

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mark B. Kabins, M.D.,
(O.I. File Number L-10-40339-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-260

Decision No. CR2373

Date: May 23, 2011

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Mark B. Kabins, M.D., from participating in Medicare and other federally funded health care programs for a minimum of five years.

I. Background

Petitioner is a physician. The I.G. determined to exclude Petitioner, asserting that he had been convicted of a criminal offense that falls within the reach of section 1128(a)(3) of the Social Security Act (Act). That section mandates the exclusion of any individual who is convicted of a felony offense occurring after August 21, 1996, which relates to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct that is in connection with the delivery of health care item or service.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G. filed a brief and six proposed exhibits (Ex.) that are identified as I.G. Ex. 1 – I.G. Ex. 6. Petitioner filed a brief and 45 proposed exhibits that are identified as P. Ex. 1 – P. Ex. 45. The I.G. then filed a reply brief.

The parties object to my receiving certain exhibits. In addition, Petitioner asserts that he should be given a hearing in person so that I may receive his testimony and that of a witness. I rule on the parties' respective objections and Petitioner's request for an in-person hearing below.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The issues in this case are whether:

1. Petitioner was convicted of a felony that falls within the reach of section 1128(a)(3) of the Act; and
2. An exclusion of five years is mandatory in this case.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law.

1. *I receive into evidence I.G. Ex. 1 – I.G. Ex. 5, P. Ex. 1, and P. Ex. 8 – P. Ex. 12. I exclude I.G. Ex. 6, P. Ex. 2 – P. Ex. 7, and P. Ex. 13 – P. Ex. 45. I find no reason to convene an in-person hearing.*

As I mention above, the parties objected to my receiving into evidence certain exhibits. The objected-to exhibits are I.G. Ex. 6, P. Ex. 2 – P. Ex. 7, and P. Ex. 13 – P. Ex. 45. P. Brief at 34; I.G. Reply at 19. I sustain the parties' objections to these exhibits, and I exclude them from consideration. I.G. Ex. 6 is a plea agreement in a proceeding that is related to the criminal conviction of Petitioner that underlies this case. Petitioner objects to my receiving it primarily because it contains hearsay. I would overrule that objection if it were the sole basis for my not receiving the exhibit. The fact that a document contains hearsay is not a basis for excluding it. Moreover, even if the Federal Rules of Evidence were to apply to this case, the document is an official court record and would be admissible under the exception governing such documents. I find, however, that the exhibit is cumulative. I exclude it for that reason.

I exclude P. Ex. 2 – P. Ex. 7 and P. Ex. 13 – P. Ex. 45 because they are irrelevant. As I shall discuss, Petitioner seeks to enlarge the scope of this case to address issues that are beyond my authority to hear and decide and that are not germane to deciding whether Petitioner must be excluded. All of these exhibits relate to Petitioner's irrelevant arguments.

I also find no basis to convene an in-person hearing in this case. The sole basis for a hearing in person would be to receive testimony. Petitioner offers his own testimony plus that of a witness, Ms. Melodie Simon, a former patient of Petitioner, whose care by Petitioner underlies his conviction of a felony. P. Ex. 3. Petitioner avers that his proposed testimony would establish that the care he gave to Ms. Simon complied with applicable standards of care. He asserts that Ms. Simon would corroborate his own testimony and would testify additionally that Petitioner is a trustworthy provider of care.

This proposed testimony is irrelevant to the issues that I may hear and decide. Neither Petitioner's proposed testimony or that of Ms. Simon is germane to the issue of whether Petitioner was convicted of a felony that falls within the purview of section 1128(a)(3) of the Act. Rather, the proposed testimony addresses the quality of care that Petitioner rendered to Ms. Simon. P. Ex. 3. The quality of care that Petitioner provided to Ms. Simon has no relevance to the issues that I may hear and decide because it is something that is not encompassed by section 1128(a)(3). For that reason, I exclude Petitioner's and Ms. Simon's testimony, and I find no basis to convene an in-person hearing.

2. Petitioner was convicted of a felony that falls within the reach of section 1128(a)(3) of the Act.

The mandatory exclusion requirements of section 1128(a)(3) embody the following necessary elements. An individual must be convicted of a felony occurring after August 21, 1996. The felony must relate to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The felony must be in connection with the delivery of a health care item or service.

The evidence unequivocally establishes that all of these elements are present in this case.

Petitioner was convicted of a felony that occurred after August 21, 1996. Petitioner pled guilty to misprision of a felony, a felony that occurred in or about 2001, to in or about July 2002. I.G. Ex. 3 at 1; I.G. Ex. 2.

Petitioner's conviction relates to fraud. He pled guilty to failing to report or covering up a scheme to defraud one of his patients and other health care providers who were involved in that patient's care. In pleading guilty, Petitioner admitted that he knew about the crime of mail or wire fraud that had been committed by other individuals, that he concealed material information about that crime, and that he did not as soon as possible make that crime known to a judge or other person in civil or military authority in the United States. I.G. Ex. 2 at 10.

In pleading guilty, Petitioner admitted to the following facts. On August 3, 2000, Petitioner assisted another physician in performing surgery on Ms. Simon. I.G. Ex. 2 at 8. Ms. Simon developed a severe headache after the surgery, which was diagnosed as

being caused by a leak of spinal fluid. The other physician placed a catheter in Ms. Simon and then left her in Petitioner's care. *Id.* at 8-9. Ms. Simon then developed additional complications that Petitioner diagnosed as the consequence of a spinal epidural hematoma. On August 9, 2000, Petitioner operated on Ms. Simon to evacuate the hematoma. However, Ms. Simon ultimately became paraplegic. *Id.* at 9.

Ms. Simon retained an attorney, Noel Gage, to represent her in a potential malpractice suit against any physician or other health care provider whose potential negligence arguably caused her injury. Petitioner knew that medical experts could opine that he failed to comply with the applicable standard of care by delaying surgery on Ms. Simon. He also believed that experts could opine that his failure timely to remove Ms. Simon's hematoma contributed to her permanent injury. Petitioner believed that she could bring a viable lawsuit against him. I.G. Ex. 2 at 9.

Petitioner knew an individual named Howard Awand. Mr. Awand was a self-described medical consultant. He had a financial and business relationship with Petitioner through which Petitioner received patient referrals from Mr. Awand. Petitioner knew that Mr. Awand referred cases from Petitioner and other physicians to certain personal injury lawyers and that these lawyers made money in contingency fees from the referrals. Petitioner knew that these referrals could influence the personal injury lawyers' decisions about whom to sue or not to sue. I.G. Ex. 2 at 9.

Petitioner asked Mr. Awand to intercede with Mr. Gage, Ms. Simon's attorney, to persuade Mr. Gage not to sue him in connection with Petitioner's treatment of Ms. Simon. Petitioner believed that Mr. Awand would seek to influence Mr. Gage by referring personal injury cases to him. Mr. Awand agreed to approach Mr. Gage. I.G. Ex. 2 at 9-10.

During or after a meeting between Petitioner and Mr. Gage that took place in the fall of 2001, Mr. Gage told Petitioner that he had obtained an expert who would testify that Petitioner had fallen below the applicable standard of care in providing care to Ms. Simon. This revelation confirmed Petitioner's belief that Mr. Gage could bring a successful malpractice suit against him. However, Petitioner was not sued, and Petitioner believed that Mr. Gage's decision not to file suit against him was influenced by Mr. Gage's financial relationship with Mr. Awand. Petitioner believed that referrals from Mr. Awand to Mr. Gage influenced Mr. Gage's decision not to file suit against him. He also believed that this relationship between Mr. Awand and Mr. Gage created a conflict of interest for Mr. Gage that Mr. Gage concealed from Ms. Simon. I.G. Ex. 2 at 10.

Subsequently, Petitioner drafted a "Letter of Complaint" to help Mr. Gage bring a lawsuit against other health care providers who were involved in providing care to Ms. Simon. Petitioner intentionally omitted from this letter material information about his meeting with Mr. Gage and about Ms. Simon's condition as it pertained to the August 9, 2000

surgery that Petitioner had performed on her. Petitioner caused Mr. Awand to mail or fax this letter from Colorado to Mr. Gage in Nevada. The “Letter of Complaint” was an affirmative act of concealment giving rise to misprision of a felony. I.G. Ex. 2 at 10.

Petitioner’s admissions establish that fraud was the essence of his felony conviction. What Petitioner concealed and failed to report was a scheme to defraud Ms. Simon. Petitioner not only knew about that scheme and failed to report it, but he was an integral element of the scheme. Through his relationship with Mr. Awand, Petitioner helped create a conflict of interest between Ms. Simon’s attorney and Ms. Simon that induced the attorney not to file suit against Petitioner. Petitioner materially abetted the fraud perpetrated by Mr. Gage by drafting a letter that concealed or omitted material facts and that Mr. Gage could use to further his interests.

The facts also establish unequivocally that the remaining necessary element of an 1128(a)(3) offense – a felony conviction that is in connection with a health care item or service – is present. The foundation of Petitioner’s crime was the surgery he performed on Ms. Simon. There would never have been a basis for Mr. Gage to contemplate suing Petitioner had Petitioner not provided medical care to Ms. Simon. Petitioner’s care of Ms. Simon was thus an essential fact, something that had to exist for all that followed to have occurred. There is thus a direct relationship between Petitioner’s treatment of Ms. Simon and his felony conviction.

Petitioner makes numerous arguments challenging the basis for his exclusion. I find these to be without merit.

First, Petitioner contends that none of the necessary elements of his conviction relate to a health care item or service. He argues that misprision of a felony has only four necessary elements. These are that: (a) the principal committed and completed the felony alleged; (b) the defendant had full knowledge of that fact; (c) the defendant failed to notify the authorities; and (d) the defendant took an affirmative step to conceal the principal’s crime. Petitioner contends, effectively, that these four elements can be found in a vacuum without any consideration of the facts that actually motivated the principal to commit a crime, and the defendant to conceal them. In short, Petitioner asserts that I must look no further than the bare bones of his conviction to decide what his conviction consisted of.

I find this argument to be unpersuasive because it defies reality. In this case, the essential elements of Petitioner’s conviction clearly involved fraud, and that fraud just as clearly related to Petitioner’s delivery of health care items or services to Ms. Simon. One would have to put on blinders to avoid knowing those facts.

Nothing in section 1128(a)(3) suggests that the Act must be read so technically or narrowly as to ignore the facts that underlie a conviction. Indeed, the purpose of the Act

– to protect beneficiaries from untrustworthy individuals who have committed health care related crimes – would be vitiated if I were required to read it as narrowly as Petitioner suggests.

Next, Petitioner argues that there is no conceivable connection between his conviction and a health care item or service. He premises this argument on the following assertions: (1) his crime occurred in 2001 or 2002, “well after” the August 2000 surgery that he performed on Ms. Simon; (2) his conviction involved only the failure to report the crimes committed by others – Mr. Gage and Mr. Awand – thereby demonstrating that most of the facts admitted to by Petitioner are irrelevant to his conviction; (3) the crimes of Mr. Gage and Mr. Awand did not involve the delivery of health care items or services but only related to the delivery of legal services; and (4) the “crime” allegedly committed by Mr. Gage and Mr. Awand is not, in fact, a crime because it does not involve either bribes or kickbacks. Petitioner’s Brief at 11-13.

These arguments are simply not persuasive. First, there is nothing in section 1128(a)(3) that suggests that a crime loses its relationship to a health care item or service because some period of time elapses between the underlying health care item or service and the commission of the crime. Moreover, in this case, the crimes of Mr. Gage and Mr. Awand, and Petitioner’s involvement in those crimes, occurred in close temporal proximity – within some months or at most a year or two – with the surgery that triggered all subsequent events.

Second, Petitioner’s conviction did not involve “only the failure to report the crimes of others.” P. Brief at 12-13. Petitioner’s admissions make it clear that he was intimately involved in the planning and execution of those crimes. But, even if Petitioner’s conviction was predicated only on his failure to report the crimes committed by Mr. Gage and Mr. Awand, those crimes related directly to the surgery performed by Petitioner.

Third, the crimes of Mr. Gage and Mr. Awand did not involve “only the delivery of legal services.” P. Brief at 13. This argument by Petitioner is reminiscent of his contention that one may only look at the narrowest possible legal definition of misprision of a felony to decide whether the crime relates to the delivery of a health care item or service. The crimes of Mr. Gage and Mr. Awand – and of Petitioner – all had a direct relationship to the surgery that Petitioner performed on Ms. Simon. As I have stated, these crimes would not have been possible but for the fact that Petitioner performed that surgery.

Fourth, I find to be without merit Petitioner’s argument that he cannot be excluded because the facts that he failed to report are not, in fact, a crime. In effect, Petitioner now seeks to attack collaterally his conviction by contending that he is not really guilty of any criminal offense. This is not the forum for that attack. I have no authority to vacate Petitioner’s conviction nor may I conclude that there is no basis to exclude him on the ground that he is not really guilty of a crime. The meaning of the Act is plain. It applies

whenever an individual is *convicted* of an offense that falls within its reach. If that conviction is voided through an appeal or other legal process, then the Act no longer applies to it. But, failing that, I may not look behind a conviction to determine whether the excluded party is lawfully convicted.

Petitioner then argues that the health care services that he provided to Ms. Simon are too remotely connected to his conviction to satisfy the “in connection with” test of section 1128(a)(3). Petitioner asserts (without citing any authority for his contention) that the statutory term “in connection with”:

asks both whether there was a close chronological connection with the delivery of health care services and whether the criminal conduct was likely to have in any fashion affected the quality or availability of delivered health care or its reimbursement.

Petitioner’s Brief at 15. The Act says nothing of the kind. The language of section 1128(a)(3) is drafted broadly, and it must be applied broadly absent some qualifying language in the Act or some other expression of Congressional intent that the Act be limited in its reach. Petitioner has pointed to nothing that suggests that the Act must be read so narrowly as he contends.

Here, the nexus between health care items or services and Petitioner’s conviction is evident. There is a clear and easy to comprehend relationship between the health care items and services that Petitioner provided to Ms. Simon and his subsequent crime. There never would have been a scheme involving Petitioner to defraud Ms. Simon or to conceal that fraud had Petitioner not provided medical care to her. What is plain from Petitioner’s admission of fact is that he was acutely aware of the possibility that he might be sued for malpractice related directly to his surgery and that he worked diligently and unlawfully to deflect a possible suit.

Petitioner cites *Andrew Anello*, DAB No. 1803 (2001), alleging that this decision, in which an exclusion based on misprision of a felony was upheld, is clearly distinguishable from the present case. Petitioner in *Anello* was convicted of misprision of a felony consisting of failing to report and concealing a fraud against the Medicare program perpetrated by another individual. Petitioner argues that the valid distinction between *Anello* and this case is that, in *Anello*, the crime that was concealed consisted of fraud that targeted Medicare directly, whereas, in this case, Medicare is not implicated as a direct target of Petitioner’s crime or of the crimes of Mr. Gage and Mr. Awand. He concludes from that asserted distinction that he may not be excluded because his crime – as opposed to the crime in *Anello* – neither targeted Medicare nor had an adverse impact on that program.

The difference between *Anello* and this case is not a meaningful distinction. The exclusion imposed in *Anello* was pursuant to section 1128(a)(1) of the Act and not section 1128(a)(3). Section 1128(a)(1) mandates exclusions for crimes related to Medicare or other federally funded health care programs. Here, the exclusion is for fraud that is committed in connection with a health care item or service. A nexus to a federally funded health care program is not a necessary element of an exclusion that is imposed pursuant to section 1128(a)(3).

Petitioner then asserts that the I.G. makes the untenable argument that Petitioner's crime was committed in connection with the delivery of a health care item or service because he agreed to pay substantial restitution as part of his plea agreement. I do not agree with Petitioner that the I.G.'s case hinges on Petitioner's payment of restitution. His conviction meets the statutory criteria for inclusion under section 1128(a)(3) without considering any restitution that he may have agreed to pay. Therefore, I find it unnecessary to address this aspect of Petitioner's arguments in detail.

Next, Petitioner contends that the care that he gave to Ms. Simon was, in fact, within the applicable standard of medical care and he that committed no malpractice. Petitioner's Brief at 19. Petitioner argues further that Ms. Simon is prepared to testify on his behalf and to support his contention that he did her no harm. This argument is irrelevant. Petitioner's conviction is not based on his providing substandard care to Ms. Simon but on his failure to report a scheme to defraud her and concealing that scheme. As I have stated, Ms. Simon's opinion about the care that Petitioner gave to her is irrelevant to the issues that I must hear and decide.

Petitioner then argues that the I.G. is now applying section 1128(a)(3) to him in a way that is inconsistent with the I.G.'s applications of this section in other cases. To support this contention, Petitioner cites to various instances in which he claims that the I.G. failed to exclude individuals who were convicted of misprision of a felony in circumstances that are comparable to those of Petitioner's case. Petitioner's Brief at 22-25.

I have no authority to address this argument, because, rather than challenging the basis for the I.G.'s exclusion of Petitioner, it addresses the I.G.'s evaluation of facts in other cases and his determinations whether to exclude or not to exclude in those cases. The I.G.'s analyses in cases other than this one are discretionary acts, which I have no authority to address. 42 C.F.R. § 1005.4(c)(5). My authority is limited to deciding whether the facts of this case establish a basis for an exclusion pursuant to section 1128(a)(3). As I have discussed, the facts of *this case* clearly establish grounds for excluding Petitioner.

Petitioner contends that his crime did not involve the essential element of fraud. Thus, according to Petitioner, he may not be excluded even if his crime was committed in connection with the delivery of a health care item or service. In advancing this argument,

Petitioner first asserts the identical contention that he makes on the question of whether his crime was in connection with the delivery of a health care item or service. He contends that the elements of the crime of misprision of a felony do not involve fraud. Thus, according to Petitioner, it would be improper to look behind the four corners of his conviction to find that his crime related to fraud. Petitioner's Brief at 27-29.

The problem with this argument is that Petitioner's conviction plainly involved fraud. Indeed, the essence of Petitioner's crime was to conceal a fraud that was being perpetrated against Ms. Simon by her attorney and Mr. Awand. Petitioner's misprision of a felony was a criminal act that abetted and furthered the fraud.

Petitioner then argues that his crime did not involve any financial misconduct. He asserts that he was only convicted of failing to report the fraud of other individuals and not of perpetrating financial fraud against Ms. Simon.

Petitioner's crime certainly involved financial misconduct. The intent of the scheme to defraud Ms. Simon was to deprive her of the opportunity to obtain financial relief through a malpractice action against Petitioner. However, it is not strictly speaking necessary that I decide that Petitioner's crime constituted financial misconduct. Financial misconduct is just one of the crimes that are a basis for an exclusion pursuant to section 1128(a)(3). Fraud is, in and of itself, a basis for exclusion, and Petitioner was convicted of a crime that related to criminal fraud.

Next, Petitioner argues that he did not commit fraud because his acts did not include withholding material information from Ms. Simons. Petitioner's Brief at 30. But, that is not the test for deciding whether Petitioner was convicted of a crime relating to fraud. Petitioner pleaded guilty to knowing about the wire fraud committed by other individuals, to concealing material information about that fraud, and to not bringing the fraud to the attention of a person in authority. I.G. Ex. 2 at 10. That is more than enough to establish that Petitioner was convicted of a crime relating to fraud.

Petitioner argues that the fraud of others (Mr. Gage and Mr. Awand) cannot be a basis for excluding Petitioner because he did not commit fraud directly. Petitioner's Brief at 31. I do not agree with Petitioner's contention that he did not participate in fraudulent activity. He admitted to drafting a letter that concealed facts relevant to his performance as a physician. Moreover, section 1128(a)(3) does not require that an individual commit fraud to be excludable. It requires only that the individual be convicted of a crime relating to fraud. Here, Petitioner effectively abetted the fraud of others by failing to report what he knew. That is enough to satisfy the statutory test.

Petitioner argues that he is a competent and trustworthy professional who does not merit exclusion. Petitioner's Brief at 34-36. Many of the exhibits that Petitioner offers address that assertion. However, the argument is irrelevant. As a matter of law, an individual

