

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Dawn Potts,)	DATE: March 15, 1991
)	
Petitioner,)	Docket No. C-291
)	
- v. -)	Decision No. CR120
)	
The Inspector General.)	

DECISION

On August 14, 1990, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs.¹ The I.G. told Petitioner that she was being excluded for five years as a result of her conviction in a Florida 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. Petitioner was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(2) of the Social Security Act (Act). The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years.

Petitioner timely requested a hearing as to the exclusion, and the case was assigned to me for a hearing and decision. The I.G. moved for summary disposition. On January 28, 1991, I issued a Ruling which granted in part and denied in part the I.G.'s motion. I ruled that, based on the undisputed material facts and the law, the I.G. had established that Petitioner was "convicted" of a criminal offense within the meaning of section 1128 of

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

the Act. I also ruled that the undisputed facts did not establish that Petitioner had been convicted of a criminal offense relating to the neglect or abuse of patients within the meaning of section 1128(a)(2) of the Act.

I afforded the parties the opportunity to file additional submissions in connection with the motion for summary disposition. The parties have done so. I now conclude that, based on the undisputed material facts and the law, Petitioner was convicted of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service, as described by section 1128(a)(2) of the Act. I conclude that the I.G. had no choice but to exclude Petitioner from participating in Medicare and Medicaid for at least five years. Therefore, I sustain the five-year exclusion which the I.G. imposed and directed against Petitioner.

ISSUES

The issue in this case is whether Petitioner was convicted of a criminal offense relating to the neglect or abuse of a patient within the meaning of section 1128(a)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW²

1. On March 5, 1990, Petitioner was charged under Florida law with the criminal offense of failing to report a case of known or suspected abuse, neglect, or exploitation of an aged person or disabled adult. I.G. Ex. A.³

² The parties' exhibits and memoranda will be referred to as follows:

I.G.'s Exhibit	I.G. Exhibit (number)/(page)
Petitioner's Hearing	
Request	P. Hrg. Req. (page)

³ The I.G. filed two sets of exhibits in connection with his motion for summary disposition in this case. The I.G. filed his first set of exhibits as an attachment to his motion for summary disposition. The I.G. chose to identify the exhibits in this first set as Exhibits A through E. The I.G. filed his second set of exhibits as an attachment to his supplemental memorandum in support
(continued...)

2. On May 22, 1990, the County Court of Marion County, Florida, entered a disposition of the criminal charge against Petitioner. I.G. Ex. E.

3. Adjudication of guilt against Petitioner was withheld. I.G. Ex. E; P. Hrg. Req. 1.⁴

4. Petitioner was sentenced to pay a fine of \$100.00 and to pay court costs of \$87.50. I.G. Ex. E.

5. Petitioner had worked in the position of house manager at a facility named the Ocala Cluster. I.G. Ex. D.

6. Petitioner's duties as house manager included insuring that employees at the Ocala Cluster provide proper care for residents of the facility. I.G. Ex. I.

7. The Ocala Cluster is a facility, licensed by the State of Florida, which provides health care for mentally retarded persons. I.G. Ex. F and G.

8. Residents of the Ocala Cluster are, therefore, patients within the meaning of section 1128(a)(2) of the Act.

9. The incident which was the basis for the criminal charge against Petitioner occurred at the Ocala Cluster. I.G. Ex. D.

10. In the course of her duties as house manager, Petitioner was informed that one of the employees whom she supervised had struck a resident of the Ocala Cluster. I.G. Ex. D.

³(...continued)

of his motion for summary disposition. The I.G. chose to identify the exhibits in this second set as Exhibits A through D. Because of the obvious potential for confusion resulting from multiple exhibits with the same identifier, I have opted to reidentify the exhibits in the second set. These exhibits are now identified as I.G. Exhibits F (formerly Exhibit A), G (formerly Exhibit B), H (formerly Exhibit C), and I (formerly Exhibit D).

⁴ The judgment does not indicate a trial by jury with a verdict of guilty. In her hearing request, Petitioner states that she was found guilty by a jury.

11. The individual who allegedly had been struck was a profoundly mentally retarded resident, who received health care at the Ocala Cluster. I.G. Ex. A and H.

12. Petitioner did not report this incident to State authorities as required by Florida law. I.G. Ex. D.

13. The criminal charge against Petitioner involved Petitioner's failure to report the alleged striking of the resident by an employee whom Petitioner supervised. Findings 1-12.

14. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Findings 1 and 2; Social Security Act, Section 1128(i).

15. Petitioner was convicted of a criminal offense relating to neglect or abuse of patients within the meaning of section 1128(a)(2) of the Act. Findings 1-14; Social Security Act, section 1128(a)(2).

16. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

17. On August 14, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that she be excluded from participating in Medicaid, pursuant to section 1128 of the Social Security Act.

18. There are no disputed issues of material fact in this case and summary disposition is appropriate.

19. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required for exclusions pursuant to section 1128(a)(2) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).

20. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Social Security Act, sections 1128(a)(2) and 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. Petitioner was employed as a house manager, a supervisory position, at the Ocala Cluster, a Florida residential care facility for mentally retarded persons. In the

course of her assigned duties, Petitioner learned that an employee whom she supervised at the Ocala cluster allegedly had struck a profoundly mentally retarded resident. Petitioner did not report this episode to State authorities.

Florida law requires a person to immediately report to State authorities any incident of neglect or abuse of an aged or disabled person that he or she knows or reasonably suspects to have occurred. Florida Statutes, 415.103. Failure to make such a report is a criminal offense under Florida law. Florida Statutes, 415.111. Petitioner was charged with this offense, and eventually a disposition of the charge was entered in Petitioner's case. The court's records relate that adjudication of guilt against Petitioner was withheld, and she was sentenced to pay a fine of \$100.00 and court costs of \$87.50.

1. Petitioner was "convicted" of a criminal offense within the meaning of section 1128 of the Social Security Act.

The issue which I must resolve is whether, based on these undisputed material facts, Petitioner has been convicted of a criminal offense relating to the neglect or abuse of a patient in connection with the delivery of a health care item or service, as described in section 1128(a)(2) of the Act. If so, then I must affirm the five-year exclusion imposed and directed against Petitioner by the I.G., because the Act mandates exclusions of at least five years for persons convicted of criminal offenses as described in section 1128(a)(2). Social Security Act, sections 1128(a)(2) and 1128(c)(3)(B).

In deciding that issue, I must first decide whether Petitioner was "convicted" of a criminal offense within the meaning of the Act. Based on the undisputed facts, I conclude that Petitioner was "convicted" of a criminal offense. Petitioner has admitted that she was found guilty of the offense of which she had been charged after a jury trial. P. Hrg. Req. 1. Section 1128(i)(2) of the Act defines "convicted" of a criminal offense to include cases where there has been a finding of guilt. Petitioner was sentenced to pay a fine and court costs pursuant to a disposition which recited that adjudication of guilt was withheld. Finding 2; I.G. Ex. E.

Section 1128(i)(4) of the Act defines "convicted" of a criminal offense to include:

[W]hen 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.

In this case there is no document which precisely explains the meaning, under Florida law, of a disposition in which adjudication of guilt is withheld. I conclude that in light of Petitioner's admission that she was found guilty after a jury trial and sentenced to pay a fine and court costs, the disposition in her case constituted either a finding of guilt (section 1128(i)(2)) or a disposition where judgment of conviction was withheld (section 1128(i)(4)). A jury finding of guilt would fall precisely within the definition contained in section 1128(i)(2). A disposition where adjudication of guilt is withheld is synonymous with a disposition where judgment of conviction is withheld in light of the fact that the disposition included the sentence of payment of a fine and court costs.

2. Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

I must next decide whether Petitioner's conviction is for a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service. It is evident from the undisputed material facts that the statutory criteria have been met in this case.

Under section 1128(a)(2), the statutory criteria may be met in one of two circumstances. First, a party who is convicted of patient neglect or abuse will be found to have been convicted of an offense within the meaning of the section. Ronald Allen Cormier, DAB Civ. Rem C-206 (1990). Second, a party who is convicted of an offense relating to patient neglect or abuse will be found to have been convicted of an offense within the meaning of the section.

In this case, Petitioner's conviction amounted to a conviction for neglect of a patient. Therefore, Petitioner was convicted of an offense within the meaning of section 1128(a)(2). The undisputed facts which direct this conclusion are as follows. First, the individual against whom an abusive act was allegedly perpetrated was a patient in a health care facility. This individual was a profoundly retarded person who was institutionalized at the Ocala Cluster, a facility devoted to the residential

care of retarded persons. Findings 7 and 11. Second, the allegedly abusive act was perpetrated in connection with the delivery of a health care item or service. This conclusion logically follows from the patient's state of dependency and the fact that the alleged abusive conduct was reported to Petitioner as having been perpetrated against the patient by an employee whom Petitioner supervised. It is not unreasonable to infer that the patient in question was utterly dependent on the staff at the Ocala Cluster for even the essential minimum services necessary for her survival. See I.G. Ex. H. Given that, the patient's maintenance at the Ocala Cluster is a health care item or service, and any act perpetrated against that patient by a staff employee in the course of that patient's residence at the Ocala Cluster must be deemed to be in connection with the delivery of a health care item or service.

Third, Petitioner's failure to report the allegations of abuse constituted an act of "neglect" within the meaning of section 1128(a)(2). The term "neglect" is not defined in section 1128. In the absence of a statutory definition, the term must be defined according to its common and ordinary meaning. In the context of section 1128, "neglect" means failure to attend to the needs of patients in circumstances where the treating party is under a duty to provide care. Summit Health Care Limited, dba Marina Convalescent Hospital, DAB Civ. Rem. C-108 (1989), affirmed DAB App. 1173 (1990). Here, Petitioner's duties as a house manager at the Ocala Cluster included caring for the needs of patients under her charge. Her duty of care under State law included the duty to report incidents which might place patients in jeopardy of their health or safety. Her failure to report an act of alleged abuse against one of those patients breached that duty of care to that patient and constituted an act of "neglect" within the meaning of section 1128(a)(2).⁵ Her conviction of a criminal offense resulting from her failure to report the alleged act of abuse therefore constituted a conviction of a criminal offense for "neglect" of a patient within the meaning of the Act.

It is not relevant to the question of whether Petitioner was convicted of a criminal offense within the meaning of the Act whether or not the patient actually was abused.

⁵ Because I conclude that Petitioner was convicted of an act of neglect, I do not need to decide whether Petitioner was convicted of an offense relating to an act of neglect or abuse.

There is no evidence in this case which proves that an act of abuse actually was committed against the patient. The act which triggered Petitioner's conviction and which ultimately is the basis for the exclusion in this case is Petitioner's failure to report an allegation of abuse, where Petitioner was under a duty to make such a report. Her failure to report such allegation was an act of neglect under Florida law and within the meaning of section 1128(a)(2).

3. The exclusion imposed and directed against Petitioner is mandated by law.

Section 1128(a)(2) mandates exclusion of parties who are convicted of offenses as described in that section. In such cases, Congress gave the Secretary no discretion to impose exclusions of less than five years. Therefore, I must affirm the exclusion imposed and directed here by the I.G.

Petitioner argues that section 1128(a)(2) should not be applied to mandate her exclusion, because to do so would produce an unfair result. She argues that her failure to report the allegations of abuse resulted from her concern that the charges against the employee whom she supervised might not be true. Petitioner contends that she misunderstood her duty to report such allegations. She asserts in effect that she is a dedicated and compassionate health care provider, who is being unfairly penalized.

Although I have no choice but to affirm the exclusion, I am nonetheless sympathetic with Petitioner. It appears from the undisputed facts that, at most, Petitioner exercised poor judgment as to her responsibilities. It is quite possible that Petitioner was acting in good faith. It may well be, as Petitioner contends, that she has learned her lesson and will never again repeat her mistake. However, Congress has not given the Secretary discretion to reduce exclusions under section 1128(a)(2) beneath the five year minimum mandatory period. Congress determined as a matter of legislative policy that cases of patient abuse and neglect pose such a threat to program beneficiaries and recipients that minimum exclusions of five years were necessary for the protection and well-being of beneficiaries and recipients. The inevitable consequence of that policy determination is that in some cases, such as this one, application of the Act will produce results which seem to be harsh.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from Medicare, and to direct that Petitioner be excluded from participation in Medicaid, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

Steven T. Kessel
Administrative Law Judge