Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Anthony A. Tommasiello,	DATE: August 20, 1993
Petitioner,	Docket No. C-93-061
- v. -	Decision No. CR282
The Inspector General.	

DECISION

By letter dated February 12, 1993, Anthony A. Tommasiello, 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 the State health care programs covered by section 1128(h) of the Social Security Act (Act). (Unless the context indicates otherwise, 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 neglect or abuse of patients, 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 with the Departmental Appeals Board (DAB), and the I.G. moved for summary disposition.

Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide 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[1]

1. On February 20, 1992, Petitioner was employed as a Registered Nurse at the Roger Williams Medical Center (the Center), located in Providence, Rhode Island. I.G. Br. at 2; P. Br. at 2.

2. On August 6, 1992, Petitioner was arraigned in a Rhode Island State court on charges of two counts of simple assault under section 11-5-3 of the Rhode Island General Laws, a misdemeanor. I.G. Ex. 1; I.G. Br. at 2; P. Br. at 2.

3. On September 9, 1992, Petitioner pled nolo contendere to one count; the court accepted the plea and sentenced Petitioner to probation for six months. The court dismissed the other count. Id.

4. The assault charge to which Petitioner pled nolo contendere accused him of administering an injection, without a physician's order, to G----- C------. I.G. Ex. 1. I have altered the name of the victim out of deference to her privacy.

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[1] The I.G. submitted two exhibits (I.G. Ex. 1 and 2) with the motion for summary disposition. I admit both into evidence. Petitioner submitted no exhibits with his response. Both parties submitted proposed findings of fact and conclusions of law. To the extent that the proposed findings are not in dispute, I treat them as stipulations and cite them as I.G. Br. at (page number) and P. Br. at (page number), respectively.

5. The assault charge which was dismissed accused Petitioner of striking G----- C------ on the head and pulling her hair. I.G. Ex. 1.

6. The person to whom Petitioner administered the injection on which the first assault charge was based was a patient in Petitioner's care. I.G. Ex. 1; I.G. Br. at 2; P. Br. at 2.

7. The State suspended Petitioner's nursing license for six months. I.G. Ex. 2.

8. Petitioner's conviction for injecting a patient in his care with a drug not ordered by her physician is a conviction for a criminal offense related to the abuse of a patient.

9. Petitioner's employment as a nurse in the health care facility in which the victim was a patient, and the assault consisting of the administration by Petitioner of a purported health care item or service, both make Petitioner's conviction for a criminal offense related to the abuse of a patient a conviction in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act.

10. For a conviction to be one within the meaning of section 1128(a)(2) of the Act, the words "patient abuse" or "patient neglect" do not have to appear in the statute under which the charges were brought, the indictment or information containing the charges, or the court issuances documenting the plea and the conviction.

11. Petitioner's exclusion does not violate the constitutional protection against double jeopardy.

PETITIONER'S ARGUMENT

Petitioner asserts that:

1. The statute under which Petitioner was charged and pled nolo contendere is not part of a health care statute, nor does it mention patient abuse. Rather, it is a general prohibition against assault. Section 1128(a)(2) of the Act may be applied only where there has been a violation of a criminal statute which deals directly with health care or patients.

2. He cannot be found to have been convicted because the laws of Rhode Island expressly provide that where a criminal defendant pleads nolo contendere, and a court

places him on probation, such plea and probation cannot be regarded as a conviction for any purpose. Section 1128 of the Act does not say that local laws may be disregarded. To indiscriminately treat his nolo contendere plea as an admission of guilt -- especially when the I.G. has neither conducted a factfinding hearing nor made any individualized assessment of Petitioner's circumstances -- violates Petitioner's right to due process.

3. The fact that an unauthorized injection was given is insufficient evidence to prove patient abuse. The record does not show that the drug was detrimental to the patient's health or that Petitioner harmed the patient. Petitioner responded to an emergency situation and injected the patient with a sedative to keep her from harming herself.

4. Petitioner was punished by the State by being put on probation for six months. The HHS sanctions amount to a second punishment for the same offense, and, therefore, violate his constitutional protection against double jeopardy.

5. The facts that Petitioner is in his 60s and has an elderly wife who is legally blind and dependent upon him are mitigating factors.

DISCUSSION

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

In the case at hand, Petitioner entered a plea of no contest to a charge of assault. Section 1128(i)(3) of the Act states that an individual entering such a plea will be deemed to have been convicted of a criminal offense. The parties agree that the statute under which Petitioner was prosecuted was a misdemeanor criminal statute and that the person to whom Petitioner administered the injection constituting the assault was a "patient." I.G. Br. at 2; P. Br. at 2.

I have no doubt that Petitioner's treatment of the patient constituted abuse. His injecting her with a drug not ordered by her physician demonstrated at the very

least an improper disregard of a procedure intended to preserve the patient's well-being and protect the patient from harm. Thus, his assault was an abuse of the patient.

Petitioner argues that, because of the very minimal record presented, it is difficult to know precisely what happened, and I agree. He then suggests that the evidence could plausibly be interpreted as showing that he acted with good intentions, based on his believing that the patient needed sedation. His chief point apparently is that the evidence is not so unequivocal as to justify summary disposition in favor of the I.G. I disagree with this reasoning. If Petitioner has evidence to establish that he did not commit a crime, he should bring it to the attention of the proper authorities. I am not authorized to retry him on the underlying criminal offense. To prevail by summary disposition, the I.G. need prove only that Petitioner was convicted within the meaning of sections 1128(a)(2) and 1128(i) of the Act. For the reasons set forth below, I conclude that Petitioner's conviction for assault by unauthorized injection constitutes patient abuse within the meaning of section 1128(a)(2) of the Act.

As to the last statutory criterion, I conclude that the facts that the perpetrator of the crime was a nurse employed by a health-care facility to care for patients, that the victim of the abuse was just such a patient, and that the abuse occurred by reason of the purported delivery of a health care item or service, demonstrate that the criminal offense was connected to the delivery of health care.

Once section 1128(a)(2) of the Act is determined to be applicable, the statute requires that the guilty individual be excluded for a minimum period of five years. There is no authority in law or regulation for an administrative law judge's waiving or reducing this minimum sanction, even if factors such as those relied on by Petitioner -- his age and the condition of his wife -- are present.

Next I address the specific arguments advanced by Petitioner.

Petitioner's contention that section 1128(a)(2) of the Act applies only where there has been a violation of a criminal law which deals directly with health care or patients is without basis and has been rejected in other DAB cases by administrative law judges and appellate panels. In one such case, for example, the panel held

that the question the administrative law judge must resolve "...is whether the criminal offense which formed the basis for the conviction related to neglect or abuse of patients, not whether the court convicted Petitioner of an offense called 'patient abuse' or 'patient neglect'." Bruce Lindberg, D.C., DAB 1280 (1991).

Using similar logic, in another case the appellate panel observed that "the inquiry is whether the conviction 'related to' Medicaid fraud, not whether the state court convicted Petitioner of Medicaid fraud. Thus, my task is not simply to examine the judgment and state criminal statute to determine whether they specifically refer to Medicaid Fraud. Rather, my task is to examine relevant conduct to determine if there is a relationship between the . . . conviction and the Medicaid program." Dewayne Franzen, DAB 1165 (1990).

As noted above, Petitioner argues also that he cannot be found to have been "convicted" because the laws of Rhode Island provide that where a criminal defendant pleads nolo contendere, and a court accepts the plea and places the defendant on probation, such plea and probation cannot be regarded as a conviction for any purpose. Therefore, Petitioner continues, to disregard his plea and to treat him as though he had entered a guilty plea is to deny him due process and equal protection of the laws. Unfortunately for Petitioner's theory, Congress spelled out in section 1128(i) of the Act that an individual was to be considered "convicted" either when the individual entered a plea of nolo contendere which was accepted by a court or when an individual has entered into an arrangement where judgment of conviction has been withheld. Thus, a plea of nolo contendere has the same legal effect as a guilty plea and this effect is not diminished by the court's deferring or witholding entry of the judgment.

The relevant legislative history fully supports this holding. For example, the congressional committee which drafted the legislation clarifying the meaning of conviction in section 1128 of the Act stated that it did not want persons who entered nolo contendere or guilty pleas and were then put into first offender/deferred adjudication programs to be able to avoid exclusion. There might be valid criminal justice reasons for these programs, the committee observed, but it wanted Medicare and Medicaid to be able to avoid involvement with such persons. H. Rep. No. 727, 99th Cong., 2d Sess. 74 - 5 (1986), reprinted in 1986 U.S.C.C.A.N. 3607, 3664 - 5; Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd DAB 1104 (1989).

Also, I am not persuaded by Petitioner's argument that an unauthorized injection is insufficient to prove patient abuse. Petitioner bases this contention on his allegation that the record does not show that the drug was detrimental to the patient's health or that Petitioner intended to harm the patient. Indeed, Petitioner suggests that he was acting in the patient's best interests by recognizing her urgent need for such medication. The problem with this position, however, is that Petitioner may not use this proceeding to attack his conviction, claiming that he is not guilty. In cases like this, I am authorized to examine only: 1) whether there was a conviction within the meaning of the Act (and not whether the conviction was wise, plausible, or accurate); and 2) that the criminal offense of which Petitioner was convicted related to the neglect or abuse of patients, in connection with the delivery of a health care item or service. Having found these two conditions to be met, I would have no purpose in exploring Petitioner's motives.

Petitioner's last substantive legal argument is that he was punished by being placed on probation for six months. Citing United States v. Halper, 490 U.S. 435 (1989), Petitioner contends that the exclusion thus amounts to a second punishment for the same offense, violating his constitutional protection against double jeopardy.[2] I disagree, for the following reasons. First, his was a State conviction; a federal administrative sanction, even if sufficiently punitive, would not violate the Double Jeopardy clause of the U.S. Constitution. Second, exclusion for the mandatory minimum period is not punitive and thus not constitutionally offensive. Janet Wallace, L.P.N., DAB 1126 (1992). Also, see Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992).

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act require that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least

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[2] In Halper, the Court remanded the case to have the lower court determine whether the federal civil administrative monetary penalty was so punitive in relation to the effect of the provider's false claim as to amount to a punitive rather than a remedial sanction and thus, in the face of an earlier federal conviction on the same set of facts, a violation of the Double Jeopardy clause.

five years because of his conviction of a State criminal offense relating to the neglect or abuse of patients in connection with the delivery of health care.

Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, at 12 - 14 (1989), aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

The exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge