

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Sharon Heselton, |) | Date: December 14, 1998 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-98-314 |
| |) | Decision No. CR559 |
| The Inspector General. |) | |
| |) | |

DECISION

By letter dated April 30, 1998, the Inspector General (I.G.), United States Department of Health and Human Services (HHS), notified Sharon Heselton (Petitioner), that she would be excluded from participation in the Medicare, Medicaid, and all federal health care programs¹ for a period of five years. The I.G. stated that it was imposing the exclusion pursuant to section 1128(a)(2) of the Social Security Act (Act) because Petitioner had been convicted in the Lynn District Court, State of Massachusetts, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. The I.G. also informed Petitioner that five years is the minimum statutory period of exclusion for exclusions imposed pursuant to section 1128(a)(2) of the Act.

Petitioner filed a request for review of the I.G.'s action. I convened a prehearing conference on July 1, 1998 by telephone. During the conference, the parties agreed that the case could be heard and decided based on a written record. The I.G. submitted

¹ Unless the context indicates otherwise, I use the term "Medicare and Medicaid" to refer to all of the federal and State health care programs from which Petitioner was excluded.

a brief accompanied by four proposed exhibits (I.G. Ex. 1-4). Petitioner submitted a response brief in which it objected to the admission of I.G. Ex. 2, a news release, on the grounds that it is "incompetent to establish the facts alleged." Petitioner brief at page (p.) 2. I recognize that I.G. Ex. 2 is hearsay evidence. However, I am not prohibited from admitting hearsay evidence and I routinely admit it into evidence in administrative proceedings before me. Accordingly, I admit I.G. Ex. 1-4 into evidence. Although I have admitted I.G. Ex. 2 into evidence, I did not rely on it in reaching my decision in this case. Two proposed exhibits accompanied Petitioner's response brief (P. Ex. 1-2). The I.G. declined to file a reply brief and did not object to Petitioner's exhibits. In the absence of objection, I admit P. Ex. 1-2 into evidence.

I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid 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 Medicare and Medicaid for a period of five years.

PETITIONER'S ARGUMENT

Petitioner contends that she was not convicted of a criminal offense within the scope of section 1128(i) of the Act. Rather she asserts that she merely acknowledged the presence of sufficient facts to form a factual basis for the charges against her under Massachusetts law. She asserts that, under Massachusetts law, such procedure is not conclusive evidence that the individual committed the conduct which resulted in the criminal proceeding. Based on this, Petitioner argues that the underlying criminal proceeding cannot be used as grounds to exclude her from program participation. Petitioner argues also that the exclusion is not justified in light of the unique circumstances of this case. She asserts that her employment record reflects that she has worked for many years as a dedicated

caregiver.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was employed as a Certified Nurse's Aide by Louise Caroline Rehabilitation and Nursing Center in Saugus, Massachusetts. I.G. Statement of Proposed Uncontested Material Facts and Conclusions of Law #1; Petitioner Response to Statement of Proposed Uncontested Material Facts and Conclusions of Law #1.

2. On or about January 30, 1997, a criminal complaint was filed against Petitioner in Lynn District Court, State of Massachusetts, Case No. 9713 CR 0726. I.G. Ex. 4.

3. Petitioner was charged with knowingly and willfully abusing, mistreating, or neglecting S.M.,² an 80-year-old patient at Louise Caroline Rehabilitation and Nursing Center in Saugus, Massachusetts. I.G. Statement of Proposed Uncontested Material Facts and Conclusions of Law #3; Petitioner Response to Statement of Proposed Uncontested Material Facts and Conclusions of Law #3.

4. Petitioner was also charged with two counts of assault and battery against S.M. In describing these counts, the complaint alleged that Petitioner "did assault and beat" S.M. I.G. Ex. 4.

5. On May 9, 1997, Petitioner admitted to "sufficient facts" to be found guilty on the charges against her. I.G. Statement of Proposed Uncontested Material Facts and Conclusions of Law #6; Petitioner Response to Statement of Proposed Uncontested Material Facts and Conclusions of Law #6.

6. On May 9, 1997, the court entered an order in which it stated that it found "sufficient facts" and it continued the case without a guilty finding on the charges against her until November 9, 1998. I.G. Ex. 4.

7. Petitioner's admission to "sufficient facts" and the court's finding of "sufficient facts" accompanied by a continuance

² In order to protect the identity of this individual, I refer to her as S.M. rather than providing her complete name.

without a guilty finding constitutes a conviction within the meaning of section 1128(i)(4) of the Act.

8. Petitioner was convicted of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

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

10. Pursuant to section 1128(a)(2) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

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

12. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid 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 period of 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 being excluded has been convicted of a criminal offense; (2) the conviction is related to 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. Section 1128(i) of the Act defines when an individual or entity has been convicted for

purposes of an exclusion. This section provides that an individual or entity is considered to have been 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.

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 deferred. 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 guilt. 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).³ Petitioner has admitted to facts sufficient to find her guilty under Massachusetts law. Her case was continued without a finding of guilt. I conclude 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 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 Medicaid individuals who entered into first offender or deferred adjudication programs." Benjamin P. Council, M.D., DAB CR391, at 7 (1995); Carlos E. Zamora, M.D., DAB CR22 (1989) (five-year exclusion of physician who entered plea of nolo contendere which was later withdrawn upheld). A recent case upheld the five-year exclusion of a registered nurse similarly convicted of abusing a patient in a Massachusetts nursing home. Ann M. McDonald, DAB CR519 (1998). In McDonald, I held that the petitioner's admission to "sufficient facts" under Massachusetts law was a conviction within the meaning of section 1128(i)(4) of the Act, thereby supporting the I.G.'s exclusion of her pursuant to section 1128(a)(2) of the Act. Petitioner's admission to "sufficient facts" and the resultant continuance without a finding parallels the facts in McDonald. Petitioner victimized and abused an elderly patient in her care, admitted to "sufficient facts" to be found guilty of the charges against her and consequently entered into an arrangement whereby judgment of conviction was withheld. Under McDonald, such an arrangement constitutes a criminal conviction.

I conclude also that the offense underlying Petitioner's conviction relates to the abuse of a patient within the scope of section 1128(a)(2) of the Act. Petitioner does not dispute the assertion made by the I.G. that the criminal charge to which

³ Section 18 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).

Petitioner admitted "sufficient facts" emanated from allegations of abusive conduct against a nursing home patient, and I find that the record supports the I.G.'s assertion.

In this case, Petitioner was a nurse's aide who was charged with two counts of assault and battery against a nursing home patient. In describing these counts, the criminal complaint alleged that Petitioner "did assault and beat" this patient. Although the term "abuse" is not defined within the Act, the term "abuse" is intended to include those situations where a party willfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). Petitioner was convicted of assaulting and beating another person. Conduct of this nature clearly falls within the common and ordinary meaning of the term "abuse." Moreover, Petitioner was convicted of an additional count described in the criminal complaint as conduct in which she "did knowingly and wilfully abuse, mistreat, or neglect" a nursing home patient. On its face, this offense constitutes abuse or neglect of a patient.

I also find that Petitioner's abuse of a patient occurred in connection with the delivery of a health care item or service. It is undisputed that Petitioner was a certified nurse's aide, and that her duties as a nurse's aide directly involved patient care and the delivery of health care services. In addition, the undisputed material facts establish that the alleged incident which formed the basis of Petitioner's conviction occurred in the course of Petitioner's employment duties, and that it involved an individual entrusted to her care. Based on these undisputed facts, I conclude that Petitioner was convicted of a criminal offense which occurred in connection with the delivery of a health care item or service.

Petitioner argues also that the exclusion imposed by the I.G. is not justified in light of the circumstances of this case. She asserts that her employment record reflects that she has served as a dedicated nursing assistant for many years.

As I stated above, sections 1128(a)(1) and 1128(c)(3)(B) of the Act require the Secretary or her delegate, the I.G., to impose an exclusion of at least five years against an individual who is convicted of a criminal offense relating to abuse or neglect of patients in connection with the delivery of a health care item or service. In this case, Petitioner has been convicted of such an

offense. Therefore, the I.G. is required to exclude Petitioner for at least five years. I am without the authority to consider the equitable arguments raised by Petitioner regarding the effect the unique circumstances of her case should have on the I.G.'s determination to impose a five-year exclusion against her.

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from Medicare and Medicaid for a period of at least five years because she was convicted of a criminal offense relating to 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