Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Ernest Valle,	DATE: April 15, 1994
Petitioner,	Docket No. C-93-106
- v. -	Decision No. CR309
The Inspector General.	

DECISION

By letter dated June 15, 1993, Ernest Valle, the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense relating to 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. The I.G. moved for summary disposition.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

---

[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

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 relating to 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. During the period relevant to this case, Petitioner was employed by the Woodlawn Hills Care Center (Woodlawn) as its administrator. I.G. Ex. 4.[2]

---

[2] The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s Brief in Support of Motion for Summary Disposition	I.G. Br. (at page)
I.G.'s Proposed Findings of Fact and Conclusions of Law	I.G. Proposed FFCL (at page)
Petitioner's Brief in Opposition to Motion for Summary Disposition	P. Br. (at page)
Petitioner's Proposed Findings of Fact and Conclusions of Law	P. Proposed FFCL (at page)
I.G.'s Reply Brief	I.G. R. Br. (at page)
My Findings and Conclusions	FFCL

The I.G. submitted four exhibits. Petitioner "adopts" all of the I.G.'s exhibits. P. Br. at 3. I admit I.G. exhibits 1-4 into evidence. I cite the I.G.'s exhibits as "I.G. Ex. (number) (at page)." Petitioner submitted no exhibits.

2. Woodlawn is a nursing home facility. September 28, 1993 Order and Schedule for Submission of Briefs and Exhibits; I.G. Ex. 4; I.G. Br. at 1, 12.

3. On March 22, 1991, Petitioner was charged, by information, with the criminal offense of failure to report abuse (Tex. Stat. Ann. Art. 4442C, § 16(a)(g)). I.G. Exs. 1, 2.

4. The abuse Petitioner was charged with failing to report allegedly had been inflicted upon a patient at Woodlawn by an orderly who was employed by Woodlawn. I.G. Exs. 1, 4.

5. In March 1989, the acting director of nurses at Woodlawn allegedly had reported the patient's complaints of abuse by an orderly to Petitioner in his official capacity as Woodlawn's administrator. P. Br. at 1; I.G. Br. at 1; FFCL 1, 4.

6. On April 30, 1991, in the County Court of Bexar County, Texas, Petitioner pled nolo contendere to the charge of failure to report abuse. I.G. Exs. 2, 3; FFCL 3.

7. On September 4, 1991, the court accepted Petitioner's plea and imposed monetary penalties and a period of probation upon him. I.G. Exs. 2, 3; FFCL 6.

8. Instead of "entering an adjudication of guilty" (I.G. Ex. 2) against Petitioner, the court deferred further proceedings against him pending completion of probation. I.G. Exs. 2, 3.

9. On March 4, 1992, Petitioner satisfactorily completed his deferred adjudication probation and, on that day, the court dismissed the charge against him. I.G. Ex. 3; FFCL 3, 8.

10. To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove: (1) that the individual has been convicted of a criminal offense; (2) that the conviction is related to the neglect or abuse of patients; and (3) that the patient neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service.

11. The court's acceptance of Petitioner's nolo contendere plea constitutes a conviction within the meaning of section 1128(i)(3) of the Act. FFCL 6-7.

12. The court's deferral of a formal finding of guilt against Petitioner is a deferred adjudication or other arrangement or program where judgment of conviction has been withheld, constituting a conviction within the meaning of section 1128(i)(4) of the Act. FFCL 8.

13. The Woodlawn resident who allegedly was abused was a patient at Woodlawn. I.G. Ex. 4; P. Br. at 1.

14. Under State law, Petitioner, as Woodlawn's administrator, owed a legal duty of care to Woodlawn's patients to report any allegations of patient abuse which either had occurred or might have occurred. FFCL 1.

15. Petitioner's failure to report the alleged abuse at issue was an offense related to the neglect or abuse of a patient, within the meaning of section 1128(a)(2). FFCL 14.

16. As Woodlawn's administrator, Petitioner was responsible for the health, safety, and well-being of all patients at Woodlawn, including the responsibility to ensure that the health care services provided to Woodlawn's patients safeguarded the patients' health, safety, and well-being.

17. Part of the health care services Petitioner rendered to Woodlawn's patients was his duty to report incidents or allegations of abuse or neglect to proper authorities in order to protect the health, safety, and well-being of those patients. FFCL 14-16.

18. Petitioner's failure to report the alleged abuse directly related to the duty of care he owed to the allegedly abused patient and occurred in connection with the delivery of his health care services to that patient. FFCL 17.

19. The conviction of the criminal offense at issue here relates to the neglect or abuse of a patient and is connected with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act. FFCL 10-18.

20. The five-year exclusion imposed and directed against Petitioner by the I.G. is for the minimum period required by the Act. Act, sections 1128(a)(2), 1128(c)(3)(B).

21. Under section 1128(a)(2) of the Act, the fact that a conviction within the meaning of section 1128(i) has occurred mandates exclusion. An administrative law judge is not authorized to look behind the conviction.

22. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory five-year period of exclusion.

23. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

PETITIONER'S ARGUMENT

Petitioner contends that he did not plead guilty or nolo contendere to the charge of failure to report abuse, that he was not convicted of the charge of failure to report abuse, that he was not convicted of an offense involving the neglect or abuse of patients, that he was not put on probation, and that he did not receive a deferred adjudication as defined by State law. P. Br. at 1-3; P. Proposed FFCL at 1; see letter from Petitioner's attorney, dated August 13, 1993. Petitioner alleges also that he did, in fact, report the alleged abuse. P. Br. at 1.

Specifically, Petitioner argues that court records introduced by the I.G. do not show that his case was disposed of as the I.G. alleges. Petitioner asserts the I.G. misunderstood the court's docket sheet relating to his case (I.G. Ex. 3) and misinterpreted the nature of the court's action. Petitioner asserts further that the I.G. did not consider the necessary legal elements of a deferred adjudication as defined by State law. P. Br. at 1-3. Petitioner argues further that there is a crucial difference between a deferred adjudication and what he calls "straight probation." P. Br. at 1. It is Petitioner's contention that his case is not a deferred adjudication, principally because the court made no formal declaration of a deferred adjudication and did not impose community supervision (by which Petitioner means supervised probation). Additionally, Petitioner asserts that the court did not make an entry that Petitioner was warned of the consequences of violating his probation. P. Br. at 1-2. Instead, Petitioner maintains that he was charged with a criminal offense, but that the charge was eventually dismissed, apparently for reasons having nothing to do with the State's deferred adjudication process. P. Br. at 3.

DISCUSSION

The undisputed facts establish that, on March 22, 1991, Petitioner was charged, by information, with the criminal offense of failure to report abuse (Tex. Stat. Ann. Art. 4442C, § 16(a)(g)). FFCL 3. The abuse Petitioner was charged with failing to report allegedly had been inflicted upon a patient at Woodlawn by an orderly who was employed by Woodlawn. I.G. Ex. 4; FFCL 4. In March 1989, the acting director of nurses at Woodlawn reported the patient's complaints of abuse by an orderly to Petitioner in his official capacity as Woodlawn's administrator. FFCL 5. The Criminal Investigative Report Supplement prepared by the Texas Attorney General's Medicaid Fraud Control Unit, the contents of which are summarized in the affidavit of William J. Hughes (I.G. Ex. 4), contains the information that the patient said the orderly frequently hit him on the head and covered his mouth. I.G. Ex. 4. In the course of investigating a second incident of abuse involving the same orderly, a special investigator with the Texas Department of Health contacted the regional Texas Department of Health in San Antonio and requested that it review all incident reports from March 1989 through May 1989 for any incident report concerning the first incident of abuse which was alleged to have taken place in March 1989. The Texas Department of Health's review found no report of the March 1989 incident. I.G. Ex. 4.

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

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

Section 1128(i) of the Act indicates that there are several actions a court can take which the Act will regard as the equivalent of a conviction for purposes of mandatory exclusion. Specifically, 1) a court could enter a judgment of conviction (it is immaterial whether there is an appeal pending or whether the judgment is ultimately expunged) (section 1128(i)(1)); 2) a court could make a formal finding of guilt (section 1128(i)(2)); 3) a court could accept a guilty or nolo contendere plea (section 1128(i)(3)); or, 4) a court

could allow the individual or entity to enter into a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld (section 1128(i)(4)).

I find that the facts show Petitioner to have been "convicted" based upon: 1) the court's acceptance of his nolo contendere plea, which falls within the meaning of section 1128(i)(3) of the Act, and 2) the court's placing Petitioner in a deferred adjudication status or other arrangement or program where judgment of conviction has been withheld, which falls within the meaning of section 1128(i)(4) of the Act. FFCL 11-12. The I.G. supports her contention that Petitioner was "convicted" within the meaning of section 1128(i) of the Act by submitting as exhibits two public documents, a Deferred Adjudication document and a document captioned "Criminal Docket." I.G. Exs. 2, 3.

I.G. Ex. 2 is a photocopy of a report or summation of the minutes of the court, with the heading "Capias Pro Fine -- Deferred Adjudication." I.G. Ex. 2. This document was signed by a deputy to the clerk of the County Court at Law, Bexar County, Texas, on September 4, 1991, and bears the (authenticated) seal of the court. I.G. Ex. 2. The I.G. attached a declaration to this exhibit representing that the exhibit was a true copy of the original on file with the County Clerk of Bexar County, Texas. This Deferred Adjudication document states that Petitioner appeared in court, with his attorney, and "...entered a plea of nolo to the offense of failure to report abuse...as charged in the information." I.G. Ex. 2. The document continues by stating that the court, on September 4, 1991, after listening to the Petitioner and reviewing evidence, "...deferred further proceedings without entering an adjudication of guilty, placed the defendant on probation for a term of six months..." and required him to pay fines and costs. I.G. Ex. 2.

Petitioner argued that this Deferred Adjudication document was "not an order signed by the Court but is in fact an entry by a Clerk in order to obtain money." P. Br. at 2. I reject Petitioner's characterization of this official court document. The document clearly recites the action taken by the court ("...the Court, after receiving defendant's plea, after hearing the evidence submitted, the Court deferred further proceedings without entering an adjudication of guilty...") with respect to Petitioner's case. I.G. Ex. 2. The fact that the document was signed by a deputy to the clerk is not fatal. The court's seal has been impressed upon it and the document provides for the signature of a deputy to

the clerk rather than for a judge's signature. Accordingly, it has been signed by the appropriate public official. Moreover, although this document does state the fines and costs assessed upon Petitioner, it serves more than a mere bookkeeping purpose. I find that the Deferred Adjudication document is, on its face, a routine record kept by the court in the course of its ordinary business, and is a trustworthy recitation of the court's proceedings against Petitioner.

The other court document submitted as an exhibit by the I.G. (I.G. Ex. 3) is a photocopy of a ledger-like page captioned "Criminal Docket," which has columns for judges' orders and clerks' memoranda. With respect to the meaning of the handwritten markings on this document for the September 4, 1991 entry, Petitioner stated that "[t]here is no basis offered to support the Inspector General's interpretation of the markings in question. Further, the cited entries were made more than four months after the fact." P. Br. at 1. The I.G. attached a declaration to this exhibit representing that the exhibit was a true copy of the original on file with the County Clerk of Bexar County, Texas. Unlike I.G. Ex. 2, which deals almost exclusively with Petitioner's court appearance on September 4, 1991, I.G. Ex. 3 is a log of Petitioner's involvement with the State court system over an 11-month period, containing the date of his first court appearance, to the ultimate dismissal of his case. I reject Petitioner's unsubstantiated claim that some of the entries were made "after the fact." Moreover, whether or not the entries were made "after the fact," I find this document to be trustworthy as a routine record summary of Petitioner's case as kept by the court in the course of its ordinary business.

I conclude that preponderant evidence shows I.G. Exs. 2 and 3 to be relevant, trustworthy, and not readily subject to misinterpretation. Thus, I reject Petitioner's argument that I.G. Exs. 2 and 3 must have been misunderstood and misinterpreted by the I.G.

The Deferred Adjudication document and the Criminal Docket sheet support the I.G.'s contention that Petitioner entered a nolo contendere plea to the offense of failure to report abuse. FFCL 6-7. Both court documents indicate that Petitioner pled "nolo."[3]

---

[3] In the August 13, 1993 letter from Petitioner's attorney requesting a hearing, Petitioner's attorney stated that "[o]n the advice of Counsel, [Petitioner]

(continued...)

Petitioner offered his nolo contendere plea to dispose of the criminal charge against him. The record demonstrates that the court heard the plea, evaluated it, and then imposed monetary penalties and a period of probation[4] upon Petitioner. FFCL 7. Put another way, the court, motivated by Petitioner's plea, took action to resolve the charges brought against him, thereby disposing of his case. Such an assumption of control by the court over this case may be regarded as proof of the court's "acceptance" of the plea. I find that this arrangement amounts to acceptance of Petitioner's plea of nolo contendere within the meaning of section 1128(i)(3). See Douglas L. Reece, D.O., DAB CR280 (1993), remanded, DAB 1448 (1993), on remand, DAB CR305 (1994); Act, section 1128(i)(3); FFCL 6-7.

I find further that the court's imposition of fines, costs, and a period of probation upon Petitioner (during which time entry of judgment against him was deferred), followed by the dismissal of all charges when the probationary period was satisfactorily completed, amounts

---

[3](...continued)
entered a plea of "no contest" on the understanding the charge against him would be dismissed." However, during the September 8, 1993 prehearing conference and in Petitioner's proposed findings of fact, Petitioner asserted that he "did not plead nolo contendere to failure to report abuse. . ." P. Proposed FFCL at 1. However, both I.G. Exs. 2 and 3 refute Petitioner's assertions that he did not plead nolo contendere.

[4] Although Petitioner denies that he was ever put on probation by the court or ever served a period of probation (P. Br. at 2), the evidence shows that Petitioner served a six-month period of probation. The Deferred Adjudication document, by which the court summarized its deferral of further proceedings without entering an adjudication of guilt and placed Petitioner on a six-month probation, is dated September 4, 1991. I.G. Ex. 2. The court dismissed Petitioner's charge on March 4, 1992, which is exactly six months from September 4, 1991. I.G. Ex. 3. Any doubt as to whether Petitioner served probation is clarified by the stamped "3/4/92" entry on I.G. Ex. 3, which, on its face, indisputably indicates that Petitioner satisfied his deferred adjudication probation.

to additional confirmation that his nolo contendere plea was accepted.

The court's disposition of Petitioner's case also constitutes a conviction under section 1128(i)(4). Under section 1128(i)(4) of the Act, an individual is considered to have been "convicted" of a criminal offense if he "has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." (Emphasis added.) Petitioner insists that his case cannot be called a deferred adjudication because it did not correspond to his interpretation of certain State laws relevant to deferred adjudications (for example, he believes that State law makes unsupervised probation incompatible with deferred adjudication). P. Br. at 1-2. The problem with Petitioner's argument (besides the fact that Petitioner's statutory interpretations are by no means beyond dispute) is that it is irrelevant for purposes of this administrative proceeding whether Petitioner's case was a deferred adjudication as defined by State law. At issue is whether Petitioner's deferred adjudication fits within one of the definitions of "conviction" under section 1128(i) of the Act. Moreover, Petitioner did not controvert the facts set forth in the I.G.'s exhibits. In his brief, Petitioner stated that he "adopts" all of the I.G.'s exhibits. P. Br. at 3. Instead, Petitioner presents a legal argument as a question of fact.

The last entry on the Criminal Docket sheet evidences the ultimate disposition of Petitioner's case. Although some of the entries on this document are handwritten and almost unreadable, this final entry was made with a rubber stamp and is quite clear. Next to the handwritten date of "3/4/92" is the entry: "Defr. Adj. Prob. Satisfied and Dismissed." I.G. Ex. 3. It is noteworthy that Petitioner himself argues that the criminal charge against him "was subsequently dismissed." P. Br. at 3. Thus, based on Petitioner's own statement, it is clear that the court did take some type of action in his case. That the court dismissed Petitioner's charge is borne out by the 3/4/92 stamped entry, which indicates that the charge was dismissed. However, in addition to stating the word "Dismissed", the stamped entry also states the abbreviations "Defr. Adj. Prob." With respect to these abbreviations, I find that they stand for "Deferred Adjudication Probation." Thus, reading the stamped entry of 3/4/92 in its entirety, I find it to mean that Petitioner, on March 4, 1992, had satisfactorily completed his deferred adjudication probation and, on

that day, the court dismissed the charge against him. FFCL 9.

I find that the manner in which the court treated Petitioner falls within the term "deferred adjudication, or other program where judgment of conviction has been withheld." Act, section 1128(i)(4). This conclusion is consistent with the plain meaning of section 1128(i)(4). Additionally, as the I.G. correctly points out, the action taken by the court is the type of arrangement contemplated by Congress, as expressed through legislative history. I.G. Br. at 8-9. The congressional committee charged with drafting the 1986 amendments to the Act stated:

> The principal criminal dispositions to which the exclusion remedy [currently] does not apply are the "first offender" or "deferred adjudication" dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.
>
> These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo [contendere] pleas to criminal charges of defrauding the Medicaid program are not subject to exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion. If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.

H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986), reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

As I said in Reece, Congress intended to exclude from Medicare and Medicaid programs those who entered into first offender or deferred adjudication arrangements or programs. The legislative history demonstrates Congress' strong desire to protect the Medicare and Medicaid programs from untrustworthy providers. Although the aforementioned passage refers to the mandatory provisions of section 1128(a)(1), it is reasonable to apply this same rationale to those who are excluded under section 1128(a)(2). I find that the arrangement between Petitioner and the court falls squarely within the kinds of arrangements envisioned by the congressional drafting committee to be within the scope of section 1128(i)(4). See Reece, DAB CR305, at 15 (1994).

Finally, Petitioner argues that he is not guilty of failing to report abuse, stating that he did notify the Texas Department of Health of the alleged abuse. P. Br. at 1. However, I am not authorized to look behind a conviction. FFCL 21. Peter J. Edmonson, DAB 1330, at 4 (1992). Thus, an excluded person or entity may not utilize administrative proceedings to collaterally attack a prior court action (for example, by seeking to show that he did not do the act charged, or that there was no criminal intent, or that a criminal conviction was tainted by legal error). Id. at 4-5. Additionally, Petitioner asserts that the court "made no entry of any kind regarding the required admonition of the consequences of a violation of the mandated community supervision." P. Br. at 2. If Petitioner is suggesting that his conviction is void because of this alleged oversight, such an argument is not valid here. Petitioner may have recourse in the State courts to rectify such matters, but not in this forum. Peter J. Edmonson; Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991).

I re-emphasize that the evidence leaves no doubt about what happened to Petitioner in the State judicial system. First, Petitioner pled nolo contendere, and the court evaluated the plea in the context of the relevant evidence. The court then afforded Petitioner some leniency, by allowing him to pay a sum of money and undergo a period of probation, following which the case against him could be (and was) dismissed. FFCL 6-9. These facts are set forth unambiguously in reliable and trustworthy public documents, and they comport fully with the "conviction" requirement of the federal mandatory exclusion law.

By contrast, Petitioner offered no evidence to support his view of the disposition of his case. Petitioner asserted that he was charged with a criminal offense, but that the charge was dismissed. Petitioner did not explain the circumstances behind the dismissal of the charge, other than to argue that a deferred adjudication had not taken place. P. Br. at 3.

Thus, I find that the court's handling and disposition of Petitioner's case falls within the definition of a conviction under sections 1128(i)(3) and (4) of the Act, thereby conclusively establishing that Petitioner was "convicted."

B. Petitioner's conviction relates to the neglect or abuse of patients in connection with the delivery of a health care item or service.

1. The Woodlawn resident who allegedly was abused is a patient.

The alleged abuse which Petitioner was convicted of not reporting consisted of a report of physical attacks upon a resident being cared for at Woodlawn. The abuse was allegedly committed by an orderly employed by Woodlawn. FFCL 4. In the Information, the victim is referred to only as a "residence [sic]" at Woodlawn (I.G. Ex. 1). However, the Criminal Investigative Report Supplement prepared by the Texas Attorney General's Medicaid Fraud Control Unit, the contents of which are summarized in the affidavit of William J. Hughes (I.G. Ex. 4), contains information that the institutionalized resident at Woodlawn who complained of being abused by an orderly was a "patient" at Woodlawn. Specifically, the affidavit states that, on June 13, 1989, a nurse at Woodlawn reported to the Medicaid Fraud Control Unit investigator that, on March 23, 1989, when she was the acting director of nurses, she received information that one of the patients at Woodlawn had complained that he was being abused by an orderly. The patient said that the orderly frequently hit him on the head and covered his mouth. I.G. Ex. 4. I note also that Petitioner did not contest that the Woodlawn resident was a patient. In his brief, Petitioner stated, "[a]s the Inspector General points out[,] the employee, who was an orderly, denied abusing the patient." (Emphasis added.) P. Br. at 1. I conclude from this that the Woodlawn resident who was allegedly abused was a patient at Woodlawn. FFCL 13.

2. Petitioner's failure to report the alleged abuse of the Woodlawn patient was an offense related to the neglect or abuse of a patient, within the meaning of section 1128(a)(2).

Petitioner's failure to report the alleged abuse at issue was an offense related to the neglect or abuse of a patient, within the meaning of section 1128(a)(2). FFCL 15. Petitioner is not alleged to have abused anyone. However, the State has a legitimate interest in requiring health care workers to report incidents of suspected patient abuse. Towards this end, the State has a mandatory reporting requirement, which Petitioner was convicted of violating. The specific violation, as stated in the Information filed by the State against Petitioner, was that the Petitioner, "while an employee of an institution, namely: Woodlawn Hills Care Center, and having cause to believe that an institution residence's [sic]...physical and mental health and welfare had been or may have been adversely affected by abuse, to-wit: physical contact, caused by another,...did knowingly fail to report said incident in violation of Art. 4442C, Sec. 16, subsection (a) and (g), V.A.C.S." I.G. Ex. 1.

Under State law, Petitioner, as Woodlawn's administrator, owed a legal duty of care to Woodlawn's patients to report any allegations of patient abuse which either had occurred or might have occurred. FFCL 14. Petitioner had a duty to maintain the health, safety, and well-being of all the patients at Woodlawn and to ensure that their health, safety, and well-being was not put in jeopardy. FFCL 16. By failing to report the alleged abuse in this case, Petitioner breached his duty of care to a Woodlawn patient, which directly impacted the health, safety, and well-being of that patient. Thus, Petitioner's offense was related to the neglect or abuse of a patient, within the meaning of section 1128(a)(2). FFCL 15. See Dawn Potts, DAB CR120 (1991); Vicky L. Tennant, R.N., DAB CR134 (1991); Glen E. Bandel, DAB CR261 (1993); Carolyn Westin, DAB CR229 (1992), aff'd, DAB 1381 (1993).

Accordingly, I conclude that Petitioner's conviction for failure to report abuse constitutes a conviction of a criminal offense related to the neglect or abuse of a patient within the meaning of section 1128(a)(2) of the Act. FFCL 10-15.

3. The abuse Petitioner was charged with failing to report occurred in connection with the delivery of a health care item or service.

Finally, to justify an exclusion pursuant to section 1128(a)(2), I must find that the patient neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service. Here, Petitioner was a nursing home administrator,[5] and, as such, he provided health care services to all patients at Woodlawn. This is because, as Woodlawn's administrator, Petitioner had overall responsibility for the health, safety, and well-being of all Woodlawn's patients. FFCL 16. This responsibility included reporting incidents or allegations of abuse which might adversely affect a Woodlawn patient's health, safety, or well-being to the proper authorities. FFCL 17. Petitioner's failure to report the alleged abuse of a patient is thus inextricably related to the health care of that patient. Therefore, I conclude that Petitioner's failure to report the alleged abuse directly related to the duty of care he owed to the allegedly abused patient here and occurred in connection with the delivery of his health care services to that patient, within the meaning of section 1128(a)(2). FFCL 18; See Vicky L. Tennant, R.N. Accordingly, the conviction of the criminal offense at issue here relates to the neglect or abuse of a patient and is connected with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act. FFCL 19.

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because he was 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. FFCL 20. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory

---

[5] Petitioner did not contest that Woodlawn is a nursing home facility.

period of exclusion. FFCL 22; Jack W. Greene, DAB CR19, aff'd, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge