

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Olasehmde Arowsaye  
a/k/a Isaac Arowosaye  
(OI File No. H-11-41769-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1478

Decision No. CR3593

Date: January 22, 2015

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Olasehmde Arowsaye a/k/a Isaac Arowosaye, for 15 years from participating in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a felony related to the delivery of an item or service under Medicare or a State health care program. Petitioner sought review of the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner because Petitioner was convicted of a criminal offense related to the delivery of an item or service under the New Jersey Medicaid program. Further, I affirm the length of the exclusion because the IG proved that four aggravating factors exist to justify the 15-year exclusion. Finally, the June 19, 2014 exclusion effective date is governed by regulation and I have no authority to alter that date.

**I. Background**

By letter dated May 30, 2014, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1) for a period of 15 years. IG Exhibit (Ex.) 1 at 1. The IG advised Petitioner that

the exclusion was based on his felony conviction “in the Essex County Superior Court of the State of New Jersey, 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 programs.” IG Ex. 1 at 1. Further, the IG imposed a length of exclusion in excess of the five-year statutory minimum because: “[t]he court ordered [Petitioner] to pay approximately \$800,000 in restitution. . .”; “the acts occurred from about July 2005 to about April 2008”; “the court sentenced [Petitioner] to 3 years of incarceration”; and because “the New Jersey State Office of the Medicaid Inspector General disqualified [Petitioner] from participation in the Medicaid program.” IG Ex. 1 at 1-2.

Petitioner timely filed a request for hearing. I was assigned to hear and decide this case. On August 20, 2014, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) dated August 22, 2014. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG submitted a brief (IG Br.) together with ten exhibits (IG Exs. 1-10), Petitioner submitted a response brief (P. Br.), and the IG submitted a reply brief.

## **II. Decision on the Record**

Petitioner did not object to any of the IG’s proposed exhibits. Therefore, I admit IG Exs. 1-10 into the record. Order ¶ 5. Petitioner did not submit any proposed exhibits.

The decision in this case will be based on the written record. *See* Order ¶ 6. I ordered the parties to complete and submit short form briefs. The IG filed a completed short form brief and indicated that he did not believe an in-person hearing was necessary and that he did not have any testimony to offer at a hearing. IG Br. at 14. Petitioner did not complete the short form brief. In his submission, he did not indicate that an in-person hearing was necessary or that he had testimony to offer. I previously informed Petitioner that he had the right to request a video hearing and that the request must explain why a video hearing is necessary. Order ¶ 4. Petitioner did not request a video hearing or explain why a video hearing was needed. Therefore, I issue this decision based on the written record.

## **III. Issues**

The issues in this case are limited to determining if there is a basis for exclusion and, if so, whether the length of the exclusion imposed by the IG is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

#### IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

#### V. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>

***A. The IG proved each of the required elements under 42 U.S.C. § 1320a-7(a)(1); therefore, there is a basis to exclude Petitioner.***

The IG cites 42 U.S.C. § 1320a-7(a)(1) as the basis for Petitioner's mandatory exclusion. IG Ex. 1. The statute provides:

(a) Mandatory exclusion

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):

\* \* \* \*

(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 subchapter XVIII of this chapter or under any State health care program.

Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(1) in this case are: (1) Petitioner was convicted of a criminal offense, and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a State health care program.

***1. Petitioner pled guilty in Essex County Superior Court of the State of New Jersey, to second-degree health care claims fraud, a violation under N.J.S.A. § 2C:21-4.3(c), and the court entered a Judgment of Conviction.***

On April 26, 2010, Petitioner was arrested on several charges, including second-degree health care claims fraud, in violation of N.J.S.A. § 2C:21-4.3(c). IG Ex. 2 at 2; IG Ex. 4,

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<sup>1</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

at 1. Count One of the Accusation charging Petitioner with “Health Care Claims Fraud-Second Degree” states that:

between on or about July 2005, and on or about April 2008, at the City or Orange, in the County of Essex . . . [Petitioner] knowingly did make, or did cause to be made, a false, fictitious, fraudulent, or misleading statement of material fact in five or more records, bills, claims or other documents, in writing, electronically or in any other form, and did submit same or cause same to be submitted for payment or reimbursement for health care services, and the aggregate pecuniary benefit obtained or sought to be obtained was at least one thousand dollars; that is, [Petitioner] did knowingly submit or cause to be submitted to Medicaid five or more claims valued at at least one thousand dollars for personal care assistance services allegedly provided to Medicaid beneficiaries when in fact the personal care assistance services were not provided . . . .

IG Ex. 5.

On August 4, 2010, Petitioner pled guilty to Count One of the Accusation, which the Superior Court accepted. IG Ex. 6; IG Ex. 7 at 20-21. On December 6, 2013, the Superior Court entered a Judgment of Conviction & Order for Commitment and sentenced Petitioner to a three-year term of incarceration, with credit for 98 days already served. IG Ex. 4; IG Ex. 8 at 14. The court also ordered restitution to the New Jersey Division of Medical Assistance and Health Services (DMAHS)<sup>2</sup> in the amount of \$800,000. IG Ex. 4 at 1; IG Ex. 8 at 14; IG Ex. 10 at 2-3. As a condition of his plea agreement, Petitioner agreed to be disqualified from participating in the New Jersey Medicaid program for five years. IG Ex. 10 at 2; IG Ex. 7 at 19.

***2. Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(1) because he was convicted of a criminal offense related to the delivery of an item or service under the New Jersey Medicaid program.***

The IG must exclude an individual from participation in all federal health care programs if the individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any State health care program. 42 U.S.C. § 1320a-7(a)(1). An individual is “convicted” of a criminal offense “when a judgment of

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<sup>2</sup> DMAHS is responsible for the administration of the New Jersey Medicaid program. See N.J.S.A. § 30:4D-4, 30:4D-5 (2009); <http://www.nj.gov/humanservices/dmahs/home>.

conviction has been entered against the individual . . . by a Federal, State, or local court . . .” *Id.* § 1320a-7(i)(1). Further, an individual is also “convicted” of a criminal offense when “a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court.” *Id.* § 1320a-7(i)(3). As previously discussed, Petitioner pled guilty to a criminal offense, and the court accepted his plea and issued a judgment of conviction. IG Exs. 4, 6-8. Further, Petitioner concedes he pled guilty and was convicted. P. Br. at 1-2. Accordingly, for purposes of exclusion, Petitioner was “convicted” of a criminal offense.

Petitioner does not dispute that his conviction was related to the delivery of an item or service under a State health care program. I find, moreover, that a nexus exists between Petitioner’s criminal acts and the purported delivery of an item or service under Medicare or a State health care program. *See, e.g., Berton Siegel, D.O.*, DAB No. 1467 (1994) (requiring an administrative law judge to find that some “nexus” or “common sense connection” exists between the offense of which a petitioner was convicted and the delivery of an item or service under Medicaid).

Count One of the Accusation, to which Petitioner pled guilty, involved Petitioner “knowingly submit[ing] . . . to Medicaid five or more claims valued at at least one thousand dollars for personal care assistance services allegedly provided to Medicaid beneficiaries when in fact the personal care assistance services were not provided . . . .” IG Ex. 5 at 2. Courts have determined that the submission of a false claim to Medicaid is “related” to the delivery of an item or service under a state health care program. *Jack W. Greene*, DAB No. 1078 (1989), *aff’d*, *Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff’d*, *Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992), *aff’d*, *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994). Thus, the offense of second-degree health care claims fraud, by submitting claims for services that were never performed to the New Jersey Medicaid program, has a nexus or common sense connection to the delivery of services under a state health care program. 42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(h)(1) (defining “State health care program” to include a program under Title XIX of the Act, *i.e.*, Medicaid); 42 C.F.R. § 1001.2 (definition of *State health care program*).

Moreover, where an individual is convicted of a crime, “proof that any sentence based on that conviction included the payment of restitution to a protected program creates a rebuttable presumption of a nexus or common-sense connection between the conviction and the delivery of an item or service under [that] program.” *Johnnelle Johnson Bing*, DAB CR1938 at 6 (2009) (citing *Alexander Nepomuceno Jamias*, DAB CR1480 (2006)); *see also Gordon T. Noakes, D.D.S.*, DAB CR3044 (2013) (concluding that court-ordered payment of restitution to the Ohio Department of Job and Family Services provided evidence of a nexus to the Medicaid program). Thus, the fact that the court ordered Petitioner to pay \$800,000 in restitution to DMAHS as part of his sentence also supports the nexus showing his offense was program-related. Therefore, I conclude that each

element under 42 U.S.C. § 1320a-7(a)(1) is satisfied and that Petitioner must be excluded.

***B. The presence of four aggravating factors and the absence of any mitigating factors justifies excluding Petitioner for a period of 15 years.***

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). While the IG must impose the five-year minimum mandatory term of exclusion, the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). The IG added ten years to Petitioner's exclusion based on the presence of four aggravating factors: 42 C.F.R.

§§ 1001.102(b)(1) (the acts resulting in the conviction caused a financial loss to a government program of \$5,000 or more); (b)(2) (the acts resulting in the conviction were committed over a period of one year or more); (b)(5) (the sentence imposed by the court included incarceration); and (b)(9) (an adverse action taken by a State agency, based on the same circumstances that serve as the basis for imposing the exclusion). I must uphold the IG's determination as to the length of exclusion so long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii).

***1. The acts resulting in Petitioner's conviction caused, or were intended to cause, a loss to a government program or to one or more entities of \$5,000 or more.***

The IG has demonstrated sufficiently that the acts resulting in Petitioner's conviction resulted in a loss to a government program of \$5,000 or more. 42 C.F.R.

§ 1001.102(b)(1). The record shows that the sentencing judge ordered Petitioner to pay \$800,000 in restitution to the New Jersey Medicaid program. IG Ex. 4 at 1; IG Ex. 10 at 2-3. It is well-established that an amount ordered as restitution constitutes proof of the amount of financial loss. *See, e.g., Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder*, DAB No. 2416, at 9 (2011).

I consider the enormity of the program's financial losses here an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum. Governmental loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory standard." *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). On its own, the governmental loss, 160 times greater the minimum needed to support an increase to the exclusion period, strongly supports the 15-year exclusion period imposed here because it is long enough to reflect the significant loss to the government and serves to ensure that government programs are protected from an individual proven to be untrustworthy when participating in such programs. *See Michael D. Miran, et al.*, DAB

No. 2469, at 5-6 (2012) (upholding a 13-year exclusion based on \$257,946 loss to government program and one additional aggravating factor); *Jeremy Robinson*, DAB No. 1905, at 12 (upholding a 15-year exclusion based on a \$205,000 loss to a government program and two additional aggravating factors).

**2. *The acts resulting in Petitioner's conviction were committed over a period of one year or more.***

The IG has also demonstrated that the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The sentencing judge accepted Petitioner's guilty plea to second-degree health care claims fraud and the Accusation stated that "between on or about July 2005, and on or about April 2008 . . . [Petitioner] knowingly did make, or did cause to be made, a false, fictitious, fraudulent, or misleading statement of material fact in five or more records, bills, claims or other documents . . ." I.G. Ex. 5. Therefore, Petitioner's involvement in the scheme was for more than one year.

The purpose of this aggravating factor "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period of time." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 8. Petitioner fraudulently submitted claims to Medicaid for over two and a half years and this demonstrates Petitioner's lack of integrity was more than just "short-lived." The length of Petitioner's conduct shows prolonged lack of integrity that supports the IG's decision to increase the five-year minimum exclusion period to 15 years.

**3. *The Superior Court of the State of New Jersey sentenced Petitioner to a three-year term of incarceration.***

The IG has also shown the presence of the aggravating factor that Petitioner's sentence included incarceration. 42 C.F.R. § 1001.102(b)(5). The District Court sentenced Petitioner to three years of incarceration, with 98 days credit for time served. IG Ex. 4 at 1. *See also* IG Ex. 8 at 14; IG Ex. 9. A prison sentence of as little as nine months is considered to be relatively substantial for exclusion purposes. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Petitioner's sentence is four times longer than that and represents a substantial period of time, which indicates the seriousness of his offense. Accordingly, this aggravating factor provides significant support for the IG's decision to increase the exclusion well beyond the five-year minimum exclusion period to 15 years. Even if the IG had only proven this aggravating factor and the aggravating factor involving loss to the government, discussed above, I would conclude that the length of Petitioner's exclusion is not unreasonable.

**4. *Petitioner agreed to be disqualified from participating in the New Jersey Medicaid program for a period of five years as a result of his conviction.***

I conclude that an enlargement of Petitioner's exclusion is also not unreasonable given the presence of the aggravating factor that Petitioner agreed to be disqualified from participating in the New Jersey Medicaid program for five years as part of a Consent Order of Disqualification and Restitution. IG Ex. 10 at 1-2; 42 C.F.R. § 1001.102(b)(9). The fact that Petitioner was disqualified from participating in Medicaid for five years based on his conviction is "additional evidence of the seriousness of [Petitioner's] underlying conduct." *Narendra M. Patel, M.D.*, DAB No. 1736, at 28-29 (2000). The disqualification of Petitioner from participating in Medicaid based upon the same facts as those underlying his Medicare exclusion falls within the ambit of 42 C.F.R. § 1001.102(b)(9). See *Darren J. James, D.P.M.*, DAB CR860 (2002); *Joseph Picciotti, D.P.M.*, DAB CR769 (2001). Moreover, the fact that Petitioner was prohibited from participating in the New Jersey Medicaid program for five years underscores the harm his conduct caused and his lack of trustworthiness.

Based on these facts, I conclude that the IG proved that Petitioner was subject to an adverse action by a state agency that was based on the same set of circumstances that formed the basis for the IG's exclusion. 42 C.F.R. § 1001.102(b)(9). Accordingly, the presence of this additional aggravating factor further justifies Petitioner's exclusion for an extended period of 15 years.

**5. *Petitioner did not prove the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG.***

If the IG proves that an aggravating factor listed in the regulations exists to warrant an exclusion of more than five years, then Petitioner may raise mitigating factors listed in the regulations to seek a reduction in the length of exclusion. 42 C.F.R. § 1001.102(c). Petitioner did not raise any mitigating factors listed in the regulations.

Petitioner raised two other issues in his brief. First, Petitioner asserts that the Medicaid billing errors were unintentional and that he has suffered financial hardship due to his conviction. P. Br. at 1-2.

I cannot consider Petitioner's arguments regarding the circumstances surrounding his conviction as a basis for reducing his period of exclusion. Petitioner's arguments constitute an impermissible collateral attack upon his conviction. When an exclusion is based on a criminal conviction, the underlying conviction is not reviewable and an individual may not collaterally attack the conviction on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Lyle*



*Kai, R.Ph.*, DAB No. 1979, at 8 (2005), *aff'd*, *Kai v. Leavitt*, Civ. No. 05-00514 BMK

Petitioner also contends that his plea agreement in the criminal case constituted a global resolution of all the claims against him and that under that agreement Petitioner “consented to be debar[red] from Medicaid and Medicare for 5 year[s] starting from 8/26/2010.” P. Br. at 2. Petitioner argues that an IG exclusion subjecting him to additional punishment “is a double jeopardy.” P. Br. at 2.

I do not have jurisdiction to consider Petitioner’s constitutional argument that his exclusion represents a second punishment violative of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *See* 42 C.F.R. § 1005.4(c)(1). Although I do not consider this argument, I note that double jeopardy is a criminal law concept and this exclusion case is a civil administrative matter. Furthermore, as the IG points out, the Consent Order of Disqualification and Restitution that Petitioner reached with New Jersey did not purport to bind the United States. *See* I.G. Ex. 10, at 3. The Consent Order of Disqualification and Restitution signed by Petitioner expressly states that New Jersey would notify the IG of Petitioner’s conviction “which may result in legal actions by the federal government against [Petitioner] including, but not limited to, the exclusion of [Petitioner] from participation in any federally funded health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).”

Therefore, Petitioner’s arguments have no merit and I am unable to reduce the length of exclusion in this case.

***C. The effective date of exclusion is June 19, 2014, and I have no authority to modify that effective date.***

Petitioner appears to argue that the effective date of exclusion should be retroactively commenced to the date of his conviction in August of 2010. *See* P. Br. at 2. However, exclusions are effective 20 days after the date of the notice. 42 C.F.R. § 1001.2002(b); *see also* 42 U.S.C. § 1320a-7(c)(1). When an exclusion is effective before a decision is issued by an administrative law judge, as it is in this case, that exclusion is “deemed to commence on the date such exclusion originally went into effect.” 42 C.F.R. § 1005.20(b).

In the present matter, the IG issued the exclusion notice on May 30, 2014. IG Ex. 1 at 1. Therefore, Petitioner’s exclusion commenced 20 days later, on June 19, 2014. I have no authority to change the effective date. *See* 42 C.F.R. § 1005.4(c)(1).

**VI. Conclusion**

For the foregoing reasons, I affirm the IG 's determination to exclude Petitioner for 15 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

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/s/  
Scott Anderson  
Administrative Law Judge