Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ferdinand Echavia
(O.I. File No. 5-09-4-1027-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-968

Decision No. CR3864

Date: May 15, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Ferdinand Echavia (Petitioner) that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years based on his conviction for a crime under the Anti-Kickback Statute. Petitioner requested a hearing to dispute the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated November 28, 2014, the IG notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1) because of his conviction in the United States District Court, Northern District of Illinois, of a criminal offense related to the delivery of an item or service under the Medicare program 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 program. IG Exhibit (Ex.) 4. On January 14, 2015, Petitioner, through counsel, filed a request for a hearing (RFH) to dispute the exclusion.

On February 12, 2015, the IG moved for dismissal of the RFH arguing that Petitioner failed to raise any appealable issue. The IG filed four exhibits (IG Exs. 1-4) with the motion. During a February 18, 2015 prehearing conference, I granted Petitioner two weeks to respond to the IG's motion to dismiss. My February 18, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order) summarizes what was said at the prehearing conference.

Following receipt of Petitioner's response, I denied the IG's motion to dismiss. In compliance with the prehearing submission dates I established at the prehearing conference, the IG timely submitted a brief (IG Br.) and three additional exhibits (IG Exs. 5-7). Petitioner timely filed a brief (P. Br.). The IG filed a reply brief (IG Reply Br.).

II. Decision on the Record

Petitioner did not object to any of the IG's proposed exhibits. Therefore, I admit IG Exs. 1-7 into the record. *See* Order ¶ 5. Petitioner did not submit any proposed exhibits.

Because both parties indicated in their briefs that they did not have any witnesses to offer and that an in-person hearing was not necessary, I decide this case on the basis of the written record. IG Br. at 6; P. Br. at 6; Civil Remedies Division Procedures § 19(d) (eff. Jan. 1, 2015).

III. Issue

Whether the IG 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)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

The IG must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a).

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

A. Petitioner pled guilty in the United States District Court for the Northern District of Illinois (District Court) to one count of Conspiracy to Solicit and Receive Remuneration for Patient Referrals, and the District Court issued a Judgment in Criminal Case adjudging Petitioner guilty of that crime.

Petitioner is a Registered Nurse licensed to practice in the state of Illinois. IG Ex. 5. On August 9, 2012, a federal grand jury indicted Petitioner, several other individuals, and Goodwill Home Healthcare, Inc. (Goodwill). IG Ex. 1. Count I of the Indictment, in relevant part, alleged that Petitioner and the other individuals conspired to:

> [K]nowingly and willfully solicit and receive remuneration, including kickbacks and bribes, directly and indirectly, overtly and covertly, from GOODWILL in return for referring patients to GOODWILL for furnishing and arranging for the furnishing of services for which payment may be made in whole and in part under Medicare, in violation of Title 42, United States Code, Section 1320a-7b(b)(1)(A).

IG Ex. 1 at 4-5.

Count I of the Indictment provided the following allegations against Peittioner:

> It was further a conspiracy that in or about August 2009, shortly after [Petitioner] began treating patients on behalf of GOODWILL, [two other defendants] and Individual G, agreed to cause GOODWILL to pay, and [Petitioner] agreed to receive, kickback payments for the referral and recertification of patients for the provision of home health care services to be reimbursed under Medicare. From approximately August 2009 to approximately July 2010 [two other defendants] and Individual G, paid kickbacks to [Petitioner] for each patient that [Petitioner] referred to GOODWILL for a Start of Care cycle and recertification for additional cycles of home health care services. In total, [two other defendants] and Individual G, paid approximately $28,000 in kickbacks directly to [Petitioner] through GOODWILL. In addition, [two other defendants] and Individual G, paid approximately $56,000 in kickbacks to Care Specialist, Inc., a company owned and controlled by [Petitioner].

IG Ex. 1 at 7-8.

On October 30, 2013, Petitioner entered into a plea agreement in which he agreed to plead guilty to Count I of the Indictment and admit he violated 42 U.S.C. § 1320a-7b(b)(1)(A). IG Ex. 2.

On June 17, 2014, the District Court entered a Judgment in a Criminal Case in which the District Court acknowledged that Petitioner pled guilty to Count I of the Indictment and indicated Petitioner was "adjudicated guilty" of violating 42 U.S.C. § 1320a-7b(b)(1)(A). IG Ex. 3 at 1. The District Court sentenced Petitioner to six months of home detention and three years of probation, and ordered Petitioner to pay a $100 assessment as well as forfeit $84,509. IG Ex. 3 at 2, 4-5; IG Ex. 6 at 112-113.

B. Petitioner was convicted of a felony for the purposes of 42 U.S.C. § 1320a-7(a)(1).

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense" 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 guilty to a charge of violating 42 U.S.C. § 1320a-7b(b)(1)(A), and the District Court "adjudicated [Petitioner] guilty" of that crime. IG Ex. 2 at 2; IG Ex. 3 at 1. I conclude, based on these facts and Petitioner's admission that he was convicted of a criminal offense (P. Br. at 1), that Petitioner was convicted of a criminal offense.

C. Petitioner's criminal offense of receiving kickbacks for referring and recertifying patients for home health services that Goodwill billed to Medicare is a criminal offense related to the delivery of an item or service under Medicare.

An individual must be excluded from participation in any federal health care program if the individual was convicted of a criminal offense related to the delivery of an item or service under Medicare. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R § 1001.101(a). The requirement that the conviction be "related to" the delivery of health care items or services simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health & Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation" (internal quotes omitted)).

Petitioner was convicted of violating the following provision of the Anti-Kickback Statute:

> Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—in return for referring an individual to a person for the furnishing or arranging for the **furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program** . . . shall be guilty of a felony . . . .

42 U.S.C. § 1320a-7b(b)(1)(A) (emphasis added). Therefore, based on the statute, Petitioner's criminal conduct has a nexus to furnishing an item or service under a federal health care program. Petitioner's criminal conduct also has a nexus to the delivery of an item or service under the Medicare program because he engaged in a criminal conspiracy to refer his patients for home health services, provided by Goodwill and paid for by Medicare, in order to receive a payment from Goodwill for the referral. Petitioner admitted the following in his plea agreement:

> Between in or about August 2009 and continuing through in or about May 2010, [Petitioner] conspired with [a co-defendant] and others to knowingly and willfully solicit and receive remuneration, directly and indirectly, overtly and covertly, from Goodwill Home Healthcare, Inc., **in return for referring patients to Goodwill for the furnishing and arranging for the furnishing of services for which payment may be made in whole and in part under Medicare,** in violation of [42 U.S.C. § 1320a-7b(b)(1)(A)], all in violation of Title 18, United States Code, Section 371.
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> Specifically, as [Petitioner] knew, Medicare provided free and below-cost health care benefits, including medically necessary in-home health care services for persons who were deemed homebound due to illness or injury that restricted their ability to leave their place of residence. In addition, as [Petitioner] knew, Goodwill . . . was a licensed provider of home health services purportedly provided to its clients. [Petitioner] was a nurse licensed in Illinois. [Petitioner] provided home health care services to patients through Goodwill. [Petitioner] also owned and controlled Care Specialist, Inc., a corporation in Illinois that received payments from Goodwill.

> It was part of the conspiracy that, beginning in or about August 2009 and continuing through in or about May 2010, **[Petitioner] agreed with [one of the co-defendants] and others to receive kickback payments from Goodwill in exchange for [Petitioner's] referral of patients to Goodwill for home health services for which Goodwill sought reimbursement from Medicare.** Goodwill made these kickback payments to [Petitioner] through Care Specialist.
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> In furtherance of the conspiracy, on or about November 27, 2009, [Petitioner] received a check from Goodwill made out to Care Specialist in the amount of $7,000, **as a kickback for referring ten patients to Goodwill for home health services for which Goodwill sought reimbursement from Medicare.** [Petitioner] received $700 for each of these patients, knowing, it was illegal to receive such kickbacks.
>
> In addition, on numerous other occasions [Petitioner] received checks from Goodwill, through Care Specialist, **as kickback payments for referring additional patients to Goodwill for home health services for which Goodwill sought reimbursement from Medicare,** knowing that it was illegal to receive such kickbacks. In total, [Petitioner] received approximately $56,300 in kickback payments from Goodwill, through Care Specialists.

IG Ex. 2 at 2-4 (emphasis added). Indeed, the nexus between Petitioner's misconduct and the delivery of items or services under the Medicare program is sufficiently clear that Petitioner did not dispute this in his RFH or brief.

Petitioner's primary argument is that the IG has not properly applied the exclusion statute in this matter. The IG proceeded under a mandatory exclusion based on Petitioner's conviction under 42 U.S.C. § 1320a-7b(b)(1)(A); however, Petitioner asserts that his misconduct falls under the permissive exclusion provision in 42 U.S.C. § 1320a-7(b)(7), which permits exclusion when the Secretary of Health and Human Services determines that an individual violated 42 U.S.C. § 1320a-7b. P. Br. at 1. Petitioner then argues, at length, that he should not be excluded under 42 U.S.C. § 1320a-7(b)(7) because he did not violate 42 U.S.C. § 1320a-7b. P. Br. at 1-6; RFH 2-6.

Petitioner's argument is fundamentally flawed because the IG's exclusion under 42 U.S.C. § 1320a-7(a)(1) is derivative of Petitioner's conviction, whereas a permissive exclusion under 42 U.S.C. § 1320a-7(b)(7) is an original action in which the IG would

need to prove that Petitioner violated 42 U.S.C. § 1320a-7b by a preponderance of the evidence. Because Petitioner was already convicted of violating 42 U.S.C. § 1320a-7b, the IG no longer needs to prove such a violation in order to exclude Petitioner.

A federal court addressed this issue in detail.

> Plaintiff first contends the ALJ's imposition of a period of exclusion under the mandatory exclusion provision of 42 U.S.C. § 1320a–7(a)(1) was an erroneous application of law, and the ALJ should have applied the permissive exclusion provisions of 42 U.S.C. § 1320a–7(b)(7).
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> . . .
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> Plaintiff was convicted of conspiracy to commit kickback violations, in violation of 18 U.S.C. § 371 and offering and paying bribes in violation of 42 U.S.C. § 1320a–7b(b), one of the statutes expressly referenced in the permissive exclusion provision of 42 U.S.C. § 1320a–7(b)(7).
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> . . .
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> Pursuant to the plain language of 42 U.S.C. § 1320a–7(a)(1), the mandatory exclusion provision applies to individuals *convicted* of *program-related crimes*, that is crimes *related to the delivery of an item or service.* On the other hand, 42 U.S.C. § 1320a–7(b)(7) provides that the permissive exclusion provision Plaintiff references applies to individuals *that the Secretary determines has committed an act* described in certain statutes, including the Anti–Kickback Statute. Obviously, if a jury has convicted an individual of committing a program-related crime, the Secretary need not make a determination that the individual has engaged in the underlying conduct; a jury has found beyond a reasonable doubt that the person has committed the conduct. Mandatory exclusion thus applies to those convicted of program-related crimes, while permissive exclusion applies to those the Secretary has determined (in an administrative proceeding) have committed certain acts described in specific statutes.
>
> If legislative intent was not apparent from the plain language of the statute, the ALJ could have resorted to legislative history. But the legislative history does not support the

> interpretation urged by Plaintiff. The legislative history explains that § 1320a–7(b)(7) is a very different exclusion authority than the exclusion authority of § 1320a–7(a)(1) for program-related convictions. Exclusion authority under § 1320a–7(b)(7) rests on a determination by the Secretary that the individual has committed an act described in §§ 1320a–7a, 1320a–7b, or 1320a–8. A permissive exclusion proceeding under § 1320a–7(b)(7) is initiated by Defendant's Office of Inspector General, and the respondent has the right to a pre-exclusion hearing in which the Office of Inspector General must introduce evidence to establish, by a preponderance of the evidence, that a violation of any of the enumerated sections has occurred. The legislative history of section 1320a–7(b)(7) indicates it was enacted as an alternative to criminal prosecution or where a program-related conviction does *not* exist.

Anderson v. Thompson, 311 F. Supp. 2d 1121, 1124-1127 (D. Kan. 2004). Based on this analysis, I must reject Petitioner's argument.

Although Petitioner asserts that he is not disputing that he was convicted of conspiring to violate the Anti-Kickback Statute (P. Br. at 1), to the extent that any of his arguments appear to claim that Petitioner did not violate that statute, any such arguments are impermissible collateral attacks on his conviction because Petitioner cannot re-litigate his criminal offense before me. 42 C.F.R. § 1001.2007(d); *see also Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *Anderson*, 311 F. Supp. 2d at 1128.

Petitioner also argues that exclusion under 42 U.S.C. § 1320a-7(a)(1) is not appropriate because Petitioner did not commit fraud. RFH at 1-2. Although it is true that the District Court determined that Petitioner only violated marketing rules and did not engage in more egregious conduct, such as referring patients for unnecessary health services (*see* IG Ex. 6 at 32-34, 98-99), 42 U.S.C. § 1320a-7(a)(1) does not require that Petitioner be convicted of a criminal offense involving fraud. Therefore, Petitioner's argument is not relevant.

As Petitioner points out, the District Court did not consider Petitioner's crime to be of the most egregious character. However, Petitioner's crime makes him untrustworthy for participation in federal health care programs. As the District Court recognized: "The crimes that [Petitioner and the other defendants] have pled guilty to in this case arise from a statute which is, in essence, a prophylactic statute. Payment for referrals on a patient-by-patient basis creates bad incentives and increases risk of fraud." IG Ex. 6 at 98. The District Court also noted that "[Petitioner] was both an employee and a contractor [of Goodwill], received very substantial amount of payments in both roles, and

I think received more payment than anyone outside of the ownership group." IG Ex. 6 at 106. In fact, this led to Petitioner acknowledging that he was liable to the United States for a significant forfeiture of money related to the proceeds from his illegal behavior. IG Ex. 2 at 9; IG Ex. 3 at 5; IG Ex. 6 at 20; IG Ex. 7. Petitioner's criminal misconduct evidences a threat to federal health care programs; therefore, exclusion under 42 U.S.C. § 1320a-7(a)(1) is warranted.

D. Petitioner must be excluded for the statutory minimum of five years under 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)(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), 1001.2007(a)(2).

V. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge