient under 42 C.F.R. § 424.535(a)(3) for CMS to revoke his Medicare billing privileges without the entry of a formal conviction. *Id.* at 2-3. Because Petitioner does not appear to have appealed that decision, it is binding. 42 C.F.R. § 498.74(b).

In any event, I am without authority to change the effective date of Petitioner's exclusion. The effective date for exclusion is 20 days after the date on the notice of exclusion. *See* 42 C.F.R. § 1001.2002(b); *see also* 42 U.S.C. § 1320a-7(c)(1). The statutory exceptions to this rule are not applicable to this case. *See* 42 U.S.C. § 1320a-7(c)(2)(B), (f)(2). Therefore, administrative law judges do not have the authority to alter this effective date of an exclusion required under the regulations. *See* 42 C.F.R. § 1005.4(c)(4); *Lisa Alice Gantt*, DAB No. 2065, at 2-3 (2007).

***F. Petitioner's other arguments are unavailing.***

Petitioner testified to a number of matters not previously discussed above. Petitioner asserts that it was UMDNJ, facing the loss of accreditation, that designed the contract under which he was paid \$590,000 for services he did not provide (although he believes he "did perform the minimal amount necessary to meet the contractual obligations and expectations of UMDNJ officials"). However, upon conferring with counsel, Petitioner asserts he realized that his efforts were not enough to justify his salary and thus he entered a guilty plea. Petitioner stresses his conduct did not impact the delivery of health care services in his own practice or at UMDNJ. P. Aff. ¶¶ 15, 17, 18. Petitioner states he cooperated with the government. P. Aff. ¶ 19. Petitioner asserts there is no evidence that his actions negatively impacted Medicare or any federal program and that he paid restitution via a civil settlement of \$1,478,750, including taxes and penalties, and thus the government has been made whole. P. Aff. ¶ 20. Petitioner states he has been an effective cardiologist for more than 20 years and has been involved in civic and charitable endeavors. P. Aff. ¶¶ 21-23. Petitioner asserts he has completed his federal sentence, is in compliance with all his obligations, and has accepted responsibility for not providing

“all of the bona fide services commensurate with [his] part-time professor salary.” P. Aff. ¶ 24. Petitioner asserts that due to the suspension of his Medicare provider number, he has already lost a “significant” part of his practice and has been dropped by insurance carriers and lost hospital privileges. His professional reputation and practice have been harmed and he has suffered financially. P. Aff. ¶ 25. Petitioner asserts he will not be able to practice cardiology if he is not allowed to treat Medicare patients. The four-year suspension of his Medicare billing privileges, coupled with the five-year exclusion, is the equivalent of a forcible retirement for a 61-year-old man. P. Aff. ¶ 26.

None of this testimony is relevant as to whether there is basis to impose a statutorily mandated five-year exclusion.

## **VI. Conclusion**

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

/s/

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Scott Anderson  
Administrative Law Judge