Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: August 24, 1992
Carolyn Westin,	)	
	)	
Petitioner,	)	
	)	Docket No. C-391
- v. -	)	Decision No. CR229
	)	
The Inspector General.	)	
	)	

DECISION

On May 24, 1991, the Inspector General (I.G.) notified Petitioner that she was being excluded for five years from participation in the Medicare and any State health care programs.[1] The I.G. advised Petitioner that she was being excluded due to her conviction in the District Court, Adams County, Colorado, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. The I.G. further advised Petitioner that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(2) of the Social Security Act (Act), and that section 1128(c)(3)(B) of the Act provides a minimum five year period of exclusion.

Petitioner requested a hearing on May 30, 1991, and the case was assigned to me for hearing and decision. I have considered the exhibits submitted by the I.G., the parties' arguments, and the applicable law and regula-

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

tions.[2] Based on the record before me, I conclude that: 1) the I.G. has authority to exclude Petitioner pursuant to section 1128(a)(2) of the Act; and 2) the five year exclusion imposed by the I.G. is mandated by law. Therefore, I sustain the exclusion imposed and directed against Petitioner.

ISSUES

The issues in this case are whether Petitioner:

1) was convicted of a criminal offense;

2) 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner, a licensed nursing home administrator and a registered nurse, was, at all times relevant to this case, the Nursing Home Administrator at Aspen Care Center West (Aspen), a skilled nursing home. I.G. Ex. 3/10, 4.[3]

2. As the principal executive officer and administrator at Aspen, Petitioner's responsibilities included, but were not limited to, maintaining liaison between the various functional areas within the facility, personnel

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[2] The I.G. filed 14 exhibits (I.G. Ex.) with his brief, accompanied by the required declaration. These are admitted into evidence as I.G. Ex. 1 - 14. Petitioner filed no exhibits.

[3] The parties' exhibits and memoranda will be referred to as follows:

I.G. Exhibit	I.G. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
Petitioner Response Brief	P. Br. (page)
I.G. Reply Brief	I.G. R. Br. (page)
Petitioner Reply Brief	P. R. Br. (page)

and financial management, and providing a suitable framework for the administration of patient care. Petitioner also was responsible for the organization of the facility to carry out its responsibilities and the development of appropriate policies for patient care governing the nursing, medical, and other related services. I.G. Ex. 3/10.

3. On November 8, 1985, a criminal indictment was returned in the Denver (Colorado) District Court, against Petitioner, Victoria Tennant (Vicky L. Tennant), and T & S Leasing, Inc., DBA Aspen Care Center West. I.G. Ex. 3.

4. Petitioner was charged with one felony and four misdemeanors. I.G. Ex. 3.

5. On September 25, 1986, all but Counts Two and Four of the Indictment were dismissed by the Adams County District Court. This decision was affirmed by the Colorado Supreme Court on November 23, 1988. I.G. Ex. 5, 6.

6. On February 24, 1989, the Adams County District Court accepted Petitioner's plea of nolo contendere to Count Four of the Indictment. Count Two was dismissed. I.G. Ex. 7, 8, 9.

7. Petitioner's plea was entered pursuant to a proposed stipulation for a deferred judgment and sentence for a period of one year. The only conditions imposed upon Petitioner were that she not violate the law and that she pay court costs if so ordered. If she complied with the terms of the deferred judgment, the action against her would be dismissed. I.G. Ex. 7.

8. Count Four of the indictment charged Petitioner with "Willful Disregard of Colorado Department of Health Regulation; Section 25-1-114 C.R.S. (1982 Rep Vol) Unclassified Misdemeanor." I.G. Ex. 3/1.

9. Colorado Department of Health regulations at 6 CCR (Code of Colorado Regulations) 1011-1 Ch. V section 4.5.4 provide that:

> Accidents and incidents resulting in possible patient injury shall be reported on special report forms. The report shall include date, time and place of incident; circumstances of the occurrence, signature of witness; time the doctor was notified; physician's report; signature of person making the report. A copy of report shall be filed in the patient's medical record.

I.G. Ex. 14.

10. Count Four charged that Petitioner unlawfully and willfully violated and disobeyed the provisions of the lawful regulations of the Colorado Department of Health requiring the preparation and maintenance of an incident report to document the circumstances surrounding any unusual occurrence resulting in possible injury to a patient in a licensed nursing home. I.G. Ex. 3/9.

11. Count Four relates to an incident involving an Aspen resident, L.G., with advanced Huntington's Disease. This resident was incapacitated by her illness and dependent on the help of others for her survival. She was a "total care patient". She was unable to control her own bodily movements, needed help eating and dressing, and was unable to walk or talk. She was mentally incompetent and engaged in constant involuntary movements of her arms, legs, and trunk during her waking hours. I.G. Ex. 3/10, 4.

12. On December 17, 1984, L.G. was found tightly entrapped between the bedrail and the bedframe of her bed. Her body was freed from the bed by removing the bedrail. After emergency resuscitation, L.G. was airlifted to a hospital. I.G. Ex. 3/11 - 12, 4.

13. After L.G.'s transport, Petitioner and Vicky L. Tennant, the Director of Nursing at Aspen, advised the charge nurse that the nurse's note describing the incident did not need to mention the position in which L.G. was found. The charge nurse was responsible for preparing an incident report, which was required by Department regulation and Aspen internal policy. No incident report was ever prepared. I.G. Ex. 3/9 - 13, 4.

14. The medical records supervisor, Sharon Wasinger, upon discovering the lack of an incident report, has indicated that she told either Petitioner or Vicky L. Tennant that a report should be prepared. In response, Ms. Wasinger was told that no incident report was necessary, because "the incident was not unusual." Records Consultant Nancy Weber was told by Ms. Wasinger that she advised Vicky L. Tennant of the need to file an incident report. P. Ex. 3, 4.

15. Prior to the death of L.G., Aspen's management was aware of the tragic results that could occur from the improper care of a Huntington's disease patient and the need to take corrective action. This is reflected by the death of V.C., a patient at Aspen, who died of asphyxia in her bed in similar circumstances to L.G. Prior

knowledge also arose from a Department review of Aspen in the Spring of 1984. During the course of the review, Petitioner was told that steps had to be taken to protect another Huntington's disease patient whose bedding was observed to be unsafe. I.G. Ex. 3/11.

16. Petitioner's plea of nolo contendere constitutes a conviction for the purposes of section 1128(a)(2) of the Act. See sections 1128(i)(3) and 1128(i)(4) of the Act.

17. Notwithstanding that Petitioner's plea of nolo contendere was dismissed nunc pro tunc in March 1990, Petitioner's plea constituted a conviction of a criminal offense within the definition of section 1128(i)(3) and section 1128(i)(4) of the Act.

18. Regulations published on January 29, 1992, establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a)(1) and (2) and (b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330 - 3341 (January 29, 1992).

19. The Secretary did not intend that the regulations contained in 42 C.F.R. Part 1001, and, in particular, 42 C.F.R. § 1001.101, govern my decision in this case. However, even if these regulations did apply, they are consistent with the manner in which section 1128(a)(2) has previously been interpreted by the Departmental Appeals Board, and Petitioner would not be subjected to a different standard of liability, nor to an increased sanction.

20. 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. FFCL 1 - 17.

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

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

23. The exclusion imposed and directed against Petitioner is for five years, the minimum mandatory period for exclusions authorized pursuant to section 1128(a)(2) of the Act.

24. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law.

RATIONALE

On June 7, 1991, I sustained a five year exclusion imposed and directed by the I.G. against Vicky L. Tennant (Vicky L. Tennant, DAB CR134 (1991)), Petitioner's co-defendant in the State action constituting the basis for the exclusion in this case.[4] In Tennant, I found that Ms. Tennant's conviction provided the I.G. with authority to exclude under section 1128(a)(2) of the Act. The activity which triggered her conviction was the failure to report an unusual incident which she, as Director of Nursing at Aspen, had a duty to report. I found that this failure to report an unusual incident directly impacted on the safety and health of patients under her care and on the State's need to monitor nursing home conditions to ensure that the welfare of patients was properly met. I further found that Ms. Tennant's failure to report constituted "neglect" within the meaning of section 1128(a)(2) and that the exclusion imposed and directed against Ms. Tennant was mandated by law.

After a thorough evaluation of all the evidence presented to me in this case, I find that the facts of Petitioner's case are essentially identical to the facts in Tennant. The only differences between the two cases are that: 1) Records Consultant Nancy Weber was told, by Medical Records Supervisor Sharon Wasinger, that Wasinger had advised Ms. Tennant, but not Petitioner, of the need to file an incident report (FFCL 14); and 2) Petitioner, but not Ms. Tennant, was informed, after a Department review of Aspen in 1984, that steps had to be taken to protect Huntington's disease patients from unsafe bedding. FFCL 15. These slight fact variances are not material differences in terms of Petitioner and Ms. Tennant's liability under the Act. Petitioner and Ms. Tennant were charged with the same offenses, pled nolo contendere to the same offense, and received the same sentence. Petitioner has not offered any evidence to distinguish her case from that of Ms. Tennant. The exhibits introduced in this case are essentially the same exhibits that were introduced in Tennant. Thus, in these two cases, I am evaluating the same record. Furthermore, Petitioner has not presented any evidence which would

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[4] I forwarded copies of all Civil Remedies Division decisions with regard to section 1128(a)(2) to Petitioner on March 2, 1992, excluding the Tennant decision. This is because, as of that date, Petitioner already had a copy of the Tennant decision.

lead me to conclude that my decision in the Tennant case was in any way incorrect or not mandated by law.[5]

Thus, since Petitioner's case is essentially identical to Ms. Tennant's, for the reasons set forth in my Tennant decision, I am sustaining 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.

/s/

Edward D. Steinman
Administrative Law Judge

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[5] Petitioner did not offer any evidence in this case. Petitioner did, however, make a number of motions. I ruled on these motions (both in my "Rulings" and in letters prepared by my office at my direction) on October 9, 1991, October 16, 1991, October 30, 1991, November 25, 1991, February 24, 1992, March 2, 1992, April 1, 1992, June 12, 1992, and June 29, 1992. I incorporate by reference in this decision all of my previous rulings in this case.