Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Howard Morris Weiss
(O.I. File Number H-11-42449-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health and Human Services,
Respondent.

Docket No. C-13-141

Decision No. CR2769

Date: April 26, 2013

DECISION

Petitioner, Howard Morris Weiss, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective October 18, 2012. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a- 7(c)(3)(B)).

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated September 28, 2012, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

1128(a)(1) of the Act. The basis cited for Petitioner's exclusion was his conviction in the Superior Court of California for Los Angeles County of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing (RFH) on November 20, 2012. The case was assigned to me for hearing and decision on November 26, 2012. On December 12, 2012, I convened a prehearing conference by telephone, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on the same date. During the prehearing conference, Petitioner did not waive an oral hearing. The I.G. requested to file a motion for summary judgment prior to further development of the case for hearing and I set a briefing schedule.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on January 10, 2013, with I.G. exhibits (I.G. Exs.) 1 through 15. Petitioner e-filed a response in opposition to the I.G. motion (P. Response) on February 12, 2013, with Petitioner's exhibits (P. Exs.) 1 through 6. The I.G. filed its reply brief (I.G. Reply) on February 26, 2013. I.G. Exs. 1 through 3 and 6 through 15, and P. Exs. 1through 6 are admitted and considered as evidence for purposes of summary judgment.

On February 12, 2013, Petitioner filed objections (P. Objections) to I.G. Exs. 4 and 5, citing 42 C.F.R. § 1005.17(c) and arguing, inter alia, that the exhibits are not relevant, are more prejudicial than probative, may confuse the issues, may result in undue delay, or may be cumulative. The I.G filed a response on February 26, 2013, arguing that both exhibits should be admitted. I sustain Petitioner's objection to I.G. Ex. 4. I.G. Ex. 4 is a document signed by Thomas Donohue, Special Agent for the California Department of Justice Bureau of Medi-Cal Fraud and Elder Abuse, titled "Declaration Made Pursuant to section 2015.5 C.C.P. In Support Of And Issuance Of Arrest Warrant" purportedly related to Petitioner's criminal prosecution. I first note that the purported declaration does not satisfy the requirements of 28 U.S.C. § 1746, which prescribes the format and attestation for unsworn declarations, certificates, verifications, or statements to be used in any proceeding under laws of the United States. Furthermore, it is clear from the face of the document that it was offered to the criminal court to show that there was probable cause to believe that Petitioner and others committed the offenses alleged in the Felony Complaint for Arrest Warrant (I.G. Ex. 3) (Felony Complaint). The I.G. has not shown that the specific allegations of the declaration were proven by at least a preponderance of the evidence or that Petitioner admitted to any of the allegations during the underlying criminal proceedings as part of the plea inquiry or the plea agreement. Thus, the I.G. has not shown that the allegations in the declaration are relevant to my consideration of the I.G.'s motion for summary judgment. Although the Federal Rules of Evidence do not apply in this proceeding, it is a fundamental rule of evidence that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced **sufficient** to support a finding that the fact does exist." Fed. R. Evid. 104(b) (emphasis added).

Accordingly, out of an abundance of caution, I.G. Ex. 4 is not admitted into the record or considered as evidence for purposes of summary judgment. 42 C.F.R. § 1005.17(c), (d).

Petitioner's objection to I.G. Ex. 5 is sustained in part and overruled in part. I.G. Ex. 5 is a declaration of Vincent N. Bonotto, Deputy Attorney General (DAG) at the Bureau of Medi-Cal Fraud and Elder Abuse, the prosecutor in Petitioner's underlying criminal case. While the declaration constitutes hearsay, that fact alone does not preclude its admission in this proceeding. 42 C.F.R. § 1005.17(b). Petitioner does not dispute the authenticity of the document or that the prosecutor has sufficient knowledge about the matters asserted in the declaration. The prosecutor has sufficient knowledge of the criminal proceedings to make the factual assertions he does regarding the procedural history of the case. The allegations of the declaration that I am admitting as evidence are consistent with court records that are admitted without objection by Petitioner and the allegations are not denied by Petitioner. The declaration, therefore, is reliable and relevant. Contrary to Petitioner's arguments, the declaration does not contain evidence regarding plea negotiations that might be subject to exclusion pursuant to 42 C.F.R. § 1005.17(f). P. Objections at 3. Rather, the prosecutor simply relates the procedural history of the criminal case, and that is the purpose for which it is admitted and considered on summary judgment. I do not accept the assertion in paragraph 6 of I.G. Ex. 6 that Petitioner's guilty plea in the criminal court was based upon the facts alleged in I.G. Ex. 4, as the evidence before me on summary judgment does not support that assertion. I also do not accept the legal opinion of the prosecutor regarding Petitioner's conviction and its nexus to Medi-Cal. Specifically, the prosecutor states that Petitioner's guilty plea "directly resulted from offenses **related to** Medi-Cal, a Federal health care program." I.G. Ex. 13 at ¶ 7 (emphasis added). Whether Petitioner's conviction was "related to" the delivery of a health care item or service under Medicare or a state health care program is an issue I must resolve in deciding this case and the prosecutor's opinion is not considered. Accordingly, I.G. Ex. 5 is admitted and considered for purposes of summary judgment but paragraphs 6 and 7 are stricken.

II. Discussion

A. Applicable Law

The Act provides, in relevant part:

> (a) Mandatory Exclusion. -- The Secretary [of HHS] shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) Conviction of program-related crimes. -- Any individual or entity that has been convicted of a criminal offense related

> to the delivery of an item or service under [Medicare] or under any State health care program.

Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)). The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a).

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner the right to a hearing before an administrative law judge (ALJ) and judicial review of the final action of the Secretary.

The standard of proof in a hearing before an ALJ is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner may not collaterally attack the conviction that provides the basis for the exclusion. *Id.* § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. *Id.* § 1005.15(b).

B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). Whether the length of exclusion is unreasonable is not an issue in this case, as the five-year exclusion period imposed is the minimum period specified by Congress and the Secretary. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

Petitioner filed his request for hearing within 60 days of the date the I.G. notified Petitioner of the exclusion. I.G. Ex. 1, at 1; RFH at 1. Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. 42 C.F.R. §§ 1001.2007, 1005.2(c). I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1001.2007, 1005.2, 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There is no genuine dispute as to any fact material to a determination of this case and, therefore, summary judgment is appropriate. The undisputed material facts, as discussed in more detail hereafter, are that: Petitioner pled guilty to one count of grand theft of funds from the California Health Care Deposit Fund (I.G. Ex. 3 at 2), the funding source of Medi-Cal (Cal.Welf. & Inst. Code § 14157); Petitioner's guilty plea was accepted (I.G. Ex. 2 at 4) resulting in a conviction within the meaning of section 1128(i) of the Act; and Petitioner paid restitution to the California Health Care Deposit Fund. Petitioner conceded that he was convicted within the meaning of section 1128(i) of the Act. P. Br. at 4-6; RFH. Petitioner argues that summary judgment is not appropriate because his conviction is not program-related as a matter of law and because there are material facts in dispute related to whether his conviction is program related. The issue that Petitioner raises, i.e., whether the undisputed facts establish the required nexus between his conviction and Medi-Cal, is an issue of law that must be resolved against him. Furthermore, the undisputed material facts satisfy the elements of section 1128(a)(1) of the Act -- the facts establish that Petitioner was convicted and that there is a nexus between Petitioner's conviction and Medi-Cal, which is the California Medicaid program. The five-year period of exclusion is fixed by law and there are no material issues related to the reasonableness of that period. Accordingly, summary judgment is appropriate.

3. The offenses to which Petitioner pled guilty; for which the pleas of guilty were accepted; and, therefore, of which Petitioner was convicted were related to the delivery of an item or service under Medicare or a state health care program.

The I.G. cites section 1128(a)(l) of the Act as the basis for Petitioner's mandatory exclusion. The statute, the text of which is set forth above, requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; and (2) the offense is related to the delivery of an item or service under Medicare or a state health care program.

a. Undisputed Facts

Petitioner's rendition of the material facts in his opposition to the motion for summary judgment is consistent with the evidence. On March 1, 2010, Petitioner appeared with counsel in the Superior Court of the State of California, County of Los Angeles, and pled guilty to Count 1 of a criminal complaint that alleged a felony offense of grand theft. I.G. Ex. 2 at 5; I.G. Ex. 6 at 2, 4; P. Ex. 1; P. Br. at 4. Petitioner's counsel stipulated that there was a factual basis for the guilty plea but none of the facts were actually stated on the record. I.G. Ex. 6 at 4. The transcript of the proceeding shows that the plea was entered pursuant to a plea agreement, apparently only an oral agreement, one term of which required that Petitioner pay restitution. I.G. Ex. 6 at 3. The transcript also reflects that Petitioner agreed to a "*Harvey* waiver"[2] which under California law permits the imposition of restitution for both the charges for which one is convicted and those related charges for which one is not convicted. I.G. Ex. 6 at 5. Count 1 of the felony compliant of which Petitioner was convicted on March 1, 2010 pursuant to his guilty plea alleged grand theft as follows:

> From on or about May 1, 2003, through June 6, 2008, in the County of Los Angeles, State of California, defendants [including Petitioner], unlawfully took from the State of California (Health Care Deposit Fund) property of a value in excess of four hundred dollars ($400), in violation of section 487 of the Penal Code, a felony.

I.G. Ex. 3 at 2. Count 1 also alleged three special allegations that have no impact on this decision and so need not be set forth in detail. The criminal court judge accepted Petitioner's guilty plea; entered a judgment of guilty; and ordered Petitioner to return for sentencing on March 1, 2011. I.G. Ex. 2 at 4-5; I.G. Ex. 6 at 4-5.

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[2] The *Harvey* waiver, as discussed in more detail hereafter, is based upon a California statute that addresses the decision in *People v. Harvey*, 25 Cal. 3d 754 (1979).

Petitioner gave the State of California three checks totaling $450,000, each payable to the California Health Care Deposit fund as directed by DAG Bonotto. I.G. Ex. 7 at 2; I.G. Exs. 9-11; P. Ex. 1; P. Br. at 4-5. The sentencing hearing was delayed to March 11, 2011. I.G. Ex. 2 at 5. At the sentencing hearing, Petitioner pled guilty to a newly added charge of misdemeanor trespass; he was permitted to withdraw his prior plea of guilty to Count 1; and all the original counts of the criminal complaint were dismissed. The court records state under "Court Orders and Findings" that Petitioner was to make restitution of $450,000 to the victims, the "Department of Justice, Healthcare Deposit Fund, and the Franchise Tax Board." I.G. Ex. 2 at 5-7; I.G. Ex. 7.

Petitioner offered other evidence that also shows that there is no dispute as to the material facts. Petitioner offered a declaration from his attorney in the criminal case, Benjamin Gluck, who relates that Petitioner strongly contested the validity of the charges. P. Ex. 1. However, Petitioner entered a plea agreement under which Petitioner promised to pay $450,000 to the State of California over two years, to plead guilty to Count 1 of the criminal complaint, and to plead guilty to a charge of either misdemeanor trespass or failure to file a tax return at his sentencing hearing. The government promised in the plea agreement to permit Petitioner to withdraw his guilty plea to Count 1 at sentencing and to dismiss the original charge in the complaint when Petitioner's plea of guilty to the misdemeanor was accepted. Mr. Gluck asserts that Petitioner pled guilty to Count 1 without making any admissions relating to the allegations upon which the charge was based. P. Ex. 1.[3] I accept Mr. Gluck's assertions for purposes of summary judgment except that the assertion that Petitioner made no admissions when pleading guilty to Count 1 is inconsistent with Petitioner's counsel's stipulation in court that there was a factual basis for the guilty plea to Count 1. I.G. Ex. 6 at 4. Mr. Gluck recognized the apparent inconsistency and acknowledged that the parties stipulated that there was a factual basis for both Petitioner's guilty pleas. He asserts, however, that no one articulated the facts on the record, and that in California state courts, one can stipulate to a factual basis as a legal matter even when no such facts exist. P. Ex. 1. While Mr. Gluck's sworn assertion that in California one can stipulate to nonexistent facts raises an interesting issue, I need not determine whether the assertion is either credible or correct. The undisputed facts before me are that Petitioner pled guilty to Count 1 of the criminal complaint and stipulated that there was a factual basis for the plea. Whether or not Petitioner and his counsel falsely stated that there was a factual basis for the guilty plea to Count 1, is not an issue that I may resolve. I have no authority to review the state court criminal conviction and Petitioner cannot collaterally attack or retry his conviction before

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[3] P.Ex. 2 is a letter Mr. Gluck sent to the I.G. in the case of Petitioner's former business associate who was also the subject of the same charges and also pled guilty to Count 1 of the criminal complaint. Mr. Gluck's assertions in the letter are similar in the essentials to those of his declaration admitted at P. Ex. 1.

me on either substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). In this forum, Petitioner is bound by his statements and admissions during the criminal proceeding. I do not accept half-truths, untruths, and misrepresentations. Mr. Gluck states, and I accept for purposes of summary judgment, that Petitioner was not ordered to pay money to the Medi-Cal program, rather the plea agreement provided that Petitioner and the other individual who was also being prosecuted would pay $450,000 as directed by the California Department of Justice, and it was the Deputy Attorney General who specified that Petitioner make his checks payable to the California Health Care Deposit Fund. P. Ex. 1 at 2.

Petitioner also provided me a July 16, 2012 letter to the I.G. from DAG Bonotto, who prosecuted the case against Petitioner and his former business associate as well as three companies. P. Ex. 3. DAG Bonotto states that Petitioner and the others were subject to investigation for Medi-Cal fraud related to durable medical equipment. They were subsequently charged by a criminal complaint with Medi-Cal fraud and separate tax charges for under-reporting income. He states that there was serious dispute about the fraud charges and whether the conduct at issue actually violated Medi-Cal regulations.[4] Petitioner and the state entered a plea agreement, i.e., settlement. DAG Bonotto states that the plea agreement was reached without resolution of the fraud issue. DAG Bonotto states that it was agreed that Petitioner and the other defendants would pay restitution to the Medi-Cal program and the California Franchise Tax Board and they would ultimately be convicted of a misdemeanor charge. Petitioner elected the misdemeanor offense of trespass in violation of California Penal Code § 602(o). DAG Bonotto states that the settlement was without admission of guilt by Petitioner regarding the Medi-Cal fraud allegations. He also states that it was not intended or contemplated by the parties that the disposition would result in mandatory exclusion by the I.G. P. Ex. 3. DAG Bonotto's letter is consistent with the other evidence of the undisputed facts. Whether or not it was contemplated or intended that the criminal disposition by the State of California would result in Petitioner's mandatory exclusion is not relevant. The Secretary and the I.G. were not parties to the plea negotiations and there is no argument that they should be bound by the terms of the plea agreement. Moreover, Congress mandated that the Secretary implement and enforce section 1128 or the Act and the fact that the parties failed to consider all possible impacts of their plea negotiations is neither surprising nor persuasive that Petitioner should avoid the effect of exclusion as mandated by Congress.

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[4] Whether or not DAG Bonotto could have proven the charges beyond a reasonable doubt does not affect my decision in this case.

b. Analysis

Petitioner entered guilty pleas to two different offenses, grand theft from Medi-Cal and misdemeanor trespass. His guilty pleas to both the felony and the misdemeanor were accepted. Pursuant to section 1128(i) of the Act, one is convicted for purposes of exclusion when a plea of guilty has been accepted by a federal, state, or a local court. Petitioner concedes that he has a conviction within the meaning of the Act and that the five-year period is the mandatory minimum. P. Br. at 4-6.

Petitioner opposes summary judgment and his exclusion on grounds that his convictions were not program related as a matter of law and there are material facts in dispute as to the nexus between the convictions and Medi-Cal. It is not disputed by Petitioner that on March 1, 2010 he pled guilty to Count 1 of the criminal complaint that alleged grand theft from Medi-Cal. His plea was accepted and, therefore, he was convicted of the offense of grand theft from Medi-Cal. The conviction of grand theft from Medi-Cal adequately establishes that Petitioner was convicted of a program related offense. Accordingly, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act for the minimum period of five years. Although the conviction of grand theft from Medi-Cal provides the basis for exclusion, I proceed to analyze Petitioner's misdemeanor conviction of trespass.

Analysis of Petitioner's conviction of misdemeanor trespass shows that that conviction also has a sufficient nexus to the delivery of an item or service under Medi-Cal to be a basis for exclusion pursuant to section 1128(a)(1). The crime of misdemeanor trespass, unlike the crime of grand theft from Medi-Cal, was not on its face a crime related to the delivery of a health care item or service under Medicare or a state health care program.[5]

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[5] The misdemeanor offense to which Petitioner pled guilty was a violation of Cal. Penal Code § 602(o), which provides that any person who willfully commits a trespass by any of the acts described in the section is guilty of a misdemeanor. Section 602 (o) provides the following description :

> (o) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession. The owner, the owner's agent,

(Footnote continued next page.)

However, the Board has long held that the statutory terms of an offense do not control whether that offense is "related to" the delivery of a health care item or service under Medicare or a state health care program for purposes of an exclusion pursuant to section 1128(a)(1) of the Act. *See, e.g.*, *Dewayne Franzen*, DAB No. 1165 (1990) (inquiry is whether conviction is related to Medicaid fraud, not whether the petitioner was convicted of Medicaid fraud). Rather, an ALJ must examine whether there is a "common sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043, at 5-6 (2006) (citations omitted). To determine whether there is such a nexus or common-sense connection, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Id.* at 6-7. An ALJ may also use extrinsic evidence to "[fill] in the

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(Footnote continued.)

> or the person in lawful possession shall make a separate request to the peace officer on each occasion when the peace officer's assistance in dealing with a trespass is requested. However, a single request for a peace officer's assistance may be made to cover a limited period of time not to exceed 30 days and identified by specific dates, during which there is a fire hazard or the owner, owner's agent, or person in lawful possession is absent from the premises or property. In addition, a single request for a peace officer's assistance may be made for a period not to exceed six months when the premises or property is closed to the public and posted as being closed. However, this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 (Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code) or by the National Labor Relations Act. For purposes of this section, land, real property, or structures owned or operated by any housing authority for tenants as defined under Section 34213.5 of the Health and Safety Code constitutes property not open to the general public; however, this subdivision shall not apply to persons on the premises who are engaging in activities protected by the California or United States Constitution, or to persons who are on the premises at the request of a resident or management and who are not loitering or otherwise suspected of violating or actually violating any law or ordinance.

circumstances surrounding the events which formed the basis for the offense of which Petitioner was convicted." *Narendra M. Patel, M.D.*, DAB No. 1736, at 7 (2000).

Petitioner cites *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994) in support of an argument that it is improper for an ALJ to look to the circumstances surrounding a conviction to determine whether a conviction is program related. P. Br. at 6-7. Petitioner misreads *Travers*, which focused on whether an individual had been "convicted" for purposes of a mandatory exclusion, and whether there was a need for the I.G. to conduct an evidentiary hearing to relitigate the facts underlying the state court conviction. *Id.* at 996-98. The appellate panel that decided *Travers* discussed the mandatory nature of certain exclusions, stating that the I.G. may not "delve into the facts surrounding the conviction" once he determines that a program-related "conviction" actually exists because there is no fact-finding in that determination. *Id.* at 999; *see also Travers v. Sullivan*, 801 F.Supp. 394, 403 (E.D. Wash. 1992). In short, the *Travers* panel recognized that Congress did not intend that an exclusion proceeding under section 1128(a) of the Act be an opportunity for an excluded individual or entity to collaterally attack an underlying conviction for which exclusion is required. The *Travers* panel did not suggest that it is inappropriate for the I.G., an ALJ, or the Board, to consider all the circumstances related to the charges and underlying state court proceedings to determine whether an offense of which one was convicted is actually program related. As the Board previously recognized, it is necessary to look at the underlying state proceedings to "[fill] in the circumstances" surrounding the conviction and, therefore, to avoid applying the I.G.'s exclusion authority too narrowly. *Patel*, DAB No. 1736, at 7; *see Kenneth M. Behr*, DAB No. 1997, at 7 (2005) (addressing Congress's "intent that the mandatory exclusion authority be used broadly to protect the integrity of covered programs").

Petitioner's reliance upon a recent district court case, *Kabins v. Sebelius*, 2012 WL 4498295 (D. Nev., Sept. 28, 2012), is also misplaced. Petitioner cites *Kabins* for the proposition that the phrase found in various subsections of section 1128(a) of the Act – "in connection with the delivery of health care" – limits the Secretary's authority to exclude to offenses involving the delivery of health care, not health care previously delivered. As I understand Petitioner's argument, *Kabins* establishes a rule that exclusion may not be premised on an offense remotely related to the delivery of health care but may only be for an offense directly related to the delivery of health care. Neither the judge in *Kabins* nor Petitioner explains the source of this limitation on the Secretary's authority other than a nonspecific reference to the statute's fundamental purpose. Neither explains how the perceived limitation on the Secretary's authority to exclude is consistent with the overarching Congressional intent that exclusion be used to protect the integrity of the programs. It is important to recognize that the *Kabins* case was decided by an unpublished order granting the motion of the plaintiff, Mark B. Kabins, M.D., for summary judgment. The district court judge vacated the decision of the Secretary that Dr. Kabins was excluded from participating in Medicare pursuant to section 1128(a)(3) of the Act. The district judge in the *Kabins* case rejected the Secretary's arguments that

her decision was entitled to deference. The district judge criticized the "nexus test" that has been followed in exclusion cases for years, commenting that it may permit selective enforcement and arbitrary results. In *Travers*, the Ninth Circuit recognized that the Secretary's decision that an individual's criminal conviction was a program related offense is subject to review using the substantial evidence test rather than de novo review. *Travers*, 20 F.3d at 998. However, the district judge in *Kabins* did not apply the substantial evidence test but analyzed the case looking for the nexus between Dr. Kabins' conviction and the delivery of a health care item or service. The district judge concluded that Dr. Kabins' offense was not one of those listed in section 1128(a)(3) that triggered mandatory exclusion and that the offense was not program related. The unpublished order that disposed of the *Kabins* case has doubtful precedential effect beyond that specific case even in the district or circuit court where issued and the disposition should be viewed as being limited to the facts of that case, particularly as it appears to be inconsistent with the prior Ninth Circuit opinion in *Travers*. The district judge's analysis is not persuasive in this case.

Petitioner also argues that Congress intended that the Secretary's authority to exclude be limited to a category or class or crimes that include an element related to the delivery of items or services under Medicare or Medicaid. Petitioner asserts that Congress did not intend for the Secretary's exclusion authority to encompass a broader group of crimes without a specific element of relatedness but that are considered related based upon review of facts surrounding the crime, i.e., the nexus test the Board has adopted. P. Br. at 10-12. Petitioner cites no legislative history in support of his interpretation of Congressional intent. Rather, Petitioner argues that both federal and state laws include a class of crimes related to items and services delivered under Medicare and Medicaid and cites that fact as evidence that Congress intended that exclusions be limited to convictions for those crimes. Petitioner also relies upon his erroneous interpretation of the decision in *Travers* to argue that the Ninth Circuit found it improper for the Secretary to consider the facts and circumstances of an offense to determine whether or not it is program related. Petitioner also asserts that the district court's concern expressed in *Kabins* that the Secretary's nexus test poses a risk for arbitrary decision-making is well-founded because exclusions were not imposed in an unrelated case involving pharmaceutical companies. P. Br. at 11; P. Exs. 4-5. Petitioner's arguments are not persuasive. One need look no further than the plain language of section 1128(i) of the Act to determine that Congress intended to grant the Secretary broad, though not unfettered, discretion to ensure that individuals not avoid exclusion through skillful plea negotiations. In section 1128(i), Congress adopted a broad definition of the term "conviction" that includes a judgment of conviction whether or not on appeal or expunged; a finding of guilt; an accepted plea of guilty or no contest; or a deferred adjudication or other arrangement by which a judgment of conviction has been withheld. Act § 1128(i)(1)-(4). The broad definition of conviction adopted by Congress is consistent with the Congressional goal of protecting the programs from those who Congress intended that the Secretary exclude. Considering the circumstances or facts

underlying a conviction to determine whether or not there is a nexus to the delivery of an item or service under Medicare or Medicaid is also consistent with the Congressional purpose of protecting the programs by ensuring that those who should be excluded do not avoid exclusion by skillful plea negotiations.

Petitioner argues that even if section 1128(a)(1) of the Act applies, summary judgment will not lie in this case because there are disputes as to material facts and the I.G. does not show by a preponderance of the evidence that either offense of which Petitioner was convicted was program related. Petitioner asserts that material facts at issue include: whether the plea agreement resolved Petitioner's liability for the Medi-Cal fraud charges; the relationship between the initial allegations of the criminal complaint and Petitioner's guilty pleas; and whether Petitioner was required to pay restitution to Medi-Cal. P. Br. at 11-17.

Whether or not the plea agreement resolved Petitioner's liability for the Medi-Cal fraud charges is not a material fact that affects my decision in this case. Material facts are that Petitioner pled guilty to Count 1 of the criminal complaint which alleged the offense of grand theft from Medi-Cal, the guilty plea was accepted by the criminal court and, therefore, as a matter of law Petitioner was convicted of the offense within the meaning of section 1128(i) of the Act. It is not necessary for me to decide whether Petitioner's plea agreement had the intended effect, though I note that the evidence shows that on March 11, 2011, the original charges were all dismissed after the court was assured that Petitioner made his last restitution payment. I.G. Ex. 7 at 2-3; I.G. Ex. 2 at 5-7.

Whether Petitioner was required to pay restitution to Medi-Cal is also not a material fact in dispute. The undisputed facts show that Petitioner made payments, which at least in part, went to the California Health Care Deposit Fund, which is indisputably Medi-Cal. No written plea agreement is in evidence, but the written statements from both Petitioner's criminal defense attorney and DAG Bonotto show that restitution was to be paid to the State of California and DAG Bonotto directed that restitution be paid to the California Health Care Deposit Fund. P. Exs. 1 and 3. Court documents show that the criminal court listed as "Orders and Findings" on March 11, 2011, that Petitioner and his co-defendant were to make restitution to the victim and one of the listed victims is the "Healthcare Deposit Fund." I.G. Ex. 2 at 5-7. The undisputed facts thus show that Petitioner paid restitution to Medi-Cal, which is some evidence that there is a nexus between the offenses of which Petitioner was convicted and Medi-Cal. The only reasonable conclusion based on Petitioner's payment to the California Health Care Fund as part of the negotiated plea agreement, which also resulted in the dismissal of charges alleging fraud against the Medi-Cal program, is that the offenses to which Petitioner agreed to plead guilty were related to the charges alleging that Petitioner's conduct resulted in a loss to the Medi-Cal program. Petitioner need not admit to defrauding or stealing from Medi-Cal in order for his conviction to be "related to" the delivery of an item or service under the Medi-Cal program. Rather, his agreement to, among other

things, pay the California Health Care Fund in exchange for the dismissal of certain charges alleging Medi-Cal fraud is enough to support a finding of a nexus between the conduct underlying his conviction and the delivery of an item or service under the Medi-Cal program.

The relationship between the initial allegations of the criminal complaint and Petitioner's guilty plea to Count 1 of the criminal complaint is, in reality, undisputed. As already discussed Petitioner pled guilty to Count 1, the plea was accepted, and he was convicted. There is no dispute that Count 1 alleged grand theft from Medi-Cal and there is no dispute that counsel stipulated in open court that there was a factual basis for the plea. Although counsel now argues that there was no factual basis for the plea, it is not for me to review the criminal conviction and Petitioner cannot relitigate that matter before me. The conviction of misdemeanor trespass also has the required nexus to Medi-Cal based on the following undisputed facts: Petitioner's conviction for misdemeanor trespass was the result of a plea agreement that resulted in dismissal of a charge of grand theft from Medi-Cal and Medi-Cal fraud; Petitioner was originally convicted of grand theft from Medi-Cal; and Petitioner paid restitution that was directed, at least in part, to Medi-Cal; and he acknowledged during the plea hearing on March 1, 2010 that he was responsible for restitution on all charges of the criminal complaint even though he only pled guilty to grand theft from Medi-Cal.

Additionally, Petitioner does not dispute that he knowingly and voluntarily entered a *Harvey* waiver during the plea hearing on March 1, 2010, and acknowledged to the court that he was responsible for restitution on all counts of the criminal complaint. I.G. Ex. 6, at 5. In *Harvey*, the trial court accepted the defendant's guilty plea to two counts of armed robbery, dismissed a remaining third count that involved a separate armed robbery, and increased the defendant's sentence based on facts related to the dismissed count. *Harvey*, 25 Cal. 3d. at 757. On appeal, the California Supreme Court determined that "it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing defendant's sentence." *Id.* at 759. The court explained that "[i]mplicit in . . . a plea bargain [such as the defendant's] . . . is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." *Id.*

The California Penal Code has since been amended to reflect the decision in *Harvey*, stating:

> (a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense . . . which public offense did not result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses arising from the same or related course

> of conduct by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court.
>
> (b) If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to People v. Harvey (1979) 25 Cal. 3d 754 from the defendant as to the dismissed count.

Cal. Penal Code § 1192.3. In cases where a *Harvey* waiver is necessary, the charge to which the defendant pleads guilty may not have caused damage that would permit that restitution be ordered. However, a court may order restitution based on damages resulting from a dismissed charge, so long as the dismissed charge arises "from the same or related course of conduct by the defendant" as the charge to which he pled guilty. *Id.* The court, therefore, must obtain a *Harvey* waiver in order to permit a valid restitution order based on the dismissed charge.

In this case, one may question whether a *Harvey* waiver was required. However, the criminal court judge thought it was, and Petitioner agreed to and the court accepted a *Harvey* waiver. By agreeing to the waiver, Petitioner acknowledged, as a matter of law, that the offenses to which he pled guilty were part of "the same or related course of conduct" as the other charges on the criminal complaint that resulted in damage and were a basis for restitution to the State of California. Accordingly, Petitioner's convictions were presumptively under the California statute, the result of the "same or related course of conduct" giving rise to the charges of grand theft from Medi-Cal (Count 1) and Medi-Cal fraud (Count 2). It is apparent from the plain language of the charges that the offenses of grand theft from Medi-Cal and Medi-Cal fraud are offenses "related to" the delivery of a health care item or service under Medi-Cal, a state health care program. *See e.g., Ellen L. Morand,* DAB No. 2426 (2012) (theft of evening bank deposit of pharmacy by pharmacy technician related); *Andrew D. Goddard,* DAB No. 2032 (2006); *Erik D. Desimone, R.Ph.*, DAB No. 1932 (2004) (pharmacists theft of drug related); *Berton Seigel, D.O.*, DAB No. 1467, at 5-6 (1994) (false claims for payment are "related to" the delivery of a health care item or service under Medicare or a state health care program); *Lyle Kai, R.Ph.*, DAB No. 1979, at 7-8 (2005) (exclusion was required based on a conviction for selling misbranded commodities even though the excluded individual may have been unaware of underlying Medicaid fraud). Petitioner's acknowledgment through the *Harvey* waiver that the offenses to which he pled guilty were part of the same or related course of conduct is a sufficient nexus – a reasonable "common sense" connection – to the delivery of an item or service under the Medi-Cal program.

Accordingly, I conclude that Petitioner's convictions for grand theft from Medi-Cal and misdemeanor trespass were "related to" the delivery of a health care item or service under Medicare or a state health care program.

4. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

The I.G. must exclude an individual or entity under section 1128(a)(1) of the Act if the individual has been convicted of an offense related to the delivery of a health care item or service under Medicare or a state health care program. Petitioner does not dispute that he was convicted within the meaning of section 1128(a)(1). I have concluded that Petitioner's convictions were related to the delivery of a health care item or service under Medicare or a state health care program. Therefore, there is a factual and legal basis for the I.G. to exclude Petitioner from participating in all federal health care programs. Act § 1128(a)(1).

5. Section 1128(c)(3)(B) of the Act establishes that five years is the minimum period of exclusion imposed pursuant to section 1128(a) of the Act.

6. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years.

I have concluded that Petitioner's exclusion is required by section 1128(a)(1) of the Act. Accordingly, the minimum exclusion period must be for five years, and that period is not unreasonable as a matter of law.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective October 18, 2012.

/s/
Keith W. Sickendick
Administrative Law Judge