

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Ronald E. Jones,	)	DATE: April 16, 1993
	)	
Petitioner,	)	Docket No. C-92-096
	)	Decision No. CR257
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated April 7, 1992, Ronald E. Jones, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare program and from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the abuse of a patient in connection with the delivery of a health care item or service.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition.

Because I conclude that there are no material and relevant factual issues in dispute, I have granted the I.G.'s motion and have decided the case on the basis of written submissions in lieu of an in-person hearing.

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 related to the 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 period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW <sup>1</sup>

1. On July 22, 1991, Petitioner was a nurse's aide employed at the Episcopal Church Home (Home) in Hockessin, Delaware. I.G. Ex. 13.
2. During the relevant period, the Home was a certified provider of health care services under the Medicare program. I.G. Ex. 14.
3. Among Petitioner's duties on July 22, 1991 was providing nursing care to an 82-year-old male stroke victim who required total nursing care, including medication and assistance in all phases of daily living. I.G. Ex. 6, 13.
4. Petitioner was charged by the State of Delaware with intentionally striking the aforesaid 82-year-old male stroke victim on July 22, 1991, thereby violating section 1136(1) of Title 16 of the Delaware Code. I.G. Ex. 3.
5. On September 25, 1991, Petitioner pled guilty in the New Castle County, Delaware, Superior Court to abusing a resident of the Home. I.G. Ex. 2, 3.
6. On September 25, 1991, the Delaware court accepted Petitioner's plea of guilty and sentenced him to one year's imprisonment (suspended) and placed him on probation. Also, the Delaware court ordered that

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<sup>1</sup> Petitioner and the I.G. both submitted briefs. Also, the I.G. submitted exhibits in support of the I.G.'s briefs. In the absence of objection, I have admitted all of the I.G. exhibits (I.G. Ex.). However, I have renumbered the three exhibits submitted by the I.G. on February 5, 1993, with the renewed motion for summary disposition. Thus, I.G. Ex. 1 of the renewed motion is now I.G. Ex. 12, I.G. Ex. 2 of the renewed motion is now I.G. Ex. 13, and I.G. Ex. 3 of the renewed motion is now I.G. Ex. 14.

Petitioner not work in the health care field during his probation. I.G. Ex. 4.

7. Section 1128(a)(2) of the Act mandates the exclusion, for a minimum period of five years, of any person who has 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.

8. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

9. By letter dated April 7, 1992, Petitioner was notified by the I.G. that it had been decided to exclude him for a period of five years from participation in the Medicare and Medicaid programs because Petitioner had been convicted of a criminal offense related to the abuse or neglect of patients in connection with the delivery of a health care item or service. I.G. Ex. 7.

10. In light of the fact that the stroke victim required and received skilled nursing care at the Home, his status at the home on July 22, 1991, was that of a patient receiving treatment. I.G. Ex. 13

11. Petitioner's conviction for abusing a resident constitutes a criminal conviction relating to patient abuse in connection with the delivery of a health care service, within the meaning of section 1128(a)(2) of the Act. Findings 1 - 10.

12. The Act requires persons who violate section 1128(a)(2) to be excluded for a minimum of five years, which period cannot be waived or lessened. Sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

#### PETITIONER'S ARGUMENTS

In this proceeding, Petitioner does not claim either that he was not convicted or that the I.G. did not have a basis upon which to exclude him. Rather, he contends that the crime for which he was convicted did not reflect his training and his character. Petitioner alleges that he was trained to treat people well and that when he hit the stroke victim he was acting only instinctively, as the stroke victim had spit at him. Petitioner states also that he "love[s] to work in the nursing field," and asks that he not be barred from so doing for five years. See Petitioner's letter to Gerald Choppin of July 13,

1992; Petitioner's response brief of September 20, 1992; staff attorney's letter to the parties of March 25, 1993.

#### DISCUSSION

The law relied upon by the I.G. to exclude Petitioner requires that the individual to be excluded have been 1) convicted of a crime; 2) involving the neglect or abuse of a patient; and 3) in connection with the delivery of a health care item or service.

Here, Petitioner, a nurse's aide, was charged with intentionally and unlawfully striking an 82-year-old man living at the Home who was in Petitioner's care at the time. Petitioner pled guilty to the charge of abusing a resident. The Delaware court accepted his plea and he was sentenced. Section 1128(i)(3) of the Act provides that when a person enters a plea of guilty to a criminal charge and the court accepts such plea, that individual will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act. As Petitioner's plea of guilty was accepted by the Delaware court, Petitioner was convicted of a crime within the meaning of the Act.

Petitioner's conviction also involved the abuse of a patient. The affidavit evidence which the I.G. submitted, and which was not disputed by Petitioner, establishes that the Home is a Medicare certified medical care facility; that the stroke victim was there to receive skilled nursing care as a patient; and that Petitioner was employed as a nurse's aide when he abused the stroke victim. The Delaware court found that Petitioner's action constituted abuse. Thus, Petitioner's conviction satisfies the statutory requirement of section 1128(a)(2) that there be abuse of a patient. Moreover, Petitioner's abuse of the stroke victim occurred in the course of Petitioner's provision of nursing care to the stroke victim. Thus, Petitioner's conviction constitutes a conviction of a criminal offense relating to the abuse of a patient in connection with the delivery of a health care service, satisfying the basis for exclusion under section 1128(a)(2) of the Act.

Petitioner has attempted to explain his conduct as a reflexive gesture, contrary to his training and character. However, Petitioner's explanations are irrelevant. Section 1128(a)(2) of the Act is controlling wherever it is shown that an appropriate criminal conviction has occurred. DeWayne Franzen, DAB 1165

(1990). The statute precludes looking beyond the fact that there was a conviction. Richard G. Phillips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). Indeed, an appellate panel of the Departmental Appeals Board has explicitly held that ". . . the level of intent of the individual in committing the offense is not relevant under section 1128(a);" it is the conviction which compels exclusion. Summit Health Limited, DAB 1173 (1990).

Once I find that section 1128(a)(2) is applicable, the Act requires that the individual who has been convicted of patient abuse or neglect in connection with the delivery of a health care item or service be excluded for a minimum period of five years. There is no authority in law or regulation by which an administrative law judge can waive or reduce the exclusion.

#### CONCLUSION

Petitioner's conviction of a criminal offense involving patient abuse in connection with the delivery of a health care service justifies the five-year exclusion imposed and directed against Petitioner by the I.G.

/s/

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Joseph K. Riotto  
Administrative Law Judge