Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James O. Boothe
(OI File No.: 2-08-40329-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1289

Decision No.: CR2770

Date: May 1, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified James O. Boothe (Petitioner) that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). Petitioner appealed. I find that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated August 31, 2012, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that the exclusion was based on his conviction "in New York County Supreme Court of the State of New York, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program." I.G. Ex. 1 at 1. Petitioner, represented by counsel, timely filed his

September 14, 2012 request for hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division (CRD). Subsequently, this case was assigned to me for hearing and decision.

On October 25, 2012, I convened a telephonic prehearing conference, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) dated November 1, 2012. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on November 29, 2012, with I.G. Exs. 1 through 5. On January 3, 2013, Petitioner filed a brief (P. Br.), P. Exs. 1 and 2, and an objection to I.G. Exs. 2 and 3. The I.G. responded to the objection on January 14, 2013, and filed a reply brief (I.G. Reply Br.) and I.G. Ex. 6 on January 17, 2013.

On January 23, 2013, I issued a Ruling and Order (Ruling) in which I overruled Petitioner's objections to I.G. Exs. 2 and 3, provided Petitioner with the opportunity to file a supplemental response to those exhibits and time to file an objection to I.G. Ex. 6, and ordered both parties to submit supplemental briefs on a legal issue by February 20, 2013. On February 5, 2013, Petitioner stated that he would not file a supplemental response to I.G. Exs. 2 and 3, but did file an objection to I.G. Ex. 6. Further, on that date, Petitioner's counsel called and spoke with the CRD attorney assigned to this case and asserted that the I.G. and Petitioner should not submit supplemental briefs simultaneously, but that Petitioner should file its brief in response to the I.G.'s brief because the I.G. has the burden of proof. In a February 6, 2013 e-mail message, the CRD attorney conveyed to the parties I decided not to change the submission date for the supplemental brief. DAB E-file Record Document # 24 (Email from CRD Attorney to Petitioner).

On February 15, 2013, the I.G. filed a response to Petitioner's objection to I.G. Ex. 6 and submitted I.G. Exs. 7 through 9. On February 20, 2013, Petitioner filed a reply to the I.G.'s response to Petitioner's objection to I.G. Ex. 6, an objection to I.G. Ex. 9, and a Response to Supplemental Briefing. Later on that same date, the I.G. submitted its supplemental brief and I.G. Ex. 10. On March 4, 2013, the I.G. filed a response to Petitioner's objection to I.G. Ex. 9.

II. Evidentiary Objections

As part of the exchange of briefs and evidence that I ordered in this case (Order at 4), the I.G. submitted five exhibits (I.G. Exs. 1-5) and Petitioner submitted two exhibits (P. Exs. 1-2). Petitioner filed an objection to I.G. Exs. 2 and 3, which I overruled. Ruling at 2. The I.G. did not object to either of Petitioner's exhibits. Further, Petitioner did not object to I.G. Ex. 10. Therefore, I admit I.G. Exs. 1-5 and 10, and P. Exs. 1-2 into the record. For the reasons stated below, I exclude I.G. Exs. 6-9 from the record.

The I.G. filed I.G. Ex. 6 with its reply brief to Petitioner's exchange. I.G. Ex. 6 is an August 2008 affirmation by a prosecutor involved in the criminal case that underlies the present exclusion action. This affirmation was originally submitted to the state court in response to various motions that Petitioner made to that court. The I.G. submitted it because the prosecutor avers to certain facts, laws, and policies that the I.G. believes will help it meet its burden of proof in this case. Further, in response to Petitioner's objection to I.G. Ex. 6, the I.G. submitted Ex. 7 (a memorandum of law that accompanied the affirmation) and Ex. 8 (the decision of the court related to affirmation and memorandum).

Petitioner filed a written objection to I.G. Ex. 6, and also a reply to the I.G.'s response to Petitioner's objection. Petitioner argued that I.G. Ex. 6 was not relevant or material because the facts stated by the prosecutor in that 2008 affirmation do not reflect the ultimate outcome of the criminal case several years later. Further, Petitioner characterized much of what the prosecutor wrote as merely her opinion because she often failed to provide citation for her positions. Petitioner also argued that I.G. Exs. 7 and 8 did not cure the deficiencies in I.G. Ex. 6.

I agree with Petitioner that I.G. Ex. 6 has very limited relevance to this proceeding because the affirmation significantly predates the final conviction in Petitioner's case and relates primarily to a variety of issues that have no bearing here. Although I.G. Ex. 6, along with the closely related I.G. Exs. 7 and 8, have some limited probative value, that value is easily outweighed by the risk confusion that they have the potential to cause. *See* 42 C.F.R. § 1005.17(d).

Further, the I.G. submitted I.G. Exs. 6-8 after the date on which the I.G. was to submit its exchange (*i.e.*, brief, proposed exhibits, proposed witnesses). Order at 3-4; P. Br. at 9. I.G. Exs. 6-8 do not appear to be rebuttal evidence, *see* 42 C.F.R. § 1005.17(h), and the I.G. did not characterize those documents as such in its reply brief. In fact, the I.G. did not request leave to submit these untimely exhibits and did not provide a statement as to the reason they were submitted late. The regulation provides that "[i]f at any time a party objects to the proposed admission of evidence not exchanged in accordance with [an administrative law judge's [order], the [administrative law judge] will determine whether the failure to comply [with the order] should result in the exclusion of such evidence." 42 C.F.R. § 1005.8(b)(1). Furthermore, unless an administrative law judge finds "extraordinary circumstances justified the failure to timely exchange," then the administrative law judge must exclude the evidence. *Id.* § 1005.8(b)(2).

In the present case, the I.G. provided no reason why I.G. Ex. 6 was submitted late. Further, the submission of I.G. Exs. 7 and 8 resulted from the submission from I.G. Ex. 6; therefore, these exhibits suffer from the same defect as I.G. Ex. 6. Without a showing of exceptional circumstances, I must exclude I.G. Exs. 6-8. Therefore, Petitioner's objection is sustained.

The I.G. also submitted I.G. Ex. 9 at the time it submitted Exs. 7 and 8. I.G. Ex. 9 is a recently signed affirmation from a criminal prosecutor who was involved in Petitioner's criminal proceeding. The affirmation provides a detailed account of Petitioner's criminal case from beginning to end. Petitioner objected to this exhibit as an attempt by the I.G. to obfuscate the issues in this case. Petitioner also requested that certain portions of the exhibit be stricken.

In light of *Lyle Kai, R Ph.,* I.G. Ex. 9 appears relevant. DAB No. 1979 (2005) (declaration by prosecutor summarizing criminal conduct accepted as evidence to establish nexus). However, this exhibit is untimely, and the I.G. did not file a motion or provide a reason for its late filing. There is also no reason to conclude that this affirmation is submitted as rebuttal evidence. Further, the I.G. indicated that it did not have any witnesses to offer in this proceeding and did not request a hearing. I.G. Br. at 9. Although I can accept written testimony, the I.G. did not request that I admit I.G. Ex. 9 as written direct testimony or provide Petitioner with notice that he could seek to cross-examine the I.G.'s witness. 42 C.F.R. § 1005.16(b). The requirement to exclude late filed exhibits also applies to "any written statements that the party intends to offer in lieu of live testimony . . . ." *Id.* § 1005.8(a), (b). Because Petitioner has objected to I.G. Ex. 9 and I have no reason to conclude that there were exceptional circumstances for its late submission, I must exclude this exhibit. *Id.* § 1005.8(b)(2). Therefore, Petitioner's objection is sustained.

III. Sanction for Failing to Comply with Order

Following the exchange of briefs and exhibits in this matter, I ordered the parties to simultaneously file a supplemental brief on a purely legal issue. Ruling at 3. Petitioner's lead counsel, Gregory J. Naclario, contacted the CRD attorney assisting on this case and indicated that simultaneous briefing had the effect of shifting the burden of proof in this case to Petitioner and that Petitioner should be permitted to file a brief in response to the I.G. rather than simultaneously. The CRD attorney notified Mr. Naclario and the I.G.'s counsel that I would not change the briefing schedule because the supplemental brief involved only a narrow issue of law and, therefore, there was no burden shifting to the Petitioner. Further, the parties were notified that once they had filed their brief, they could request to file a reply brief if the parties believed it was necessary. Mr. Naclario acknowledged receipt of my ruling on his request. DAB E-file Record Document # 24 (Email from Petitioner to CRD Attorney).

On the day the supplemental brief was due, both of Petitioner's attorneys (*i.e.*, Mr. Naclario and John J. Cooney) signed and filed a document entitled Petitioner's Response to Supplemental Briefing, in which Petitioner "respectfully decline[d]" what Petitioner termed my "request" to file a supplemental brief. Petitioner based its position on the theory that it somehow improperly shifted the burden of proof in this case. However, Petitioner requested that he be permitted to file a reply brief to the yet unfiled I.G. brief.

Petitioner's request to file a reply brief is denied. I provided Petitioner an opportunity to request a reply brief, but only once he filed his supplemental brief. Petitioner did not file a supplemental brief. Therefore, Petitioner abandoned the right to request the opportunity to reply to the I.G.'s brief.

Petitioner was fully aware that I ordered, not requested, the filing of briefs by both parties on the same date and that I previously denied Petitioner's motion to permit him to file his brief in response to the I.G.'s brief. To allow Petitioner to file a reply brief now would reward Petitioner's contumacious conduct and directly undermine this tribunal's authority to regulate the course of this proceeding. *See, e.g.*, 42 C.F.R. § 1005.4(b)(8). The regulations contemplate such a scenario and provide administrative law judges with the authority to "sanction a person, including any party or attorney, for failing to comply with an order. . . ." *Id.* § 1005.14(a); *see also id.* § 1005.4(b)(8) (administrative law judges have authority to regulate the conduct of representatives and parties).

A sanction imposed under the regulations "will reasonably relate to the severity and nature of the failure or misconduct," and may include "[p]rohibiting a party from . . . supporting a particular claim or defense." *Id.* § 1005.14(a). Denying Petitioner's motion to file a reply brief is directly related to Petitioner's contumacious conduct and is the least severe sanction that can be imposed to uphold the integrity of the administrative adjudicatory process.

IV. Decision on the Written Record

In their exchanges, both parties indicated that an in-person hearing was unnecessary and that they did not offer any witnesses. I.G. Br. at 9; P. Br. at 2. Further, neither party requested summary judgment. *See* 42 C.F.R. § 1005.4(b)(12). Therefore, the record is now closed and this decision is rendered based on the written record.

V. Issue

The only issue in this case is whether the I.G. has a basis for excluding Petitioner for five years from participating in Medicare, Medicaid, and all other federal health care programs, pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a).

VI. Findings of Fact, Conclusions of Law, and Analysis[1]

The Secretary of Health and Human Services must exclude from participation in any federal health care program "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program." 42 U.S.C. § 1320a-7(a)(1).

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[1] My findings of fact and conclusions of law are set forth in italics and bold font.

A. *Petitioner pled guilty to Offering a False Instrument for Filing in the second degree in the Supreme Court of the State of New York.*

HealthFirst, PHSP, Inc. (HealthFirst) is a New York based Medicaid managed care insurance program. P. Br. at 5. In 2001, Petitioner was hired as a consultant at HealthFirst, but in 2002 became its Chief Operating Officer and Executive Vice President of Sales. I.G. Ex. 2 at 1. On May 6, 2008, Petitioner was indicted based on various alleged violations of law. I.G. Ex. 3. Relevant to this case, Count 7 of the indictment was Offering a False Instrument for Filing in the first degree, in violation of section 175.35 of the New York State Penal Law. I.G. Ex. 3 at 8. On September 30, 2011, Petitioner pled guilty to the lesser-included misdemeanor offense of Offering a False Instrument for Filing in the second degree.[2] I.G. Ex. 4; P. Br. at 6. Specifically, Petitioner pled guilty to knowingly submitting to the "New York State Department of Health the HealthFirst PHSP, Inc. May 2003 Medicaid Managed Care Marketing Plan, which falsely represented that HealthFirst PHSP, Inc.'s marketing representatives were being compensated in accordance with the Marketing Guidelines in the Medicaid Managed and Family Health Plus Contracts." I.G. Ex. 4 at 5. The trial court accepted the plea agreement and sentenced Petitioner to one year of conditional discharge. I.G. Ex. 5 at 1.

B. *Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).*

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense" before the I.G. excludes him. The statute defines "convicted" to include "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3); *see* 42 C.F.R. § 1001.2. Here, the Supreme Court of the State of New York accepted Petitioner's guilty plea to a misdemeanor offering of a false instrument for filing. I.G. Ex. 5 at 1. Petitioner concedes that he was convicted of a crime. P. Br. at 1. Accordingly, I conclude that Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).

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[2] Petitioner highlights throughout his brief that the offense for which he was convicted did not involve intent to defraud. Petitioner also acknowledges, as he must, that unlike 42 U.S.C. § 1320a-7(a)(3), which specifically refers to fraud, section 1320a-7(a)(1) does not require the conviction be related to fraud. *See* P. Br. at 10. Therefore, that Petitioner's criminal offense does not include intent to defraud is not relevant to this matter.

C. ***Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(1) because his conviction was for an offense related to the delivery of an item or service under a State health care program.***

Petitioner's primary argument in opposition to exclusion is that the "evidence does not show that his conviction is related to the delivery of an item or service under Medicare or a State health care (a State Medicaid) program." P. Br. at 5. After careful review of the record, I disagree.

The I.G. must exclude an individual from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under the Medicare program or a State health care program. 42 U.S.C. § 1320a-7(a)(1). The relevant regulation further explains that the exclusion includes "the performance of management or administrative services relating to the delivery of items or services under [Medicare or a State health care] program." 42 C.F.R. § 1001.101(a). Although the term "related to" is not defined in the statute, it is well established "that an offense is 'related to' the delivery of an item or service under a covered program if there is a . . . nexus between the offense and the delivery of an item or service under the program." *James Randall Benham*, DAB No. 2042 (2006) (internal citations omitted); *Cf. Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted). Therefore, to determine whether Petitioner's offense is related to the delivery of an item or service under Medicaid,[3] it is necessary to examine the underlying conviction.

HealthFirst is a Medicaid managed care insurance program pursuant to a Medicaid Managed Care and Family Health Plus Contract (contract) with the New York Department of Health. I.G. Exs. 2 at 1-2; 10. In general, marketing by such managed care programs is regulated. *See* 42 U.S.C. § 1396u-2(a)(5), (d)(2); 42 C.F.R. §§ 438.10, 438.104. Specifically, under the contract, HealthFirst was required to have a marketing plan approved by the New York Department of Health and local departments of social services. I.G. Ex. 10 at 70. The marketing plan was required to be consistent with the marketing guidelines included in Appendix D of the contract. I.G. Ex. 10 at 70, 145-56. The marketing guidelines included a provision requiring that HealthFirst "not offer financial or other kinds of incentives to Marketing representatives that uses the number of Enrollees as a factor in compensation." I.G. Ex. 10 at 154; *see also* I.G. Ex. 2 at 2. However, "from May 9, 2003 to October 7, 2003, [Petitioner] caused HealthFirst to

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[3] The Medicaid program is a "State health care program" for purposes of exclusion. *See* 42 C.F.R. § 1001.2 (defining "Medicaid" as "medical assistance provided under a State plan approved under Title XIX of the [Social Security] Act").

submit to various public agencies three Marketing Plans . . . which falsely reported that HealthFirst marketing representatives were being compensated in accordance with Marketing Guidelines in the . . . contract[s]." I.G. Ex. 2 at 2. Specifically, Petitioner pled guilty that he:

> [K]nowingly submitted and caused to be submitted to the New York State Department of Health, the HealthFirst PHSP, May 2003 Medicaid Managed Care Marketing Plan, which falsely represented that HealthFirst, PHSP, Inc.'s marketing representatives would be compensated in accordance with the Marketing Guidelines in the Medicaid Managed Care and Family Health Plan contracts.

I.G. Ex. 4 at 5.

Petitioner argues that during his plea and sentencing hearing he was not required to admit that HealthFirst would not have obtained the Medicaid contract if it had not submitted a marketing plan or that Petitioner was required to admit that the marketing plan was related to the delivery of an item or service under Medicaid. P. Br. at 7. However, in his hearing request, Petitioner states "HealthFirst was required to have its 'Marketing Plans' approved by the New York State Department of Health as well as local department of social services in the affected county" and that "[t]he Marketing Plans need[ed] to meet the New York State 'Marketing Guidelines' that HealthFirst did not pay its marketing representatives any incentive to enroll individuals in HealthFirst." RFH at 1-2. Thus, Petitioner acknowledges that pursuant to its contract, HealthFirst was required to have an approved marketing plan, which met the requirement in Appendix D of the contract. As such, when HealthFirst compensated its employees in a manner inconsistent with the contract, it was in violation of its contract with the New York State Department of Health, a contract which allowed HealthFirst to operate as a Medicaid managed care insurance program and bill Medicaid for items and services rendered to its enrollees. *See* I.G. Ex. 10; *see also* 42 U.S.C. § 1396u-2(a)(1)(A); 42 C.F.R. § 438.6.

According to the terms of contract, sanctions for marketing infractions include prohibiting the plan from conducting any marketing activities, suspending new enrollments, or termination of the contract. I.G. Ex. 10 at 71; Petitioner's Response to Supplemental Briefing at 2; *see also* 42 U.S.C. § 1396u-2(e)(1)(A)(iv); 42 C.F.R. § 438.700(b)(4)(2001) (intermediate sanctions may be imposed where the managed care organization "misrepresents or falsifies information that it furnishes to CMS or to the State"). The purpose of the sanctions is "to protect the interests of the [Medicaid] program and its clients." I.G. Ex. 10 at 70. Moreover, each of these sanctions has the effect – although to varying degrees – of restricting HealthFirst's ability to provide services to Medicaid beneficiaries. For example, a managed care organization prohibited from engaging in marketing activities would be restricted from participating in events such as health fairs and community outreach programs or engaging in any media

campaign. *See* I.G. Ex. 10 at 151. The nexus between Petitioner's criminal offense and the delivery of program-related health care items and services is clear and non-attenuated. The submission of the fraudulent marketing plan permitted HealthFirst to obtain new enrollees, provide *unhindered* health care items and services to Medicaid beneficiaries, and to continue to bill Medicaid for those items and services. A sufficient nexus has been found in other cases involving criminal conduct related to marketing of Medicaid services. *See Sabina E. Acquah*, DAB CR480 (1997) (finding that illegally obtained leads to market services has a nexus to Medicaid because the conduct was intended to ultimately result in billing Medicaid); *see also Vinita R. Warren*, DAB CR423, at 6-7 (1996) (conviction for obtaining marketing leads for a Medicaid HMO through bribery had a sufficient nexus to the delivery of items of services under Medicaid).

In the present matter, the nexus is stronger based on the fact that the New York Department of Health sanctioned HealthFirst for its submission of the fraudulent marketing plan. *See* Petitioner's Response to Supplemental Briefing at 2 (HealthFirst was suspended from marketing activities for four months); *see also* I.G. Reply at 3 (the New York Department of Health suspended HealthFirst's marketing activities and new enrollments). Petitioner contends that because the sanction imposed was suspension of marketing activities, "the facts clearly show that the rejection of the marketing plan did not result in rejection of the contract." Petitioner's Response to Supplemental Briefing at 2. Whether the contract was or was not terminated is not dispositive. The fact that HealthFirst was sanctioned at all supports the nexus because, as previously stated, the purpose of the sanctions is "to protect the interests of the [Medicaid] program and its clients." I.G. Ex. 10 at 70. As the I.G. states, "Petitioner's submission of a fraudulent marketing plan, the basis for his conviction, was a step in the chain of events leading to delivery of Medicaid items or services to Medicaid beneficiaries . . . ." I.G. Reply at 4.

Finally, Petitioner notes that the New York Office of the Medicaid Inspector General (NYOMIG), although initially excluding Petitioner, ultimately decided to reduce the sanction of exclusion to censure. Petitioner argues NYOMIG's decision to not exclude Petitioner supports the proposition that NYOMIG did not believe Petitioner's conviction related to the furnishing of medical care, services or supplies. I disagree with Petitioner's analysis. The letter from the NYOMIG indicates that Petitioner was excluded based on his indictment for a felony offense related to "participation in the performance of management or administrative services relating to furnishing medical care, services or supplies . . . ." P. Ex. 2 at 1; 18 New York Code of Rules and Regulations (NYCRR) § 515.7(b)(2). The pertinent regulation also states that the department can take immediate action against an individual convicted of a crime if the conviction relates to or results from "participation in the performance of management or administrative services relating to furnishing medical care, services or supplies . . . ." *Id.* § 515.7(c)(2). In this case, the NYOMIG decided to reduce the sanction of exclusion to censure. However, the authority to impose a less severe sanction is granted only where the NYOMIG is "authorized to exclude a person under this section." *Id.* § 515(f). Therefore, the NYOMIG's decision to

censure Petitioner means that the NYOMIG concluded that Petitioner's conviction was one for which it could impose an exclusion or, in other words, a conviction which "relates to participation in the performance of management or administrative services relating to furnishing medical care, services or supplies . . . ." *Id.* § 515.7(b)(2), (c)(2). This language is strikingly similar to the language in 42 C.F.R. § 1001.101(a), which requires the I.G. to exclude an individual "convicted of a criminal offense related to . . . the performance of management or administrative services relating to the delivery of items or services under [Medicare or a State health care] program." Therefore, the NYOMIG's action is consistent with the I.G.'s conclusion that Petitioner is subject to exclusion under 42 C.F.R. § 1001.101. However, unlike the NYOMIG, the I.G. does not have discretion to impose less than a five-year exclusion. 42 C.F.R. § 1001.102(a).

Based on the foregoing, I conclude Petitioner's conviction is related to the delivery of services under a State health care program under section 1320a-7(a)(1).

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

IV. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

/s/
Scott Anderson
Administrative Law Judge