

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Mark B. Kabins, M.D.  
Docket No. A-11-121  
Request for Reconsideration of Decision No. 2410  
Ruling No. 2012-1  
October 14, 2011

**RULING ON MOTION FOR RECONSIDERATION**

Mark B. Kabins, M.D., asks the Board to reconsider its decision sustaining his exclusion from participating in Medicare and other federally-funded health care programs for five years under section 1128(a)(3) of the Social Security Act (Act), *Mark B. Kabins, M.D.*, DAB No. 2410 (2011), affirming *Mark B. Kabins, M.D.*, DAB CR2373 (2011) (ALJ Decision). The Board sustained the ALJ's determination that section 1128(a)(3) required his exclusion because he had been convicted "in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." It is not disputed that Dr. Kabins was convicted of the federal felony crime of misprision of a felony, for failing to report or covering up a scheme to defraud one of his patients. ALJ Decision at 3-4; I.G. Ex. 2.

With the Motion for Reconsideration, Dr. Kabins submits two court orders issued by the judge in his federal criminal case terminating his probation and argues that the orders establish that he was not convicted in connection with the delivery of a health care item or service, as required for his exclusion. For the reasons explained below, we deny the Motion and affirm our decision.

Background

The Board in its decision found that Dr. Kabins --

pled guilty to covering up a scheme to defraud one of his patients whom he believed might have a viable malpractice suit against him growing out of a surgical operation that left her a paraplegic. The admitted scheme involved Dr. Kabins providing a letter concealing facts surrounding the surgery to the patient's attorney to use in possible suits against other health care providers and using a medical consultant to induce the attorney not to proceed against Dr. Kabins. The sentence imposed included payment of \$3,500,000 in restitution to the patient.

DAB No. 2410, at 1. In upholding the ALJ's conclusion that Dr. Kabins was convicted of a felony offense in connection with the delivery of a health care item or service, justifying his exclusion, the Board applied its long-standing approach "of looking to whether a common sense nexus exists between the offense and health care delivery." *Id.* at 10 (citations omitted).

### The Motion

Dr. Kabins' argument for reconsideration relies entirely on language characterizing his offenses from the two court orders he attaches to his motion. In the first order, the judge who presided over his criminal case in the U.S. District Court for the District of Nevada stated that "[t]here is absolutely nothing that has been presented to the court that suggests that Dr. Kabins' role was other than minimal and certainly did not involve in any manner or degree a lack of professional competence or negligence. The record is to the contrary." Order Granting Motion for Termination of Probation at 1 (July 22, 2011) (Motion Att. A). In the second, the judge stated that the charge of misprision and Dr. Kabins' guilty plea thereto "were not based upon any health care violations by Dr. Kabins, but were based upon the failure of Dr. Kabins to report an alleged improper agreement between the attorney for [his patient] and an individual allegedly representing Dr. Kabins and . . . [another] surgeon who performed the surgery on [the patient]." Order Terminating Stay of Order Granting Motion for Termination of Probation and Reinstating Order at 2 (Sept. 6, 2011) (Motion Att. B).

Dr. Kabins asks that the Board vacate its decision, admit the two court orders into the record, and either reverse its decision or remand the matter to the ALJ to consider the court orders. He states that the Board "retains jurisdiction over the case and can withdraw its decision in order to reconsider it" because he submitted his Motion and the court orders within 60 days after the decision was issued. Motion at 4-5, citing 42 C.F.R. § 1005.21(j) (Board's decision "becomes final and binding 60 days after the date on which the DAB serves the parties with a copy of the decision"). Dr. Kabins argues that the court's statements "that (1) Dr. Kabins' role in the underlying conduct was 'minimal,' (2) the conviction related to attorney misconduct . . . and (3) it was 'not based upon any health care violations by Dr. Kabins,'" demonstrate that the Board's conclusion that the offense was "in connection" with health care delivery was not supported by substantial evidence. Motion at 6-7.

### Discussion

The regulations in 42 C.F.R. Part 1005 governing appeals of exclusions do not provide for the Board to reopen and reconsider its decisions or vest the Board with continuing jurisdiction over a case after it has issued its decision. The language in section 1005.21(j) that Dr. Kabins cites, when read in context with section 1005.21(k), simply means that a Board decision is, for a period of 60 days, subject to appeal in federal court, as Dr.

Kabins appears to acknowledge. *See* section 1005.21(k) (any petition for judicial review by a U.S. Court of Appeals “must be filed within 60 days after the DAB serves the parties with a copy of the decision”); Motion at 4 (decision “does not become final until 60 days have elapsed and an appeal has not been filed in the appropriate court”).

The Board has recognized, however, that a decision-maker generally has inherent authority to reopen and reconsider a decision even in the absence of express authorization in its procedures. *Henry L. Gupton*, Ruling No. 2007-1 (Mar. 14, 2007).<sup>1</sup> Such authority serves the Department by ensuring fair process and sound decisions. *Id.* at 2. As in *Gupton*, we apply here the procedures applicable to many types of disputes heard by the Board, which provide for reconsideration of a Board decision when a party promptly alleges a clear error of fact or law. *See, e.g.*, 45 C.F.R. § 16.13. Reopening a Board decision “is not a routine step” in the process of appealing an ALJ decision, as Dr. Kabins recognizes, but “[r]ather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong,” *Highland Pines Nursing Home, Ltd.*, Ruling No. 2011-4, at 2 (Feb. 25, 2011)<sup>2</sup>; *see* Motion at 6 (a motion for reconsideration “is not a vehicle to repeat arguments already made and rejected.”).

Part 1005 makes no provision for the Board to admit evidence after it has issued its decision (indeed, the Board issues its decision only “*after* the time for submission of briefs and reply briefs, if permitted, has expired,” 42 C.F.R. § 1005.21(i) (*italics added*)). The Board may admit evidence not presented to the ALJ only if it “is relevant and material” and “there were reasonable grounds for the failure to adduce such evidence” before the ALJ. 42 C.F.R. § 1005.21(f). Even assuming we had authority to admit evidence at this point, Dr. Kabins has shown no reasonable grounds for failing to submit the July 22, 2011 order during the Board’s proceedings. In any case, we would decline to admit either order because, as we discuss next, neither is relevant or material to the issue of whether the I.G. was authorized to exclude Dr. Kabins under section 1128(a)(3) of the Act.

Dr. Kabins does not explain what he believes the court meant in stating that his conviction was not based on any “health care violations.” Black’s Law Dictionary defines “violation” as, *inter alia*, “[a]n infraction or breach of the law” and “[t]he act of breaking or dishonoring the law.” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). A finding that Dr. Kabins was not convicted of violating a health care law, such as the Medicare or Medicaid statute, is not material, as Dr. Kabins was not excluded on that basis. *See* DAB No. 2410, at 11 (program-related crime is not a required showing for a mandatory exclusion under section 1128(a)(3)). Other provisions of section 1128(a) authorize or

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<sup>1</sup> Available at <http://www.hhs.gov/dab/decisions/RULDAB2007-1.pdf> .

<sup>2</sup> Available at <http://www.hhs.gov/dab/decisions/dabdecisions/dabrul2011-4.pdf>.

require exclusion for conviction of crimes “related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program” (section 1128(a)(1)); or “with respect to any act or omission in [any other] health care program” (section 1128(a)(3)). Those provisions were not applied here.

All that was required to support Dr. Kabins’ exclusion under section 1128(a)(3) is that the conviction be for a fraud-related offense committed in connection with the delivery of a health care item or service. Nothing in the court’s orders contradicts the Board’s and the ALJ’s findings that Dr. Kabins’ plea agreement “expressly describes the crime as committed ‘in connection with [Dr. Kabins’] treatment’” of his patient; that “the offense was committed to avoid potential consequences arising from the delivery of health care services”; and that “the central force driving Dr. Kabins’ felony was evasion of potential legal consequences arising from his health care activities.” DAB No. 2410, at 10, citing I.G. Ex. 2, at 9-10; DAB No. 2410, at 11. The additional fact that the conviction may have “related to attorney misconduct” (Motion at 6) does not preclude a determination that Dr. Kabins’ offense was committed in connection with health care delivery or allege any error in the Board decision. Nothing in the court’s statements “trumps the evidence” the Board cited (Motion at 7), which included Dr. Kabins’ plea agreement. In short, the court’s statement of one undisputed fact (that a health care violation was not part of the crime) bears no relationship to the relevant issue resolved by the Board (that the crime was connected to health care delivery).

Nor is it material that Dr. Kabins’ conviction was not based on “lack of professional competence or negligence.” Att. A at 1. As the Board noted, “[n]othing in section 1128(a)(3) suggests that the underlying conviction must demonstrate the provision of substandard or negligent medical care in order to require exclusion,” and the facts Dr. Kabins admitted as part of the guilty plea show a nexus to health care delivery “whether or not Dr. Kabins’ services were actually at fault for the harm” to his patient. DAB No. 2410, at 5. Regardless of whether Dr. Kabins or anyone else believes that the treatment he provided was good, the fact that the fraud Dr. Kabins facilitated by his misprision was perpetrated against his patient suffices to show a connection to health care delivery, as does the fact that Dr. Kabins stated in the plea agreement that he believed the patient had a viable malpractice case against him. I.G. Ex. 2, at 9.

That Dr. Kabins’ involvement in the overall criminal scheme may have been “minimal” also is not material. Our conclusion that Dr. Kabins was convicted of a felony offense “in connection with the delivery of a health care item or service” (DAB No. 2410, at 12) did not depend on any findings as to the extent of Dr. Kabins’ involvement in the fraudulent conduct. Again, it is the fact of the conviction, and its obvious relation to Dr. Kabins’ delivery of health care, that support his exclusion, regardless of the level of his involvement in the entirety of the criminal conduct of all the participants in the scheme.

Finally, there is no indication that the court was addressing or even considered the question of whether Dr. Kabins committed his offense “in connection” with health care delivery for the purpose of section 1128(a)(3) of the Act. We thus do not agree with Dr. Kabins that the court “rejected such a characterization.” Motion at 4.

Given our conclusion that the court orders are neither relevant nor material, we do not address Dr. Kabins’ argument that due process requires that the Board reconsider its decision in light of the orders. Motion at 4-6.

### Conclusion

For the reasons discussed above, we deny the Motion for Reconsideration and affirm our decision.

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/s/  
Judith A. Ballard

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/s/  
Stephen M. Godek

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/s/  
Leslie A. Sussan  
Presiding Board Member