Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Peter J. Edmonson	)	
	)	DATE: November 7, 1991
Petitioner,	)	
	)	
- v. -	)	Docket No. C-401
	)	
The Inspector General.	)	Decision No. CR163
	)	

DECISION

On May 24, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in Medicare and any State health care program for a period of five years.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in a Louisiana State court of a criminal offense related to the abuse or neglect 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 required minimum period of such an exclusion is five years. The I.G. informed Petitioner that he was being excluded for the minimum mandatory five year period.

On June 11, 1991, Petitioner timely requested a hearing and the case was assigned to me. On July 26, 1991, a telephone prehearing conference was held in which both Petitioner and the I.G. participated. At the prehearing conference, the parties agreed to deadlines by which time they were to submit, respectively, a motion for summary

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[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.

disposition and an opposition. The I.G. was given until August 21, 1991 to file a motion for summary disposition and supporting brief. Petitioner was given until September 30, 1991 to file a brief in response to the I.G.'s motion for summary disposition.

The I.G. has timely submitted his motion for summary disposition and supporting brief. Petitioner was scheduled to file his response by September 30, 1991, but did not do so. After repeated attempts by Civil Remedies Division staff attorneys to contact him, Petitioner was reached during the week of October 14, 1991. Petitioner was informed by a Civil Remedies Division staff attorney that he was tardy with his response. After consultation with both the I.G. and Petitioner, I gave Petitioner until October 31, 1991 to submit his response. The I.G. did not object to the extension of time given to Petitioner.

On October 25, 1991, the Civil Remedies Division received Petitioner's response. Petitioner's response consisted of resubmitting a copy of his June 11, 1991 letter requesting a hearing along with a brief cover letter listing the name and address of a person whom Petitioner described as a witness.

I have considered the I.G.'s brief and supporting documentation. I have also considered the documents submitted by Petitioner, including Petitioner's June 11, 1991 letter in which he requested a hearing to protest his exclusion. I conclude that there are no disputed questions of material fact that would require an evidentiary hearing. I further conclude that the I.G.'s decision to exclude Petitioner in this case is mandated by law. I accordingly enter summary disposition in favor of the I.G. and against the Petitioner.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was employed as a nurse's assistant at Shreveport Manor Nursing Home located in Shreveport, Louisiana. I.G. Br. at 1, 5; I.G. Ex. 4; See I.G. Ex. 3.[2]

2. The alleged victim was, at the time of the incident, a resident at Shreveport Nursing Home. I.G. Ex. 3; I.G. Ex. 4; I.G. Br. 5; Hughes Aff.

3. Petitioner was charged with the offense of "Cruelty to the Infirm" on October 12, 1989. It was alleged in an affidavit for an arrest warrant that Petitioner intentionally and negligently mistreated a nursing home resident by beating him with a shoe. I.G. Ex. 3, 4.

4. Petitioner pled guilty in Louisiana state court to simple battery on August 27, 1990, and was sentenced to six months in the parish jail. The sentence was suspended and Petitioner was placed on probation for a period of one year. I.G. Ex. 1.

5. Petitioner was convicted of a criminal offense relating to neglect and abuse of patients in connection with the delivery of a health care item or service. Findings 1-4.

6. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Social Security Act. Findings 1-5.

7. On May 24, 1991, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Act.

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[2] The I.G. submitted four numbered and paginated exhibits in support of his motion for summary disposition. I have admitted the exhibits into evidence. They will be referred to as I.G. Ex. (number) at (page). The I.G. also submitted a brief and supporting affidavit of William J. Hughes, an I.G. program analyst who has personal knowledge of this case. The brief will be referred to as I.G. Br. (page). The affidavit will be referred to as Hughes' Aff. (page). I have admitted the affidavit into evidence. Petitioner submitted no documents other than his original letter, dated June 11, 1991, protesting his exclusion. Petitioner subsequently resubmitted a copy of his June 11 letter, along with a cover letter. I will refer to the Petitioner's original letter as Pet. Let. (page).

8. There are no disputed issues of material fact in this case and summary disposition is appropriate. Findings 1-7.

9. 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).

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

11. Petitioner may not collaterally attack his criminal conviction in this proceeding. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

12. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 5-7.

ANALYSIS

There are no disputed facts in this case. The undisputed facts are that, on August 27, 1990, Petitioner pled guilty in State court in Louisiana to the crime of simple battery. The arrest warrant and supporting documentation (I.G. Exs. 3 and 4) and affidavit of William Hughes, as well as the I.G.'s brief, make it clear that the crime to which Petitioner pled guilty arose from an incident at Shreveport Nursing Home in which Petitioner was alleged to have repeatedly struck a 75 year-old nursing home resident with a shoe. Based on Petitioner's guilty plea and on the allegations which led to the criminal complaint to which Petitioner pled, the I.G. excluded Petitioner from participating in any Medicare or Medicaid program for a period of five years, pursuant to section 1128(a)(2) of the Act.

1. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

Section 1128(i)(3) defines what is a criminal conviction for the purposes of subsection 1128(a)(2) of the Act and states, in relevant part: "For purposes of subsections (a) and (b), an individual or entity is considered to have been 'convicted' of a criminal offense ... (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court. . .".

It is undisputed that, on August 27, 1990, Petitioner did plead guilty to the offense of battery. I.G. Ex. 1; Hughes Aff. at 1. Therefore, Petitioner was "convicted" of an offense for the purposes of 1128(i)(3). The crucial issue here, however, is whether the offense for which Petitioner was convicted was "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service", as the I.G. alleges and as required by section 1128(a)(2). As was stated in Vicky L. Tennant, R.N., DAB Civ. Rem. C-329 (1991) at 7-8:

> 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. See Summit Health Limited, dba Marina Convalescent Hospital, DAB Civ. Rem. C-108 (1989).

In this case, Petitioner's conviction does not, on its face specify that the victim of the battery was a "patient". However, it is apparent from the facts alleged against Petitioner in the criminal complaint which was filed against him that Petitioner's conviction is related to patient abuse and neglect. As was stated in Vicky L. Tennant, R.N., DAB Civ. Rem. C-329, (1991) at 9 - 10, citing Norman C. Barber, D.D.S., DAB Civ. Rem. C-198 (1991) at 10 - 11:

> It is consistent with congressional intent to admit limited evidence concerning the facts upon which the conviction was predicated in order to determine whether the statutory criteria of section 1128(a)(2) have been satisfied. Congress could have conditioned imposition of the exclusion remedy on conviction of criminal offenses consisting of patient neglect or abuse. Had it used the term "of" instead of the term "relating to" in section 1128(a)(2), that intent would have been apparent. Had Congress done so, then arguably, no extrinsic evidence would be permitted to explain the relationship between the criminal conviction and the

> underlying conduct. However, Congress intended that the exclusion authority under 1128(a)(2) apply to a broader array of circumstances. It mandated that the Secretary exclude providers who are convicted or criminal offenses "relating to" patient neglect or abuse in connection with the delivery of a health care item or service. The question ... is whether the criminal offense which formed the basis for the conviction relates to neglect or abuse of patients, not whether the court convicted Petitioner of an offense called "patient abuse" or "patient neglect".

See Dewayne Franzen, DAB App. 1165 (1990) and H. Gene Blankenship, DAB Civ. Rem. C-67 (1989).

As was held in Tennant, I have the authority to go beyond the face of Petitioner's conviction in order to make a determination as to whether the offense to which Petitioner pled was related to patient neglect or abuse. In this case, the offense to which Petitioner pled guilty was battery. It is apparent from the record before me that the victim of the battery to which Petitioner pled guilty was, at the time of the offense, a resident patient at the Shreveport Manor Nursing Home. Petitioner allegedly took the patient's shoe and hit him repeatedly with it.

Abuse is defined in Webster's New International Dictionary, 1964 Edition, as "to use or treat so as to injure." This definition accords with the one given by Webster's Ninth New Collegiate Dictionary, 1983 Edition "improper use or treatment". From these plain meaning definitions of the term abuse, the type of treatment that Congress had in mind is apparent. It is also apparent that Petitioner's offense falls squarely within that category. The patient was battered by Petitioner. The offense for which Petitioner was convicted was the unlawful touching or striking of another person. The State of Louisiana defines battery as "the intentional use of force or violence upon the person of another." LA. REV. STAT. ANN., section 1435. Therefore, Petitioner was convicted of violent conduct against the patient, and Petitioner's conviction is therefore a conviction for an act of patient abuse within the meaning of section 1128(a)(2).

I find that the act of abuse for which Petitioner was convicted was an offense committed "in connection with the delivery of a health care item or service" within the meaning of section 1128(a)(2). In applying this section the key phrase is the phrase "in connection with". This

very broad terminology suggests that Congress required only a minimal nexus between the offense and the delivery of a health care item or service as a prerequisite to meeting the statutory test. I conclude that the test is satisfied where, as in this case, the rendering of a health care item or service provides some opportunity for the offense to have occurred. In this case, the test is met because the victim of Petitioner's offense was a patient at the facility at which Petitioner was employed, and Petitioner committed his offense during the course of his employment.[3]

2. Petitioner may not collaterally attack his criminal conviction in this proceeding.

Petitioner contends that he was falsely accused, that he never abused any patient at the nursing home, and that he was not adequately informed of the administrative repercussions of his plea bargain agreement. Petitioner also contends that his plea bargain was recommended to him by his public defender as a way to save time and money, and that the alleged injuries sustained by the nursing home patient were in fact the product of some outside cause, and not the battery charge to which he pleaded guilty.

The I.G. contends that Petitioner cannot collaterally attack his guilty plea in this proceeding. The I.G. contends that by accepting Petitioner's guilty plea, the Louisiana court implicitly found that Petitioner knowingly and intelligently waived his right to a jury trial, and more importantly, found that Petitioner was not induced into the guilty plea by any promises other than those contained within the plea itself.

Notwithstanding Petitioner's arguments of his innocence, it is well established that a hearing before an administrative law judge to challenge the basis for an exclusion may not be utilized to collaterally attack a State criminal conviction. Richard G. Philips, D.P.M., DAB Civ. Rem. C-347 (1991). The mandatory exclusion arises from the fact of the conviction, not its actual validity. "The law does

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[3] The test under section 1128(a)(2) is different from that stated in section 1128(a)(1). In order for an offense to meet the statutory criteria in section 1128(a)(1), that offense must be "related to" the delivery of an item or service under Medicare or Medicaid. The phrase "related to" may suggest a somewhat narrower meaning than the phrase "in connection with." Furthermore, section 1128(a)(1) specifically requires a nexus with a Medicare or Medicaid item or service, whereas section 1128(a)(2) does not require such a nexus.

not require the Secretary to look behind the conviction to determine whether it is valid. It is not relevant to the issue of the I.G.'s authority that the criminal conviction may have been defective." Philips at 6.

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

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs, for a minimum of five years, when such individuals and entities have been convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service. Congressional intent is clear from the express language of section 1128(c)(3)(B): "In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years."

Since Petitioner's criminal conviction meets the statutory requirements of section 1128(a), the I.G. must apply the minimum mandatory five year exclusion applicable to a section 1128(a) offense as set forth in section 1128(c)(3)(B). Therefore, I sustain the exclusion imposed and directed against Petitioner by the I.G.

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act. Accordingly, I enter summary disposition in favor of the I.G., sustaining the five-year exclusion which he imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge