

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Gordon T. Noakes, D.D.S.,

Petitioner,

v.

The Inspector General.

Docket No. C-13-919

Decision No. CR3044

Date: December 23, 2013

**DECISION**

The Inspector General (I.G.) of the Department of Health and Human Services notified Petitioner Gordon T. Noakes, D.D.S., that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1). For the reasons stated below, I conclude 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**

In an April 30, 2013 letter, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years under 42 U.S.C. § 1320a-7(a)(1). I.G. Exhibit (Ex.) 1, at 1. The I.G. excluded Petitioner as a result of his conviction “in the Franklin County Municipal Court, Columbus, Ohio, of a criminal offense related to the delivery of an item or service under Medicare or a State health care program . . . .” I.G. Ex. 1, at 1. The letter referenced OI File Number H-12-41813-9. Petitioner timely filed a request for hearing (RFH) and the Director of the Civil Remedies Division assigned this case to me for hearing and decision.

On July 24, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my July 25, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on August 22, 2013, with I.G. Exs. 1-8. Petitioner filed a response (P. Br.) on October 22, 2013. Petitioner did not submit any exhibits with his response. The I.G. filed a reply brief (I.G. Reply) on October 31, 2013.

## **II. Motion for Sanctions**

The I.G. requested that I sanction Petitioner because Petitioner submitted his brief late. I.G. Reply at 1. Based on the circumstances in this matter, I deny the I.G.'s motion.

On September 23, 2013, Petitioner filed a motion (P. Mot. for Leave) seeking 30 additional days in which to file his brief because he had recently retained new counsel. *See* P. Mot. for Leave at 1. The I.G. did not oppose Petitioner's request. P. Mot. for Leave at 1. Unfortunately, I was out of the office when the Civil Remedies Division received Petitioner's motion, but the staff attorney assisting me with this case, Joshua Jowers, granted Petitioner a 15-day extension, consistent with the authority I delegated to Mr. Jowers in my absence. *See* By Direction Letter of September 23, 2013. Pursuant to the By Direction Letter of September 23, 2013, Petitioner's brief was due October 8, 2013. Subsequently, a significant portion of the Federal government, including the Civil Remedies Division, was shut down between October 1, 2013, and October 16, 2013. On October 10, 2013, Petitioner filed a second motion (P. Mot. for Additional Time) seeking 7 more days in which to file his brief. *See* P. Mot. for Additional Time at 1. Again, the I.G. did not oppose Petitioner's motion. P. Mot. for Additional Time at 1. Due to the partial shutdown of the Federal government, I could not respond to Petitioner's Motion for Additional Time until I returned to the office on October 17, 2013, the day the extension ended. Although Petitioner's counsel filed his brief late, counsel for the I.G. has failed to demonstrate how the late filing prejudiced the I.G. The government shutdown was an unfortunate and disruptive event, and I will not deprive Petitioner of the full opportunity to be heard under these circumstances.

## **III. Decision on the Record**

Without objection, I admit I.G. Exs. 1-8 into the record. The I.G. indicated that it did not have any witnesses to offer and that it was not necessary to hold an in-person hearing. I.G. Br. at 8. Additionally, Petitioner neither requested an in-person hearing, nor offered any witnesses. Therefore, I issue this decision on the basis of the written record.

## **IV. Issue**

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs based on

a conviction related to the delivery of an item or service under Medicare or a State health care program.<sup>1</sup> I have jurisdiction to decide this issue. 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f).

## **V. Findings of Fact, Conclusions of Law and Analysis<sup>2</sup>**

### ***A. Petitioner entered a no contest plea in an Ohio court to one count of Medicaid Fraud.***

Petitioner has been a licensed dentist in the state of Ohio since 1995. I.G. Ex. 2. On June 26, 2012, the Attorney General of Ohio filed a complaint against Petitioner in the Franklin County Municipal Court accusing him of Medicaid Fraud in violation of Ohio Rev. Code Ann. § 2913.40(B), a first-degree misdemeanor. I.G. Ex. 3. According to the complaint, Petitioner made false statements or representations to obtain reimbursements between July 1, 2007, and August 23, 2010. I.G. Ex. 3. Specifically, Petitioner:

[D]id knowingly make or cause to be made a false or misleading statement or representation for use in obtaining reimbursement from the medical assistance program, to wit: submitting claims for service with false dates of service, the value or the property, services, of funds obtained for each false representation was less than one thousand dollars (\$1,000)[.]

I.G. Ex. 3. Petitioner pled no contest to the charge on June 26, 2012, and the court entered a judgment of guilty the same day. I.G. Ex. 4. The court ordered Petitioner to pay \$748.50 in restitution to the Ohio Department of Jobs and Family Services.<sup>3</sup> I.G. Exs. 5, 6.<sup>4</sup> The court also ordered Petitioner to pay \$2,184.60 in restitution to United

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<sup>1</sup> Petitioner originally raised a number of issues in his RFH; however, he now concedes that this is the only issue in the case. P. Br. at 1.

<sup>2</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

<sup>3</sup> The Ohio Department of Job and Family Services is the state agency that administers Ohio's Medicaid program. Ohio Rev. Code Ann. § 2913.40(A)(2); *see also Ohio Dept. of Job and Family Servs v. Tultz*, 152 Ohio App. 3d 405, 407 (2003) (describing the Ohio Department of Job and Family Services as the entity that "paid \$74,613.41 out of Medicaid funds" to a beneficiary); *Kinasz-Reagan v. Ohio Dept. of Job and Family Servs*, 164 Ohio App. 3d 458, 459 (2005) (describing the Ohio Department of Job and Family Services as the entity that "imposed a period of restrictive coverage for Medicaid benefits" on a beneficiary).

<sup>4</sup> The I.G.'s Ex. 5 is cut off at the bottom where the court delineated the amounts owed and recipients to whom Petitioner owed restitution. The I.G. submitted letters indicating

Healthcare Community Plan and \$3,369.02 in restitution to Caresource. I.G. Exs. 7, 8. The court also fined Petitioner \$200.00. I.G. Ex. 5.

***B. Petitioner was convicted of a criminal offense that related to the delivery of an item or service under a State health care program .***

An individual must be excluded 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 Medicare or a State health care program.<sup>5</sup> 42 U.S.C. § 1320a-7(a)(1). For purposes of exclusion, an individual is “convicted” of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction is withheld. 42 U.S.C. § 1320a-7(i). In the present case, Petitioner admits and the record demonstrates that Petitioner entered a plea of no contest, or *nolo contendere*, to committing Medicaid Fraud in violation of Ohio Rev. Code § 2913.40(B), and the court accepted this plea. P. Br. at 2, 3-4.; I.G. Ex. 4, 5. Further, the court entered both a judgment of conviction and a finding of guilt. I.G. Ex. 4. Therefore, Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(1).

In order for Petitioner’s conviction to support an exclusion under 42 U.S.C. § 1320a-7(a)(1), there must be a “nexus” between his conduct and the delivery of an item or service under Medicare or a State health care program. *See, e.g., James O. Boothe*, DAB No. 2530, at 5 (2013);<sup>6</sup> *Cf. Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase “relating to” in another part of section 1320a-7 as a “deliberately expansive” phrase, “the ordinary meaning of [which] is a broad one,” and one that is not subject to “crabbed and formalistic interpretation”) (internal quotes omitted).

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that the day after the court entered judgment, the Ohio Attorney General dispersed restitution checks from Petitioner to the entities affected by his misconduct. *See* I.G. Exs. 6-8. I accept the amounts of restitution delineated in the letters from the Ohio Attorney General as evidence of the amount of restitution that was ordered by the court.

<sup>5</sup> The term “State health care program” is a health plan approved under Title XIX of the Social Security Act (i.e., Medicaid). 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2 (definition of *State health care program*).

<sup>6</sup> Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

In the present matter, Petitioner pled no contest to violating Ohio Rev. Code § 2913.40(B), entitled “Medicaid fraud.” Section 2913.40(B) prohibits individuals from “knowingly mak[ing] or caus[ing] to be made a false or misleading statement or representation for use in obtaining reimbursement from the medical assistance program.” The statute further defines “medical assistance program” as “the program established by the department of job and family services to provide medical assistance under . . . Title XIX of the ‘Social Security Act’.”

The fact that Petitioner pled guilty to a violation of Ohio Rev. Code § 2913.40(B) appears to demonstrate that there is a “nexus” between Petitioner’s criminal conduct and the delivery of an item or service under Medicaid. However, relying solely on the statutory provision that Petitioner was convicted of violating is not conclusive as to whether Petitioner’s conviction is related to the delivery of an item or service under a State health care program. *See, e.g., Dewayne Franzen*, DAB No. 1165 (1990). Further, Petitioner argues that his offense pertains to misleading reimbursement claims and, therefore, “does not involve any crime relating to the delivery of an item or service” under Medicaid. P. Br. at 5. Specifically, Petitioner argues that the facts in the case support the notion that his misconduct, as vaguely stated in the record, only involved inaccurate billing dates for services that were actually provided. P. Br. at 4-7. Therefore, I must review the record to determine whether it supports the conclusion that the nexus requirement is met.

There is sufficient evidence in the record to conclude that there is a nexus between Petitioner’s conviction and the delivery of items or services under the Medicaid program. Petitioner pled no contest to a charge of “submitting claims for service with false dates of service.” I.G. Ex. 3. It is well established that submitting false Medicaid claims is “related to” the delivery of an item or service of health care. *Juan de Leon, Jr.*, DAB No. 2533 (2013) (submission of “false and fraudulent Medicare and Medicaid claims” is related to the delivery of an item or service of health care); *Gregory J. Salko, M.D.*, DAB No. 2437 (2012) (characterizing the proposition that an offense does not have to result in the actual delivery of an item or service in order to be “related to” delivery as “repeatedly confirmed”); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff’d*, *Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992) and *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); *Jack W. Greene*, DAB No. 1078 (1989) *aff’d*, *Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990) (a conviction for submitting a false bill is “directly related to the delivery of the item or service since the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the item within the purview of the program”) (internal quotations omitted). Further, the fact that the state court ordered Petitioner to pay restitution to the Ohio Department of Job and Family Services (I.G. Exs. 5, 6) is evidence of a nexus to the Medicaid program. *Alexander Nepumuceno Jamais*, DAB CR1480 (2006) (holding that a sentence involving restitution to an agency that administers a program can serve as a rebuttable presumption that there is a nexus between the criminal conviction and the

delivery of items or services under the program administered by that agency). Therefore, the facts regarding the circumstances underlying Petitioner's conviction support the existence of a nexus between his conviction and the delivery of an item or service under Medicaid.

In his brief, Petitioner raises conjecture about *why* Petitioner was not charged with a different, and perhaps more egregious, offense under Ohio law. P. Br. at 5-6. Petitioner's supposition does not change the fact that Petitioner knowingly submitted claims with false dates of services. Petitioner also asserts that "it is clear that [Petitioner's] conduct may not even [have] satisfied the statute [Ohio Rev. Code § 2913.40(B)]." P. Br. at 5-6. This argument is an impermissible collateral attack on his conviction that I cannot entertain. 42 C.F.R. § 1001.2007(d). Finally, Petitioner argues that the I.G. should have considered imposing a permissive exclusion under 42 U.S.C. § 1320a-7(b)(1) because exclusion under 42 U.S.C. § 1320a-7(a)(1) is not warranted. P. Br. at 7-9. In support of this argument, Petitioner asserts that the term "in connection with" used in the former statute is broader than the term "related to" in the latter, and that the former term would better accommodate the facts underlying his conviction. P. Br. at 8-9. Petitioner is incorrect. The reason that 42 U.S.C. § 1320a-7(a)(1) applies to Petitioner is because his criminal offense related to the Medicaid program. The permissive exclusion that Petitioner identified expressly does not apply to convictions involving Medicare or State health care programs (such as Medicaid). 42 U.S.C. § 1320a-7(b)(1)(ii). Therefore, the I.G. correctly excluded Petitioner under 42 U.S.C. § 1320a-7(a)(1), rather than 42 U.S.C. § 1320a-7(b)(1).

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

Because there is a basis for Petitioner's exclusion under 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).

**VI. Conclusion**

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

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/s/  
Scott Anderson  
Administrative Law Judge