

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Muhammad Saleem Choudhry, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-14-1126

Decision No. CR3443

Date: November 5, 2014

DECISION

The Inspector General (I.G.) of the U.S. Department of Health and Human Services (HHS) notified Petitioner, Muhammad Saleem Choudhry, M.D., 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)(3). Petitioner requested a hearing before an administrative law judge to dispute the exclusion. 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

By letter dated March 31, 2014, 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)(3). The I.G. advised Petitioner that the exclusion was based on his conviction in the Court of Common Pleas, Franklin County, Ohio, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. I.G. Exhibit (Ex.) 1.

Petitioner timely filed a request for hearing (RFH) and this case was assigned to me for hearing and decision. On June 11, 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 June 16, 2014. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) and 11 exhibits (I.G. Exs. 1-11). Petitioner filed a response brief with a supplemental letter (P. Br., P. Supp. Ltr).

II. Decision on the Record

Petitioner did not object to the I.G.'s proposed exhibits. *See* Order ¶ 4b. Therefore, I admit I.G. Exs. 1-11 into the record. Because both parties indicated that a hearing is not necessary in this case and that they did not have any witnesses to offer, I decide this case on the basis of the written record. I.G. Br. at 9; P. Br. at 2 (unnumbered pages).

III. 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 for five years pursuant to 42 U.S.C. § 1320a-7(a)(3). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis¹

HHS must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

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 (other than those specifically described in [section 1320a-7(a)(1)]) 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.

42 U.S.C. § 1320a-7(a)(3).

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

A. Petitioner pleaded no contest in an Ohio court to one count of Worker's Compensation Fraud, the court adjudged him guilty, and the court sentenced Petitioner to community control and ordered Petitioner to pay restitution of \$78,573.16 to the Ohio Bureau of Workers' Compensation (BWC).

Petitioner is a psychiatrist who was licensed to practice in the states of Illinois and Ohio. From 1995 through 2009, Petitioner worked at Nehal Psychiatric Group, Inc., located in Columbus, Ohio. I.G. Ex. 4 at 4; I.G. Ex. 5 at 4. Petitioner's practice in Ohio focused exclusively on workers' compensation patients. I.G. Ex. 4 at 4; I.G. Ex. 5 at 8. In 2000, Petitioner relocated to Chicago, Illinois, and, from 2004 through 2006, practiced in both Illinois and Ohio. I.G. Ex. 4 at 4; I.G. Ex. 5 at 11. Petitioner regularly traveled to Ohio one week per month and would see approximately 100 patients over the course of a week. I.G. Ex. 4 at 4; I.G. Ex. 5 at 8.

The Ohio BWC Special Investigations Department investigated Petitioner's Ohio medical practice and found evidence of improper billing practices. The investigation concluded that Petitioner billed BWC for services not rendered, upcoded services, and falsified treatment and progress notes sent to BWC and managed care organizations. I.G. Ex. 6.

An indictment filed on August 19, 2010, in the Common Pleas Court, Franklin County, Ohio, charged Petitioner with: two counts of Workers' Compensation Fraud, a felony of the fourth degree, in violation of Ohio Rev. Code § 2913.48; two counts of Theft, a felony of the fourth degree, in violation of Ohio Rev. Code § 2913.02; and one count of Tampering with Records, a felony of the third degree, in violation of Ohio Rev. Code § 2913.42. I.G. Ex. 7. The relevant portion of Count One of the indictment stated:

[F]rom on or about August 2, 2004 to on or about May 18, 2006, [Petitioner] . . . with purpose to defraud, or knowing that he was facilitating a fraud, did make or present, or cause to be made or presented[,] a false or misleading statement with the purpose to secure payment for goods or services rendered [to workers' compensation recipients] . . . , and/or did alter, falsify, destroy, conceal[,] or remove any record or document that is necessary to fully establish the validity of any claim filed with, or necessary to establish the nature and validity of all goods and services for which reimbursement or payment was received or requested from, the bureau of workers' compensation, . . . and the value of the goods, services, property, or money stolen is five thousand dollars (\$5,000.00) or more, and less than one hundred thousand dollars (\$100,000.00)

I.G. Ex. 7 at 1-2; *see* Ohio Rev. Code § 2913.48(A)(2) and (3).

On June 6, 2011, Petitioner entered a plea of no contest to a stipulated lesser included offense of Count One, Workers' Compensation Fraud, a felony of the fifth degree, in violation of Ohio Rev. Code § 2913.48. I.G. Exs. 8, 9; *see* I.G. Ex. 5 at 10. On June 8, 2011, the Franklin County Court accepted Petitioner's plea and adjudged him guilty of the charge. I.G. Ex. 9 at 1. The court entered a *nolle prosequi* as to Counts Two through Five of the indictment. I.G. Exs. 8-10.

The court sentenced Petitioner to five years of community control and payment of \$78,573.16 in restitution to BWC (\$19,643.29 of which represented overpayment resulting from Petitioner's fraudulent billings and \$58,929.87 of which represented investigative costs). I.G. Ex. 8 at 1.² Based on Petitioner's conviction, on April 11, 2012, the State Medical Board of Ohio permanently revoked Petitioner's medical license. I.G. Exs. 2, 4. A consent order between Petitioner and the Illinois Department of Financial and Professional Regulation indicates that, effective December 24, 2012, the state suspended Petitioner's license as a physician and surgeon for at least a three-year period, also based on Petitioner's felony conviction. I.G. Ex. 3; I.G. Ex. 11 at 2-4.

B. Petitioner was convicted of a felony for the purposes of 42 U.S.C. § 1320a-7(a)(3) and the conviction occurred after August 21, 1996.

Under 42 U.S.C. § 1320a-7(a)(3), Petitioner must be "convicted . . . [after August 21, 1996,] . . . of a criminal offense consisting of a felony . . ." before he can be excluded. An individual is considered "convicted" when a judgment of conviction has been entered by a federal, state, or local court or a plea of guilty or no contest has been accepted in a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(1), (3). In the present matter, Petitioner entered a plea of no contest to a reduced charge of Workers' Compensation Fraud, a felony of the fifth degree, in violation of Ohio Rev. Code § 2913.48, and that plea was accepted by the state court. I.G. Ex. 5 at 3, 5; I.G. Ex. 8 at 1; I.G. Ex. 9 at 1. The state court issued a judgment of conviction in which it "found [Petitioner] guilty" of violating Ohio Rev. Code § 2913.48. I.G. Ex. 8 at 1; I.G. Ex. 9 at 1. Based on these facts, and Petitioner's admission that he was convicted (P. Br. at 1 (unnumbered)), I conclude that Petitioner was convicted of a criminal offense. 42 U.S.C. § 1320a-7(i)(1), (3).

Further, the felony conviction occurred after August 21, 1996. As stated in Count One of the indictment, the criminal conduct on which Petitioner's no contest plea was based occurred "from on or about August 2, 2004 to on or about May 18, 2006." I.G. Ex. 7 at 1. Petitioner himself concedes that he was convicted of a felony that was committed after August 21, 1996. P. Br. at 1 (unnumbered). Therefore, I conclude that Petitioner was convicted of a felony for purposes of 42 U.S.C. § 1320a-7(a)(3).

² If Petitioner violated the terms of the community control, he was to receive an eight-month term of incarceration. I.G. Exs. 9, 10.

C. Petitioner's felony conviction for workers' compensation fraud requires exclusion under 42 U.S.C. § 1320a-7(a)(3) because it involves theft, embezzlement, or fraud in connection with the delivery of a health care item or service.

In order for Petitioner to be excluded under 42 U.S.C. § 1320a-7(a)(3), his conviction must involve fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct “in connection with the delivery of a health care item or service.” In his request for hearing, Petitioner argues that his conviction was not related to patient care, or to Medicare or Medicaid fraud. He contends that he is innocent and it was his office manager who deposited an overpayment check from the Ohio BWC to his bank instead of informing him or the Ohio BWC. RFH. Petitioner contends that he “took the responsibility by pleading guilty and refunded the money right away.” RFH.

I conclude that Petitioner was convicted of fraud in connection with the delivery of health care items or services. Petitioner was convicted of violating Ohio Rev. Code § 2913.48, which is entitled “Workers Compensation Fraud.” The substance of the charge as defined by the Ohio statute alleged that from on or about August 2, 2004 to on or about May 18, 2006, Petitioner, “with purpose to defraud, or knowing that he was facilitating a fraud,” made or caused to be made, “a false or misleading statement with the purpose to secure payment for goods or services rendered” to recipients of workers’ compensation benefits, “and/or did alter, falsify, destroy, conceal or remove” documents necessary to “establish the . . . validity of all goods and services for which reimbursement or payment was received or requested from” the Ohio BWC. I.G. Ex. 7 at 1-2; *see* Ohio Rev. Code § 2913.48(A)(2) and (3). As stated above, Petitioner entered a no contest plea to a modified version of Count One; thus, the facts stated in that count can be used to provide the underlying factual basis of his offense, which clearly involved fraud.³

Moreover, Petitioner’s conviction arose from his improper billing practices during the course of his Ohio psychiatric practice. An investigation by the Ohio BWC found that Petitioner treated workers’ compensation patients and routinely billed the BWC for psychotherapy services in excess of the time he actually spent with the patient. I.G. Ex. 6. According to the investigative report, Petitioner submitted claims to BWC for over 16 hours’ worth of psychotherapy services provided in one day, and at times, billed BWC for over 24 hours’ worth of psychotherapy services purportedly provided in one day. I.G. Ex. 6 at 1. The investigation also found that, in addition to upcoding services, Petitioner falsified treatment and progress notes. I.G. Ex. 6 at 3. The submission of fraudulent billings for upcoded office visits or services not rendered bears a direct connection to the

³ The only difference between the Count One charged in the original indictment and the modified version of Count One is that the modified version is a 5th degree felony and the originally charged version was a 4th degree felony. I.G. Ex. 8 at 1; *see also* I.G. Ex. 4 at 3 n.1.

delivery of a health care item or service. Accordingly, I find that the required connection, rational link, or nexus exists between Petitioner's criminal conduct and the delivery of a health care item or service.⁴ See *Charice D. Curtis*, DAB No. 2430, at 5 (2011).

Further, the record shows that Petitioner admitted to having overbilled the Ohio BWC by \$19,643.29 from August 2004 through May 2006 for his medical services. I.G. Ex. 4 at 5 ¶ 10; I.G. Ex. 5 at 3, 6, 8-9. Petitioner was ordered to pay restitution of \$78,573.16 to the Ohio BWC. I.G. Ex. 9 at 2; I.G. Ex. 10. The order of restitution provides further evidence that Petitioner's crime involved financial misconduct and related to providing health care items or services.

To the extent that Petitioner suggests in his request for hearing that he was not really guilty of any criminal conduct, I consider such an argument to constitute an impermissible collateral attack upon his conviction.⁵ I may not review the basis of a conviction, or consider a collateral attack on that conviction on procedural or substantive grounds. 42 C.F.R. § 1001.2007(d).

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

Five years is the minimum authorized period for a mandatory exclusion pursuant to 42 U.S.C. § 1320a-7(a). 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)(3), Petitioner must

⁴ In his brief, the I.G. notes that Petitioner was also convicted of fraud with respect to an act in a health care program operated or financed by a federal, state, or local government agency. I.G. Br. at 8 n.1. The I.G. explains that the BWC is an Ohio governmental entity and that Petitioner fraudulently billed a health care program administered by the BWC. I.G. Br. at 8 n.1. As argued by the I.G., 42 U.S.C. § 1320a-7(a)(3) covers two different categories of felonies relating to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct": those "in connection with the delivery of a health care item or service" and those "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]." *Erik D. DeSimone, R.Ph.*, DAB No. 1932, at 4 (2004). Because I find that Petitioner's conviction for fraud falls in the former category and thus, sustain the exclusion on that ground, it is not necessary for me to examine whether Petitioner's conviction also falls under the second category.

⁵ Petitioner also appeared to suggest he was innocent at a 2012 hearing before the State Medical Board of Ohio, for he testified that his secretary was responsible for submitting bills to the Ohio BWC and choosing the billing code to use, and he "never asked her what she was billing." I.G. Ex. 5 at 11.

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).

E. I do not have the authority to change the effective date of the exclusion.

Petitioner asserts that his Medicare billing privileges have already been revoked for three years, starting from the date of his conviction in June 2011, and that “[e]xcluding [him] for five more years will duplicate the Medicare exclusion.”⁶ P. Supp. Ltr; *see* RFH. Petitioner essentially requests credit for the three years his billing privileges have been revoked. Further, Petitioner raises the issue that the I.G exclusion determination was not made until 2014, although he was convicted in 2011. Petitioner complains that it took several years for the state to “forward the case to Washington” and that he “should not be penalized for their slow process.” P. Supp. Ltr.

The revocation of Petitioner’s Medicare billing privileges and the statutory exclusion under 42 U.S.C. § 1320a-7(a)(3) are “distinct remedial tools” that HHS may take against individuals and entities. *Ahmed v. Sebelius*, 710 F. Supp. 2d 167, 175 (D. Mass. 2010). The revocation of Petitioner’s Medicare billing privileges is an action by CMS that precludes Petitioner from billing Medicare for items and services provided to Medicare beneficiaries. 42 C.F.R. § 424.535(a)(3). In contrast, an exclusion imposed by the I.G. is significantly broader in scope than a revocation and “extends beyond Medicare to Medicaid and all other federal health care programs.” *Ahmed*, 710 F. Supp. at 176. While a revocation action results in a Medicare re-enrollment bar ranging from one to three years, depending on the circumstances, the minimum required duration of an exclusion will depend on whether the exclusion is mandatory or permissive and on the crime committed. *See Id.* at 175; *compare* 42 C.F.R. § 424.535(c) and 42 U.S.C. § 1320a-7(a)-(b). Although Petitioner has been subjected to both a revocation and an exclusion based on the same set of circumstances, they are different actions. The years during which his Medicare billing privileges have been revoked cannot be used to reduce or act as a “credit” towards the term of a mandatory exclusion.

I am without authority to change the effective date of Petitioner’s exclusion. The exclusion is effective from the date stated in the I.G.’s notice of exclusion, and the effective date of the exclusion must be 20 days from the date on the exclusion notice. 42 U.S.C. § 1320a-7(c)(1); 42 C.F.R. § 1001.2002(b).⁷ Administrative law judges do not have the authority to overturn or disregard this statute or regulation. 42 C.F.R. § 1005.4(c)(1). Although it is regrettable that the exclusion commenced in 2014 for a

⁶ Although Petitioner refers to being “excluded” by Medicare for three years effective from the date of his conviction, he appears to be referring to the revocation of his Medicare billing privileges, which was effective from the date of his conviction.

⁷ The statutory exceptions to this rule are not applicable to this case. *See* 42 U.S.C. § 1320a-7(c)(2)(B), (f)(2).

conviction that occurred in 2011, I have no authority to alter the effective date or shorten the length of the exclusion.

Finally, Petitioner states that he is seeking to vacate his felony conviction and have it expunged from his record, and if he is successful, he requests the termination of the exclusion since the conviction was the basis of the exclusion. P. Supp. Ltr.; *see* RFH. Contrary to Petitioner's argument, he would still be considered to be convicted of a criminal offense, for exclusion purposes, even if the state court vacated and expunged the conviction. The statute explicitly defines the term "convicted" to include entry of a judgment of conviction by any court whether or not an appeal is taken or the conviction is later expunged. 42 U.S.C. § 1320a-7(i)(1); 42 C.F.R. § 1001.2 (definition of *Convicted*).

V. 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)(3), (c)(3)(B).

/s/

Scott Anderson
Administrative Law Judge