Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ann M. MacDonald,	)	Date: February 26, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-545
	)	Decision No. CR519
The Inspector General.	)	
	)	

DECISION

By letter dated July 17, 1997, Ann M. MacDonald, R.N., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had decided to exclude her 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. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted in the Quincy District Court, State of Massachusetts, of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. Both parties submitted briefs in this matter. The I.G. submitted three proposed exhibits (I.G. Exs. 1-3). Petitioner did not object to these exhibits.

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[1] In this decision, I use the term "Medicaid" to refer to these State health care programs.

I grant the I.G.'s motion for summary disposition. 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 five years.

PETITIONER'S ARGUMENT

Petitioner contends that she was not convicted of a criminal offense. Rather, she asserts that she never pled guilty, her case was dismissed, and she was assessed only court costs. On such basis, she maintains that the criminal proceeding cannot be used as a basis to exclude her from program participation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was a registered nurse who was employed at Arlington Green Eldercare Nursing Home in Quincy, Massachusetts. I.G. Ex. 3.

2. Petitioner's duties as a nurse at the Arlington Green Eldercare Nursing Home included providing care to patients at that facility. Id.

3. On or about February 9, 1994, a criminal complaint was filed in Quincy District Court, State of Massachusetts, Docket No. 9456 CR 00770, against Petitioner. I.G. Ex. 1.

4. Petitioner was charged in Count One of that complaint with abuse, neglect, or mistreatment of a patient at Arlington Green Eldercare Nursing Home, in violation of Massachusetts General Laws Annotated (MASS. GEN. LAWS ANN.), Ch. 265, § 38 (West 1997). I.G. Ex. 1.

5. Count Two of that complaint charged Petitioner with assault and battery upon the patient, in violation of MASS. GEN. LAWS ANN., Ch. 265, § 13A (West 1997). I.G. Ex. 1.

6. On April 21, 1994, Petitioner admitted to "sufficient facts" to be found guilty on the charges against her, and the case was continued without a finding until October 18, 1994. I.G. Ex. 1.

7. On October 18, 1994, after satisfying the conditions of her release during the continuance period, Petitioner's case was dismissed. I.G. Ex. 1.

8. Petitioner's admission to "sufficient facts" and agreement to a continuance without a finding constitutes a conviction within the meaning of section 1128(i)(4) of the Act.

9. Petitioner's actions against a patient in her care were offenses relating to the neglect or abuse of a patient and are connected with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

10. The mandatory minimum period for exclusions pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act is five years.

11. The Secretary has delegated to the I.G. the duty to determine and impose exclusions pursuant to section 1128(a) of the Act.

12. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

13. Neither the I.G. nor the administrative law judge (ALJ) has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

DISCUSSION

To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove that: (1) the individual charged has been convicted of a criminal offense; (2) the conviction is related to the neglect or abuse of patients; and (3) 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.

The first criterion that must be satisfied, in order to establish that the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act, is that Petitioner must have been convicted of a criminal offense. The term "convicted" is defined in section 1128(i) of the Act. This section provides that an individual or entity will be convicted of a criminal offense:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(i) of the Act.

This section establishes four alternative definitions of the term "convicted." An individual or entity need satisfy only one of the four definitions under section 1128(i) to establish that the individual or entity has been convicted of a criminal offense within the meaning of the Act.

In the present case, I find that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i)(4) of the Act. I reject her contention that her admission to "sufficient facts" is not within the scope of section 1128(i)(4). Petitioner's exclusion under section 1128(a)(2) of the Act derives from her entry into an arrangement or program where judgment of conviction was withheld. Under Massachusetts law, an admission to "sufficient facts" is recognized as a method of diverting trial. See Commonwealth v. Duquette, 438 N.E.2d 334 (1982). It has also been held that an admission to "sufficient facts" is deemed to be an admission to facts sufficient to warrant a finding of guilty. Id. Such an admission is also deemed a tender of a guilty plea for purposes of procedure related to sentencing and pleas in the State of Massachusetts. See MASS. GEN. LAWS ANN., Ch. 278, § 18 (West 1997).[2] Petitioner, under Massachusetts law, has admitted to facts sufficient to find her guilty. Her case was continued pending successful completion of the conditions of her release. Upon such completion, charges against her were dismissed. I find that her situation is a deferred adjudication within the scope of section 1128(i)(4) of the Act.

I find that this conclusion is in accord with Departmental Appeals Board (DAB) decisions which have dealt with deferred adjudications under section 1128(i)(4) of the Act. These cases have held that "Congress intended to exclude from Medicare and

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[2] That section provides, in part, that "if a defendant, notwithstanding the requirements set forth hereinbefore, attempts to enter a plea or statement consisting of an admission of facts sufficient for finding of guilt, or some similar statement, such admission shall be deemed a tender of a plea of guilty for purposes of the procedures set forth in this section." MASS. GEN. LAWS ANN., Ch. 278, §18 (West 1997).

Medicaid individuals who entered into first offender or deferred adjudication programs." Benjamin P. Council, M.D., DAB CR391 (1995); Carlos E. Zamora, M.D., DAB CR22 (1989)(five-year exclusion upheld of physician who entered plea of nolo contendere which was later withdrawn). The petitioner in Council entered a guilty plea and was not adjudicated guilty or sentenced, but was instead placed on probation as part of a deferred sentencing option. Based on those facts, the ALJ held that the petitioner in Council had entered into a deferred sentencing arrangement within the scope of section 1128(i)(4). In the present case, Petitioner's admission to "sufficient facts," and the resulting continuance, is analogous to the facts in Council. Her admission is equivalent to a guilty plea under Massachusetts statutory and case law. Her case was then continued and ultimately dismissed when she completed the conditions of her release.

I further find that this determination is consistent with the Congressional intent behind section 1128(i) of the Act. It is clear from the explicit language of section 1128(i)(4) that Congress intended to require the mandatory exclusion of guilty individuals whose criminal prosecutions were diverted into first offender or deferred adjudication programs. Douglas L. Reece, D.O., DAB CR305 (1994)(decision on remand). The deferred adjudication program in Petitioner's case is precisely the sort that Congress believed should be encompassed by the mandatory exclusion law.

The congressional committee charged with drafting the 1986 amendments to the statute 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 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.
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> 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.

Congress intended to exclude from Medicare and Medicaid programs those who entered into first offender or deferred adjudication programs. More importantly, the legislative history reveals Congress' strong desire to protect the Medicare and Medicaid programs and beneficiaries from untrustworthy and criminally incompetent providers. I find that the arrangement entered into by Petitioner whereby she admitted "sufficient facts" to justify a finding of guilt falls squarely within the kind of arrangement which the committee responsible for drafting the law sought to include within the ambit of section 1128(i)(4) of the Act.

I further find that Petitioner's convictions under section 1128(i)(4) of the Act for assault and battery and for abuse, neglect, or mistreatment of a nursing home patient must both be deemed to be convictions for abuse or neglect of a patient, within the scope of section 1128(a)(2) of the Act. A conviction need not be for an offense called patient abuse or patient neglect; it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In that case, the petitioner was a nurse's aide who pled nolo contendere to a charge of battery. The petitioner allegedly struck a nursing home patient with an electrical cord. The ALJ held that it was sufficient that a party is convicted of an offense based on charges of neglectful or abusive conduct.

Petitioner in this case is a registered nurse who was employed at the Arlington Green Eldercare Nursing Home. Petitioner did not dispute in her statement that, during the course of her regular duties, she committed the act of assault against a nursing home patient. The assault occurred when Petitioner struck the patient in the face.

Although the terms "abuse" and "neglect" are not defined within the Act, the term "abuse" is to include those situations where a party wilfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). In the present case, Petitioner was convicted within the scope of section 1128(i)(4) of the Act of assault and battery and for abuse, neglect, mistreatment of a patient by striking a patient in the face. A physical assault against an individual clearly falls within the common and ordinary meaning of the term "abuse." Self.

I also find that Petitioner's abuse of a patient occurred in connection with the delivery of a health care item or service. Petitioner's duties as a nurse directly involve patient care and the delivery of health care services. Petitioner does not dispute that she was employed by the facility as a nurse and had the duty to assist in caring for Patient MM when the assault occurred. Where an attack occurs in a health care facility where the victim is residing and the perpetrator is an employee of the facility whose duty is to assist in the care of patients, the conviction is deemed to be related to the delivery of health care. Patricia McClendon, DAB CR264 (1993).

A five-year exclusion under section 1128(a)(2) of the Act is mandatory when a petitioner has been convicted of a criminal offense relating to the abuse or neglect of patients in connection with the delivery of a health care item or service. Aida Cantu, DAB CR462 (1997). Once it is determined that a conviction relating to the abuse or neglect of a patient has occurred, exclusion is mandatory under section 1128(a)(2). Peter J. Edmondson, DAB CR163, aff'd, DAB No. 1330 (1992). In this case, Petitioner has been convicted within the meaning of section 1128(i)(4) of the Act of assault and battery and abuse, neglect or mistreatment of a nursing home patient in relation to the delivery of a health care item or service. Therefore the I.G. is required to exclude Petitioner for at least five years. Neither the I.G. nor the ALJ is authorized to reduce a five-year mandatory period of exclusion. Jack W. Greene, DAB CR19, aff'd, DAB No. 1078 (1989), aff'd sub nom, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn 1990).

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because she was 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. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge