Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Behdad Omrani, D.D.S.
(O.I. File No. H-11-42322-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-90

Decision No. CR2755

Date: April 12, 2013

DECISION

Petitioner, Behdad Omrani, D.D.S., is excluded from participating 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, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

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

I. Background and Procedural History

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) 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 a period of five years, the minimum statutory period. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act based upon his conviction in the Superior Court of California, County of Los Angeles, 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 by letter dated October 31, 2012 (Hearing Request). The case was assigned to me for hearing and decision. I convened a prehearing telephone conference on December 11, 2012, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated December 11, 2012. During the prehearing conference, counsel for the I.G. requested an opportunity to file a motion for summary judgment prior to developing the case for hearing. Accordingly, I set a schedule for the I.G. to file a motion for summary judgment and for Petitioner to respond.

On January 10, 2013, the I.G. filed a motion for summary judgment and supporting brief (I.G. Br.), along with I.G. exhibits (I.G. Exs.) 1 through 14. On February 11, 2013, Petitioner filed a brief (P. Br.) in opposition to the I.G.'s motion for summary judgment with Petitioner's exhibits (P. Exs.) 1 through 5. Petitioner also filed objections (P. Objections) to I.G. Exs. 3 and 13, citing 42 C.F.R. § 1005.17, and arguing that the exhibits are not relevant, are more prejudicial than probative, may confuse the issues, may result in undue delay, or may be cumulative. On February 26, 2013, the I.G. filed a reply brief to Petitioner's opposition (I.G. Reply), as well as a response to Petitioner's evidentiary objections.

Petitioner's objection to I.G. Ex. 3 is sustained, and the exhibit is not considered for purposes of summary judgment. I.G. Ex. 3 is a "Declaration in Support of Issuance of Felony Complaint and Arrest Warrant" made by a Special Agent of the California Department of Justice during the investigation of Petitioner's underlying criminal case. The purpose of the declaration was to show that there was probable cause to support a felony complaint and an arrest warrant. The declaration alleges a scheme to defraud the California Medicaid program (Medi-Cal) and the related dental program (Denti-Cal) and alleges that Petitioner actively participated in that scheme. The I.G. has not shown that the specific allegations of the declaration were proven by at least a preponderance of the evidence or admitted 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. Accordingly, out of an abundance of caution, I.G. Ex. 3 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. 13 is sustained in part and overruled in part. I.G. Ex. 13 is a declaration by 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 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. I do not, however, accept the legal opinion of the prosecutor regarding Petitioner's conviction and its nexus to Medicare, Medi-Cal, or Denti-Cal. Specifically, the prosecutor states that Petitioner's guilty plea "directly resulted from offenses *related to* Denti-Cal, a Federal health care program, and other crimes." 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. Therefore, I admit I.G. Ex. 13 into the record, striking paragraph 7.

Accordingly, I.G. Exs. 1, 2 and 4 through 13 (paragraph 7 having been stricken) and 14 are admitted. P. Exs. 1 through 5 are admitted.

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; Hearing Request 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 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).

The material facts in this case are undisputed. Petitioner concedes that on August 14, 2010, he "was charged with crimes that related to services delivered under the Medi-Cal program." P. Br. at 1. Petitioner concedes that on November 3, 2010, he entered a plea agreement pursuant to which he would plead guilty or no contest to a felony tax charge; the prosecutor would allow him to withdraw his guilty plea to the felony tax charge at a subsequent sentencing proceeding and he would be allowed to plead guilty to a misdemeanor tax charge; he would be sentenced to three years' probation; and he would to make a voluntary payment of $60,000 to the California Healthcare Deposit Fund at the time of execution of the plea agreement. P. Br. at 4; I.G. Ex. 5, at 1-3. Although not mentioned by Petitioner in his summary of the terms of the plea agreement (P. Br. at 4), Petitioner also agreed to a condition of probation that he not participate in the Medicaid, Medicare, or Medi-Cal programs. I.G. Ex. 5, at 3. On November 3, 2010, Petitioner paid $60,000 to the California Health Care Deposit Fund. I.G. Exs. 5, 6; P. Br. at 4. It is undisputed that on November 16, 2010 Petitioner pled guilty to one felony count of filing a false tax return and the court accepted his guilty plea. I.G. Exs. 5, 7, 8; P. Br. at 4. During the plea colloquy, Petitioner agreed to a waiver under *People v. Harvey*, 25 Cal. 3d 754 (1979), which the criminal court judge explained meant that Petitioner would be liable for restitution on all charged counts of the criminal complaint, not just the count to which he pled guilty. I.G. Ex. 8, at 4. On November 18, 2011, the court permitted Petitioner to withdraw his guilty plea to the felony tax charge and to enter a guilty plea to one misdemeanor count of failure to file a tax return; the court accepted his plea; and the court dismissed all other counts of the criminal complaint. Petitioner was sentenced to three years probation and ordered not to participate in Medicare or Medi-Cal. I.G. Exs. 9, 10, 11, 12; P. Br. at 4.

Petitioner concedes he was "convicted" within the meaning of the Act for purposes of exclusion. P. Br. at 6. Petitioner argues, however, that his convictions were not for an offense "related to" the delivery of an item or service under Medicare or a state health care program. Petitioner argues that summary judgment in favor of the I.G. is not appropriate because his conviction is not program related as a matter of law and the relationship between Petitioner's conviction and Medi-Cal depends upon material facts

that are in dispute. P. Br. at 6-11. Contrary to Petitioner's arguments, this case must be resolved against Petitioner as a matter of law, because the offenses of which Petitioner was convicted, the undisputed circumstances surrounding his conviction, and his waiver of certain rights afforded under California law establish the nexus or connection between Petitioner's offenses and Medi-Cal and provides a basis for Petitioner's exclusion.

Petitioner argues that summary judgment will not lie as there are material facts in dispute. Specifically, Petitioner argues that the following material facts are in dispute: whether Petitioner participated in a scheme to submit false claims to Medi-Cal; which facts, charges, and allegations are the basis for the plea agreement; and whether the criminal court ordered restitution. P. Br. at 12-16. Whether or not Petitioner participated in a scheme to submit false claims to Medi-Cal is not a fact I need to find in this case. The mixed question of law and fact that I must resolve is whether Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program, not whether Petitioner actually submitted false claims to Medi-Cal. I resolve the legal issue based on the undisputed facts. There is also no issue that I need to resolve regarding which facts, charges, and allegations are the basis for the plea agreement. It is clear from the face of the plea agreement, and there seemed to be no confusion on the part of Petitioner, that the agreement related to the charges then pending against Petitioner. Petitioner has offered no evidence to suggest that his plea agreement was intended to dispose of less than all the charges pending against him or that he was subject to another criminal complaint or indictment. Regarding the issue of whether the criminal court ordered restitution, I agree with Petitioner that there is no evidence that the court ever ordered that Petitioner pay restitution as part of his sentence. Petitioner and his criminal attorney both assert in their declarations that Petitioner's payment of $60,000 to the California Health Care Deposit Fund was voluntary, which I accept as true for summary judgment. P. Ex. 1; P. Ex. 2. However, whether or not Petitioner paid the $60,000 without a court order for restitution has no impact upon my conclusion that Petitioner was convicted of a program-related offense; that fact is not material.

The five-year period of exclusion is fixed by law and there are no material issues related to the reasonableness of that period.

There is no genuine dispute as to any facts material to a determination of the issues before me. Accordingly, summary judgment is appropriate.

3. The offenses for which Petitioner pled guilty were related to the delivery of an item or service under Medicare or a state health care program.

As explained above, the undisputed evidence shows that on April 14, 2010, Petitioner was charged with grand theft, presenting false Medi-Cal claims, and receiving unlawful Medi-Cal payments. I.G. Ex. 2, at 1-2. On November 3, 2010, Petitioner and the

Attorney General (A.G.) of California agreed that the A.G. would add one count of felony failure to file a tax return to the criminal complaint, and Petitioner would plead guilty to that charge. I.G. Ex. 5, at 1-2. As part of the plea agreement, the court would withhold final judgment and Petitioner could later withdraw his guilty plea to the felony charge and plead guilty to a misdemeanor offense of failure to file a tax return. The A.G. would then move to dismiss the remaining charges. I.G. Ex. 5, at 1-2. Petitioner also agreed to voluntarily pay $60,000 to the California Health Care Deposit Fund and not to participate in the Medicare or Medi-Cal programs while on probation. I.G. Ex. 5, at 3. On November 3, 2010, Petitioner paid $60,000 to the California Health Care Deposit Fund. I.G. Exs. 5, 6. Petitioner subsequently pled guilty on November 16, 2010, to felony failure to file a tax return. I.G. Ex. 7, 8. Petitioner stipulated to a factual basis for the guilty plea, though the factual basis was never stated during the plea colloquy or in the plea agreement. I.G. Ex. 8, at 4. Petitioner entered a *Harvey* waiver during the plea colloquy. I.G. Ex. 8, at 4. On November 18, 2011, Petitioner withdrew his guilty plea. The A.G. added one count of misdemeanor failure to file an income tax return, to which Petitioner pled guilty. The court accepted Petitioner's plea and sentenced Petitioner to three years of probation. A condition of probation was that Petitioner not participate in the Medicare and Medi-Cal programs during the period of probation. I.G. Exs. 9, 10, 11, 12.

Petitioner entered guilty pleas to two different offenses, a felony violation of Cal. Rev. & Tax Code § 19705(a)(1), aiding and abetting the filing of a false tax return; and a misdemeanor violation of Cal. Rev. & Tax Code § 19701(a). 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 acknowledges that he was convicted within the meaning of the Act. Hearing Request at 1; P. Br. at 6.

Petitioner opposes his exclusion on grounds that the offenses of which he was convicted were not on their face crimes related to the delivery of a health care item or service under Medicare or a state health care program.[2] However, the Board has long held that the

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[2] The California statutes to which Petitioner pled guilty, Cal. Rev. & Tax Code §§ 19701(a) and 19705(a)(1) provide:

> 19701. Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($5,000):
>
> (a) With or without intent to evade any requirement of Part 10 (commencing with Section 17001), Part 11

(Footnote continued next page.)

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 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).

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(Footnote continued.)

> (commencing with Section 23001), or this part or any lawful requirement of the Franchise Tax Board, repeatedly over a period of two years or more, fails to file any return or to supply any information required, or who, with or without that intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, resulting in an estimated delinquent tax liability of at least fifteen thousand dollars ($15,000).
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> * * *
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> 19705. (a) Any person who does any of the following shall be guilty of a felony and, upon conviction, shall be fined not more than fifty thousand dollars ($50,000) or imprisoned pursuant to subdivision (h) of Section 1170 of the Penal Code, or both, together with the costs of investigation and prosecution:
>
> (1) Willfully makes and subscribes any return, statement, or other document, that contains or is verified by a written declaration that it is made under penalty of perjury, and he or she does not believe to be true and correct as to every material matter.

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 *Kabins* decision nor Petitioner explain 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 of 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 "generic class of crimes" related to the delivery of items or services under Medicare or Medicaid rather than the fact specific 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 12. 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.

Here, the undisputed facts show that Petitioner's convictions were related to the delivery of an item or service under the Medi-Cal program because Petitioner's convictions were

related to three other counts in the criminal complaint that alleged a scheme to defraud Medi-Cal. Three undisputed material facts show the relationship between the charges of which Petitioner was convicted and the Medi-Cal fraud charges for which Petitioner was not convicted, and ergo the program-relatedness of Petitioner's conviction. The three undisputed facts that support the conclusion of law that Petitioner's conviction was program related are: (1) Petitioner's *Harvey* waiver during his plea colloquy, which was his consent to the criminal court's consideration of all the charges for purposes of restitution; (2) Petitioner's agreement to a term of his plea agreement that he voluntarily pay $60,000 to the California Health Care Deposit Fund; and (3) Petitioner's agreement not to participate in Medicare and Medi-Cal as a condition of probation.

Petitioner does not dispute that he knowingly and voluntarily entered a *Harvey* waiver during the plea hearing on November 16, 2010. I.G. Ex. 8, at 4. 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, Petitioner agreed to and the court accepted a *Harvey* waiver. By doing so, Petitioner acknowledged, as a matter of law, that the offenses to which he pled guilty (filing a false tax return and failure to file a tax return) were part of "the same or related course of conduct" as the three other charges on the criminal complaint that resulted in damage and were a basis for restitution to the State of California, including grand theft, presenting false Medi-Cal claims, and receiving unlawful Medi-Cal payments.[3] 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 presenting false Medi-Cal claims and receiving unlawful Medi-Cal remuneration. It is apparent from the plain language of the charges that the offenses of presenting false Medi-Cal claims and receiving unlawful Medi-Cal remuneration are "related to" the delivery of a health care item or service under Medi-Cal, a state health care program. *Berton Seigel, D.O.*, DAB No. 1467, at 5-6 (1994) (holding that false claims for payment are "related to" the delivery of a health care item or service under Medicare or a state health care program). Moreover, Petitioner need not admit to specific facts showing he engaged in improper billing of the Medi-Cal program for there to exist a sufficient nexus to the delivery of an item or service under the Medi-Cal program. *Lyle Kai, R.Ph.*, DAB No. 1979, at 7-8 (2005) (holding that 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

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[3] Petitioner argues that the offenses for which he was convicted did not result in any loss to the victim, which shows he did not admit to the facts alleging he defrauded Medi-Cal of $306,462.25. P. Br. at 14. However, for a *Harvey* waiver the offense to which the defendant pled guilty cannot cause any loss to the victim. Cal. Penal Code § 1192.3. Rather, other charges that are dismissed must be the cause of any loss. Therefore, it was a legal requirement under the California statute that the charge to which Petitioner pled guilty did not result in loss to the victim so that Petitioner could make an effective *Harvey* waiver and pay $60,000 as a term of his plea agreement.

Harvey waiver that the offenses to which he pled guilty were part of the same or related course of conduct supporting the charges of submitting false Medi-Cal claims is a sufficient nexus – a reasonable "common sense" connection – to the delivery of an item or service under the Medi-Cal program.

Additionally, Petitioner voluntarily paid $60,000 to the California Health Care Fund as part of his plea agreement with prosecutors. 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. As stated, Petitioner need not admit to defrauding 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.

As noted above, Petitioner argues that the court did not order him to pay $60,000 in restitution to the California Health Care Fund, but that Petitioner voluntarily made that payment as part of the plea agreement. Petitioner goes so far as to imply that the $60,000 was a "gift" to the state health care fund. P. Br. at 15. Petitioner also asserts that "the decisions involving court-ordered restitution are inapplicable" because the sentencing court never actually ordered that Petitioner pay restitution. P. Br. at 15. Petitioner's claim that he provided a "gift" to the California Health Care Fund that happened to coincide with his guilty plea, and was made part of his plea agreement, verges on frivolity. Petitioner's claim is a transparent attempt to create a dispute of fact where there is none. There is no other reasonable explanation for Petitioner's payment at the time it was made and in the manner it was made for a purpose other than to compensate the California Health Care Fund for a loss that Petitioner caused. Petitioner agreed to make a $60,000 payment to the California Health Care Fund in exchange for a conviction on a misdemeanor offense. The agreement was accepted by the prosecutor and the court, and Petitioner received the benefit of his bargain. Petitioner cannot relitigate factual issues concerning his plea agreement in this forum. 42 C.F.R. § 1001.2007(d); *Kai*, DAB No. 1979, at 7. Therefore, the $60,000 payment to the California Health Care Fund is further evidence that Petitioner's conviction was "related to" the delivery of a health care item or service under Medi-Cal.

Finally, a condition of probation ordered by the trial court was that Petitioner not participate in the Medicare or Medi-Cal. The only reasonable conclusion based on Petitioner's inability to participate in the Medicare and Medi-Cal programs as part of his probation is that the offenses for which Petitioner was convicted and sentenced were related to those programs. Petitioner offers no other reasonable explanation for why the

state sought to prohibit his participation in Medicare or Medi-Cal or why he agreed to such prohibition based solely upon his conviction for failing to file a tax return. Petitioner argues that the prosecuting attorney "could have insisted on the [non-participation] condition since his office was not likely to convict [Petitioner] for the charges alleged" or that the condition was "a matter of office policy." P. Br. at 16. However, Petitioner's speculation does not support an inference favorable for Petitioner. The undisputed facts are that Petitioner agreed not to participate in the Medicare and Medi-Cal programs after being charged with submitting false claims to Medi-Cal and he also voluntarily paid $60,000 to the California Health Care Fund as part of a plea agreement. Considering these facts together, it is apparent that the offense for which Petitioner pled guilty was related to the delivery of an item or service under the Medi-Cal program and the plea bargain reflects the nexus.

The following factors support my conclusion that the offense of which Petitioner was convicted was program related: Petitioner's *Harvey* waiver triggers a presumption that the dismissed charges arise from the same or a closely related course of conduct as the charge to which Petitioner pled guilty; the terms of Petitioner's plea agreement required the payment of $60,000 to the California Health Care Fund; and the terms of Petitioner's probation prohibited Petitioner's participation in Medicare and Medi-Cal. Accordingly, I conclude that Petitioner's conviction for failing to file an income tax return was "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