

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:

Carmencita Alhabsi,

Petitioner,

- v. -

The Inspector General.

Date: November 6, 1998

Docket No. C-98-375

Decision No. CR555

DECISION

By letter dated May 29, 1998, Carmencita Alhabsi, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been 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 being imposed pursuant to section 1128(a)(2) of the Social Security Act (Act) because Petitioner had been convicted in the Criminal Court of the City of New York, Bronx County, 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 hearing. I held a prehearing conference in this case on July 2, 1997. 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.

The I.G. submitted a brief, a reply brief, and eight proposed exhibits (I.G. Exs. 1-8). Petitioner objected to the admission of the I.G.'s exhibits which "related to the criminal charges" as being prejudicial, but did not identify specifically which exhibits she objected to (P. Brief at 7). Based on my review of

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

the I.G.'s exhibits, it appears that Petitioner objects to I.G. Exs. 1-3 and I.G. Exs. 5, 6. I find that I.G. Exs. 1-3 and I.G. Exs. 5, 6 are relevant to the conviction on which Petitioner's exclusion is based and establish the circumstances underlying Petitioner's conviction. I find that the probative value of these exhibits is in no way "substantially outweighed by the danger of unfair prejudice," as contemplated under 42 C.F.R. § 1005.17(d). Moreover, Petitioner herself has submitted as an exhibit the plea agreement (P. Ex. A, which is I.G. Ex. 4). I thus admit I.G. Exs. 1-3 and I.G. Exs. 5, 6 into evidence over Petitioner's objections. I admit also into evidence I.G. Ex. 4 and I.G. Exs. 7, 8.

Petitioner submitted a brief and two proposed exhibits ("Exhibit A" and "Exhibit B") which I have renumbered as P. Ex. 1 and P. Ex. 2. The I.G. did not object to these exhibits and I accept P. Exs. 1 and 2 into evidence.

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 not less than five years.

PETITIONER'S ARGUMENT

Petitioner contends that her conviction for "violations" of the New York Penal Law is not a conviction of a "criminal" offense and cannot be the basis for an exclusion under section 1128(a)(2) of the Act. In particular, Petitioner maintains that her conviction was for harassment and disorderly conduct, which do not rise to the level of "criminal" misconduct. She maintains that, although the criminal accusation filed against her alleged facts and specified offenses which may constitute criminal offenses, she in fact pled guilty to lesser offenses which do not constitute criminal offenses and also do not establish the elements of patient abuse or neglect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was a registered nurse in the State of New York. I.G. Ex. 3.
2. During the period at issue, Petitioner was employed as a registered nurse at Park View Nursing Home, a residential health care facility in the Bronx, New York. I.G. Ex. 3.
3. A criminal accusation was filed in the Criminal Court of the City of New York, Bronx County, against Petitioner, who was charged with one count of willful violation of the Health Laws in violation of section 12-b(2) of New York Public Health Law and five counts of falsifying business records in the second degree in violation of New York Penal Law § 175.05. I.G. Exs. 3, 4.
4. The accusation charges that Petitioner: negligently injected insulin into Lina Y., a nursing home resident; attempted to conceal the error by misinforming the patient; and made false entries in the nursing home records to conceal the fact that she had negligently injected the patient with insulin. I.G. Ex. 3.
5. To resolve the charges set forth in the criminal accusation, on August 18, 1997, Petitioner pled guilty to reduced charges, specifically, one count of harassment in the second degree in violation of New York Penal Law § 240.26 and one count of disorderly conduct in violation of New York Penal Law § 240.20. I.G. Ex. 4.
6. On August 18, 1997, the court sentenced Petitioner to pay a fine of \$500 and complete three days of community service, subject to a 15-day term of imprisonment for violation of these conditions. I.G. Ex. 4.
7. On May 29, 1998, the I.G. notified Petitioner that she was being excluded from participation in the Medicare and Medicaid programs for a period of five years pursuant to section 1128(a)(2) of the Act. I.G. Ex. 7.
8. Petitioner's guilty plea constitutes a conviction within the meaning of sections 1128(i)(1) and (3) of the Act.
9. Petitioner's conviction constitutes a conviction for a "criminal offense" as that term is used in section 1128(a)(2) of the Act.
10. Petitioner's conviction for harassment and disorderly conduct concerning her actions involving a patient in her care is an offense relating to the neglect or abuse of a patient and is connected to the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

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

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

13. 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.

14. Neither the I.G. nor an 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's 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.

Section 1128(i) of the Act 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 sections 1128(i)(1) and (3) of the Act. The record reflects that Petitioner admitted her guilt in court. The court then accepted Petitioner's guilty plea and sentenced her. Petitioner was therefore "convicted" of a criminal offense within the meaning of sections 1128(i)(1) and (3) of the Act. Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd, DAB No. 1104 (1989); Anthony A. Tommasiello, DAB CR282 (1993).

I further find that Petitioner's convictions for harassment and for disorderly conduct constitute convictions for "criminal" offenses within the scope of the Act and are not merely non-criminal "violations" as Petitioner claims. It is clear that federal law supersedes State law for purposes of determining whether an individual has been convicted of a criminal offense. Nick S. Pomonis, D.O., DAB CR396 (1995); see also Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 112 (1983). Therefore, whether New York State treats convictions for violations of the Penal Law differently in some way than convictions for misdemeanors or felonies, as argued by Petitioner, is not relevant to the issue of whether Petitioner's conviction triggered the exclusion provisions of section 1128(a)(2) of the Act. Section 1128(a)(2) of the Act requires that an individual be convicted of a "criminal offense;" it does not specify that individuals may be excluded only if they are convicted of misdemeanors or felonies. See e.g., Glen E. Bandel, DAB CR261 (1993). Bandel states that, because section 1128(a)(2) does not specify a criminal offense of a particular grade, the I.G.'s authority to exclude Petitioner is not affected by the fact that the offense was a simple misdemeanor.

The facts in Petitioner's case support the conclusion that she was convicted of a "criminal offense." Petitioner was arrested on June 11, 1997. I.G. Ex. 6. She was charged with "wilfully subject[ing] Lina Y[.], a patient . . ., to an act of neglect, . . . in that the defendant after incorrectly injecting [Lina Y.] with insulin, attempted to conceal the error. . . ." I.G. Ex. 3. This accusation was filed in the Criminal Court of the City of New York. Id. Petitioner was thus charged with criminal

activity. To resolve the charges against her, Petitioner pled guilty to the reduced charges of harassment and disorderly conduct. Both harassment and disorderly conduct are codified in the New York State Penal Law. Petitioner's plea was entered in the Criminal Court of the City of New York, the same court in which Petitioner was sentenced. As part of her sentence, Petitioner faced the possibility of time in jail if she failed to fulfill the conditions of her sentence. On these facts, it is clear that the Criminal Court of the City of New York adjudicated Petitioner's offenses as "criminal offenses."

I further find that Petitioner's conviction was related to the abuse or neglect of a patient, within the scope of section 1128(a)(2) of the Act. The criminal accusation filed in the New York City Criminal Court, upon which Petitioner's guilty plea was based, stated that Petitioner, in an act of neglect, improperly injected a patient with insulin and then attempted to hide her error. A conviction need not be for an offense labeled "abuse" or "neglect;" it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In the case of Self, 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 abusive conduct, even if the crime for which the party is convicted is not specifically labeled "abuse."

In determining whether an exclusion is appropriate under section 1128(a)(2) of the Act, an ALJ may look beyond the charge for which an individual was convicted, to the underlying circumstances. Norman C. Barber, D.D.S., DAB CR123 (1991). In the present case, Petitioner's conviction for harassment and disorderly conduct was based upon her mistreatment of a patient and her falsification of business records to cover up the offense. I.G. Exs. 1-3. Because the terms "neglect" and "abuse" are not defined in section 1128(a)(2) of the Act, the DAB has determined that they should be given their ordinary and common meaning. "Neglect" includes "failure by a party to satisfy a duty of care to another person." "Abuse" is "intended to include those situations where a party willfully mistreats another person." Rosette Elliott, DAB CR84 (1990). I find that Petitioner's treatment of the patient Lina Y. falls within the common and ordinary meaning of the terms "negligence" and "abuse."

In her defense, Petitioner also maintains that her "offense of harassment and disorderly conduct was not based on a falsification of business records or on the treatment of patient Lina Y." P. Brief at 6. I find no merit in this claim. Petitioner's conviction was, in fact, based on the charges filed against her, for, without them, the State of New York had no case against her. The record establishes that Petitioner was charged

with one count of willful violation of the health laws in violation of section 12-b(2) of the New York Public Health Law and five counts of falsifying business records in the second degree in violation of the New York Penal Law § 175.05 (I.G. Exs. 3, 4), in the Criminal Court of the City of New York, Bronx County, based on her treatment of Lina Y. "For the purposes of disposition" of these original charges, which are enumerated in the plea agreement, Petitioner was allowed to plead guilty to reduced charges - the lesser offenses of disorderly conduct and harassment. I.G. Ex. 4, at 2-3. Petitioner's plea was the direct result of the original charges filed against her by the State of New York.

The charges to which Petitioner pled guilty support the I.G.'s contention that her conviction was based on her neglect or abuse of patient Lina Y. A conviction for harassment in the second degree requires that an individual "with intent to harass, annoy or alarm another person . . . strikes, shoves, kicks or otherwise subjects such other person to physical contact or attempts or threatens to do the same; or . . . follows a person in or about a public place . . . or . . . engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." New York Penal Law § 240.26. Disorderly conduct includes engaging in "fighting or in violent, tumultuous or threatening behavior," or the creation of "a hazardous or physically offensive condition by any act which serves no legitimate purpose." New York Penal Law §§ 240.20(1) and (7). I find that Petitioner's convictions for these crimes, coupled with the additional evidence in the record which explains that the basis of the charges was Petitioner's incorrect injection of insulin into a patient and then her attempt to cover up her mistake, support a finding that Petitioner was convicted of a crime related to the abuse or neglect of Lina Y.

Civil Remedies Division case law supports my determination that Petitioner's criminal conviction constitutes a conviction related to abuse or neglect. In Jacqueline L. Dennis, R.N., DAB CR404 (1995), the ALJ found that the petitioner was properly excluded for five years. The petitioner, a registered nurse, was charged with four counts of willful violation of the health laws, in violation of §§ 12-b(2) and 2803-d(7) of the New York State Public Health Law and three counts of falsifying business records in the second degree, in violation of § 175.05(1) of the New York State Penal Law. The petitioner had failed to provide appropriate treatment to three patients in her care and then made false entries in the patients' charts to indicate that she had provided proper services. Petitioner was found guilty of all counts after a jury trial and was sentenced by the judge. Additionally, in a separate criminal proceeding, Petitioner was convicted of a willful violation of the public health laws in connection with her failure to provide adequate and appropriate

services to patients. In upholding the petitioner's exclusion, the ALJ found that her failure to perform proper services and her falsification of records constituted patient abuse or neglect and warranted exclusion under section 1128(a)(2) of the Act.

In a similar case, Janet Wallace, L.P.N., DAB CR155 (1991), aff'd DAB No. 1326 (1992), an appellate panel of the Departmental Appeals Board upheld a five-year exclusion against a nurse who failed to administer a dose of medication to a residential care facility patient and then made a false entry in the patient's chart to indicate that she had given the medication as prescribed. The petitioner was charged with violation of § 12-b(2) of the New York State Public Health Law. She pled guilty to this charge and was sentenced to community service and conditional discharge.

I find also that Petitioner's abuse or neglect of a patient occurred in connection with the delivery of a health care item or service. Where an attack occurs in a health care facility where the victim had been residing as a patient, and the perpetrator was a facility employee whose duty was to assist in the care of patients, this is deemed to satisfy the statutory requirement that the criminal offense must have been related to the delivery of health care. Patricia McClendon, DAB CR264 (1993). The victim of Petitioner's neglect or abuse, Lina Y., was a resident of Park View Nursing Home, a residential health care facility, where she received health care services. I.G. Exs. 1, 3. She was therefore a "patient" within the meaning of the Act. As a nurse, Petitioner was employed to provide health care services to Lina Y. and the other facility residents. The Departmental Appeals Board has interpreted the broad terminology of section 1128(a)(2) to suggest that Congress intended to allow even a minimal nexus between the offense and the delivery of a health care item or service to satisfy this statutory test. Anthony W. Underhill, DAB CR231 (1992). Petitioner's situation clearly is within the scope of section 1128(a)(2) of the Act.

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). In this case, Petitioner has been convicted within the meaning of section 1128(i) of the Act of an act involving the abuse or neglect of a residential health care facility patient in connection with the delivery of a health care item or service. Therefore, the I.G. is required to exclude Petitioner from Medicare and Medicaid for at least five years. Neither the I.G. nor an 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 a patient 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