

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Robert Muscio, M.D.,  
(OI File No. 2-10-40680-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-1868

Decision No. CR4163

Date: August 26, 2015

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Robert Muscio, M.D., from participating in Medicare and all other federally funded health care programs for a minimum of five years. The exclusion is mandated by section 1128(a)(3) of the Social Security Act (Act). The period of exclusion is mandated by section 1128(c)(3)(B) of the Act.

**I. Background**

Petitioner requested a hearing to challenge the I.G.'s exclusion determination. The I.G. filed a brief supporting the determination and exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 8. Petitioner filed a brief in opposition and exhibits that are identified as P. Ex. 1 – P. Ex. 6. The I.G. filed a reply brief. I receive the parties' exhibits into the record of this case although I note that in large measure Petitioner's exhibits duplicate those offered by the I.G.

Petitioner also requested to present in-person testimony from himself and another witness. The I.G. opposed Petitioner's request. Below, I explain why I deny Petitioner's request.

## **II. Issue, Findings of Fact and Conclusions of Law**

### **A. Issue**

The issue in this case is whether an exclusion of at least five years is mandated by sections 1128(a)(3) and 1128(c)(3)(B) of the Act.

### **B. Findings of Fact and Conclusions of Law**

Section 1128(a)(3) of the Act mandates the exclusion of any individual who:

has been convicted for an offense which occurred after . . . [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program . . . operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The necessary elements of a section 1128(a)(3) offense are as follows:

- An individual must be convicted of a felony that occurred after August 21, 1996;
- The offense must have been committed in connection with the delivery of a health care item or service; or
- It must have been committed with respect to any act or omission in a health care program that is operated by or financed in whole or in part by a federal, State, or local government agency;
- The offense must relate to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner contends that this section applies only to individuals who are convicted of crimes that were committed with respect to an act or omission of a federal, State, or locally operated health care program. According to him, crimes that involve only private monies are not within the reach of the section.

I disagree. Section 1128(a)(3) is written in the disjunctive. It applies to crimes committed in connection with the delivery of any health care item or service, even those items or services that are limited only to the private sector. It *also* applies to crimes committed against federal, State-run, or locally run health care programs. There is nothing in the language of section 1128(a)(3) that suggests that it applies *only* to those individuals convicted of crimes that are committed against government-run programs. Nor is there language in the section that suggests that a crime must involve public funds in order to fall within the section's reach.

Here, the undisputed facts establish that Petitioner was convicted of a felony occurring after August 21, 1996, consisting of embezzlement committed in connection with the delivery of health care items or services. That is all that is necessary to establish that he was convicted of an offense falling within the reach of section 1128(a)(3).

On February 19, 2014, Petitioner was charged in a federal court in the State of New Jersey with a single count of felony mail fraud. I.G. Ex. 4. He was charged with having embezzled more than \$1.1 million from an entity, the Center for Advanced Surgery & Pain Management, L.L.C. (CASPM). *Id.* at 1 – 3. Petitioner was a part owner and medical director of CASPM. *Id.* Specifically, he was charged with unlawfully converting monies to his own use by fraudulently writing, signing, and causing the mailing of more than 105 checks drawn on CASPM's bank account. *Id.* at 2. Petitioner pled guilty to the charge. I.G. Ex. 7; I.G. Ex. 8 at 1.

Petitioner argues that his crime was not committed in connection with the delivery of a health care item or service. He asserts that:

Although CASPM is a health care entity, . . . [Petitioner] did not act in a manner that affected CASPM's provision or delivery of health care services, its patient relationships or the manner in which CASPM or its owners/employees performed their job functions. . . [Petitioner's] offense in no way impacted medical providers' independent decision making or CASPM's participation in government agency programs. . . .

Petitioner's Brief at 6.

Any of the possible consequences cited by Petitioner might be sufficient to establish that a crime was committed in connection with the delivery of a health care item or service. However, those consequences do not comprise the complete range of circumstances or consequences of a crime that establish the requisite connection.

The necessary connection exists in this case because Petitioner stole monies that were the product of the delivery of health care items or services by CASPM and its employees. Those monies would not have been within Petitioner's grasp but for the fact that they

constituted revenues earned from the delivery of health care items or services. That is all the connection that is needed in order to bring Petitioner's embezzlement within the reach of section 1128(a)(3).

Petitioner also argues that, if an exclusion is imposed against Petitioner, it must be imposed pursuant to the permissive exclusion requirements of section 1128(b)(1) of the Act and not section 1128(a)(3). In Petitioner's view, crimes that are not "program related" do not fall within the reach of the mandatory exclusion provisions of the Act. Petitioner's Brief at 6 – 7. Moreover, according to Petitioner, there is a separate section of the Act, section 1128(b)(1), which applies to non-program related fraud convictions, and this section is a permissive and not a mandatory exclusion section. Thus, according to Petitioner, if he is to be excluded, it should be under the more liberal permissive exclusion provisions of section 1128(b)(1) and not the mandatory exclusion provisions of section 1128(a)(3).

I find no basis in the Act for this assertion. Section 1128(a)(3) is clear on its face. It plainly applies to the crime committed by Petitioner and of which he was convicted. There is no language in the section that states that a crime must be "program related" in order to fall within its purview. Furthermore, Petitioner misreads section 1128(b)(1). That section applies only to *misdemeanor* convictions. It has nothing to do with the crime of which Petitioner is convicted, which is a felony falling within the mandatory exclusion requirement.

As I noted in the introduction to this decision, Petitioner seeks to offer the testimony of himself and another individual. Petitioner asserts that his testimony is necessary to explain the details of his relationship with CASPM, the flow of monies within that entity, CASPM's "distribution practices," and how the flow of monies related to the delivery of health care items or services. He asserts that his testimony will prove that his embezzlement bore no relationship to the delivery of healthcare items or services.

I find Petitioner's proffered testimony to be irrelevant. The undisputed facts are that Petitioner embezzled more than a million dollars from CASPM and that these monies consisted in part or entirely of revenues generated from providing health care items or services. Nothing that Petitioner proffers detracts from or materially changes these facts and the facts are sufficient to establish that his conviction falls within the reach of section 1128(a)(3) of the Act.

Petitioner also seeks to call as a witness an assistant United States Attorney. Petitioner argues that this individual's testimony would explain cooperation that Petitioner provided to federal officials. That testimony is irrelevant because the I.G. opted to exclude Petitioner for a minimum exclusion period. Cooperation, which might serve to mitigate an exclusion that is for more than the minimum period, is not relevant where the exclusion is for the statutory minimum.

I note also that the pre-hearing order that I issued in this case on May 29, 2015, explicitly directed the parties to reduce any proposed witness testimony to writing made under oath. Petitioner did not comply with that direction nor did he explain his failure to do so. I would exclude his proposed witness' testimony, even if it were potentially relevant, based on Petitioner's failure to comply with my pre-hearing order.

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Steven T. Kessel  
Administrative Law Judge