

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
Elsie Persall, L.P.N.,	)	Date: November 10, 1998
Petitioner,	)	
- v. -	)	Docket No. C-98-359
The Inspector General.	)	Decision No. CR556

**DECISION**

By letter dated April 30, 1998, Elsie Persall, L.P.N., Petitioner, was notified by the Inspector General (I.G.), United States Department of Health and Human Services (HHS), that it had decided to exclude her for a period of five years from participation in the Medicare, Medicaid and all federal health care programs.<sup>1</sup> The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted in the State of Michigan, 76th Judicial District Court, of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

By letter dated June 3, 1998, Petitioner filed a request for hearing before an Administrative Law Judge (ALJ). This case was assigned to me for hearing and decision.

The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. The I.G. submitted a brief in this matter and seven proposed exhibits (I.G. Exs. 1-7). Petitioner did not object to these exhibits and I receive into evidence I.G. Exs. 1-7. Petitioner submitted a brief in response and nine proposed

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<sup>1</sup> In this decision, I use the term "Medicare" to refer to these federal health care programs.

exhibits (P. Exs. 1-9). The I.G. did not object to these exhibits and I receive into evidence P. Exs. 1-9. The I.G. also submitted a reply brief.

I grant the I.G.'s motion for summary disposition. I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

#### APPLICABLE LAW

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service to be excluded from participation in the Medicare and Medicaid programs for a minimum period of five years.

#### PETITIONER'S ARGUMENT

Petitioner contends that the offense for which she was convicted does not constitute an offense relating to the abuse or neglect of a patient. She maintains that her actions were in accord with nursing home policy and in accord with the instructions from the patient's physician and guardian. To support her claim, she notes that none of the other nursing home employees involved in the incident (whom she claims were equally culpable) received any sanction and that an investigation of the incident by the State of Michigan Department of Public Health did not result in any disciplinary action against her. Petitioner maintains that the term "abuse" applies to situations where a party wilfully mistreats, wrongfully strikes or physically assaults another person. In this case, she maintains that her actions in restraining the patient were medically necessary and appropriate.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was a licensed practical nurse in the State of Michigan.
2. Petitioner was employed as a licensed practical nurse at Tendercare of Mount Pleasant Nursing Home in Mount Pleasant, Michigan, during the period relevant to this case.
3. On September 23, 1996, a complaint misdemeanor was filed in the 76th Judicial District Court, State of Michigan, Case No. 96-1352-SM, against Petitioner charging her with three counts of patient abuse. I.G. Ex. 4.

4. The September 23, 1996 complaint misdemeanor charged that Petitioner physically, mentally and/or emotionally abused, mistreated, or harmfully neglected patients of the nursing home where she was employed on three different occasions. I.G. Ex. 4.

5. On September 22, 1997, pursuant to a plea agreement, Petitioner entered a plea of guilty to assault and battery under count two of the indictment, which related to her improperly and illegally restraining a patient of the nursing home by tying his wrists and his ankles to the bed. Counts one and three of the complaint were nolle prosequi. I.G. Exs. 3 and 5.

6. On October 31, 1997, a Judgment of Sentence against Petitioner for assault and battery was entered in the 76th Judicial District Court of Michigan. I.G. Ex. 6.

7. Petitioner was placed on probation for 12 months and ordered to pay a total of \$350 as a fine, restitution, and a crime victim fee. I.G. Ex. 6.

8. On April 30, 1998, the I.G. notified Petitioner that she was being excluded from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act. I.G. Ex. 1.

9. Petitioner's plea of guilty and the entry of the Judgment of Sentence constitute a "conviction" within the meaning of sections 1128(i)(1) and (3) of the Act.

10. Petitioner's conviction for assault and battery upon a patient in her care was an offense relating to the neglect or abuse of a patient and is connected with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

11. The mandatory minimum period for an exclusion pursuant to section 1128(a)(2) of the Act is five years. Act, section 1128(c)(3)(B).

12. The Secretary has delegated to the I.G. the duty to determine and impose exclusions pursuant to section 1128(a) of the Act.

13. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

14. Neither the I.G. nor the ALJ has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

## DISCUSSION

To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove that: (1) the individual charged has been convicted of a criminal offense; (2) the conviction is related to the neglect or abuse of patients; and (3) the patient's neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act is that Petitioner must have been convicted of a criminal offense. The term "convicted" is defined in section 1128(i) of the Act. This section provides that an individual or entity will be convicted of a criminal offense:

- (1) when a judgment of conviction has been entered against the individual or entity by a federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
- (2) when there has been a finding of guilt against the individual or entity by a federal, State, or local court;
- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court; or
- (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(i) of the Act.

This section establishes four alternative definitions of the term "convicted." An individual or entity need satisfy only one of the four definitions under section 1128(i) to establish that the individual or entity has been convicted of a criminal offense within the meaning of the Act. In the present case, I find that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(i)(1) and (3) of the Act.

Further, I find that Petitioner's conviction under section 1128(i) of the Act for assault and battery must be deemed to be a conviction for abuse or neglect of a patient within the scope of section 1128(a)(2) of the Act. A conviction need not be for an offense called patient abuse or patient neglect; it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In that case, the petitioner was a nurse's aide who pled nolo

contendere to a charge of battery. The petitioner allegedly struck a nursing home patient with an electrical cord. The ALJ held that it was sufficient that a party is convicted of an offense based on charges of neglectful or abusive conduct.

Petitioner, in this case, is a licensed practical nurse who was employed at the Tendercare of Mount Pleasant Nursing Home. During the course of her regular duties, a patient of the nursing home was subjected to forceful and improper use of restraints when Petitioner tied down the patient's arms and legs. Although the terms "abuse" and "neglect" are not defined within the Act, the term "abuse" is to include those situations where a party wilfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). In the present case, Petitioner was convicted within the scope of section 1128(i) of the Act, of assault and battery as a result of the incident involving the affected patient. A physical assault against an individual clearly falls within the common and ordinary meaning of the term "abuse." Patricia Self, supra.

In her defense, Petitioner claims that her actions did not constitute physical mistreatment and were in accord with nursing home policy and the instructions of the patient's physician and guardian. I find no merit in such claims. The memorandum from the Michigan Attorney General's office, issued in conjunction with the criminal proceedings against Petitioner, discredits these claims. I.G. Ex. 5. Moreover, battery, which is a portion of the offense to which Petitioner pled guilty, involves the intentional use of unlawful force, in a harmful or offensive manner, and is actionable under section 1128(a)(2) of the Act. Loretta Chee, DAB CR351 (1995).

Petitioner's arguments which seek to challenge the propriety of her criminal conviction and to justify her actions as medically appropriate are immaterial because the intent of the individual in committing the crime or the surrounding circumstances of the offense are not factors that may be considered when imposing an exclusion under section 1128(a)(2) of the Act. Patricia McClendon, DAB CR264 (1993). In essence, Petitioner's argument amounts to a collateral attack on her conviction. The DAB has previously held this to be an ineffectual argument in the context of an exclusion appeal as the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter J. Edmonson, DAB No. 1330 (1992). Therefore, in view of her criminal conviction, Petitioner's assertions concerning her intentions or the alleged propriety of her actions when she intentionally restrained the patient may not be considered in evaluating the propriety of her exclusion under section 1128(a)(2) of the Act.

I also find that Petitioner's abuse of a patient occurred in connection with the delivery of a health care item or service. Petitioner's duties as a licensed practical nurse directly involve patient care and the delivery of health care services. Petitioner does not dispute that she was employed by the facility as a licensed practical nurse and had the duty to assist in caring for this patient when the assault occurred. Where an attack occurs in a health care facility where the victim had been residing and the perpetrator was an employee of the facility whose duty was to assist in the care of patients, the conviction is deemed to be related to the delivery of health care. Patricia McClendon, supra.

In addition, Petitioner argues that none of the other nursing home employees involved in the incident (whom she claims were equally culpable) received any sanction and that an investigation of the incident by the State of Michigan Department of Public Health did not result in any disciplinary action against her. Petitioner's arguments are irrelevant for the purposes of her exclusion. A five-year exclusion under section 1128(a)(2) of the Act is mandatory when a petitioner has been convicted of a criminal offense relating to the abuse or neglect of patients in connection with the delivery of a health care item or service. Aida Cantu, DAB CR462 (1997). Once the I.G. determines that a conviction relating to the abuse or neglect of a patient has occurred, exclusion is mandatory under section 1128(a)(2). Peter J. Edmondson, DAB CR163, aff'd, DAB No. 1330 (1992). In this case, Petitioner has been convicted, within the meaning of section 1128(i) of the Act, of assault and battery of a nursing home patient in relation to the delivery of a health care item or service. Therefore the I.G. is required to exclude Petitioner for at least five years. Neither the I.G. nor the ALJ is authorized to reduce a five-year mandatory period of exclusion. Jack W. Greene, DAB No. CR19, aff'd, DAB No. 1078 (1989), aff'd sub nom, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn 1990).

#### CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare, Medicaid and federal health care programs for a period of at least five years because she was convicted of a criminal offense related to the abuse or neglect of a patient in connection with the delivery of a health care item or service. The five-year exclusion is therefore sustained.

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**Joseph K. Riotto**  
Administrative Law Judge