

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

In the Case of:)	
Rosette Elliott,)	DATE: June 20, 1990
)	
Petitioner,)	
)	Docket No. C-200
- v. -)	
)	DECISION CR 84
The Inspector General.)	

DECISION

On December 1, 1989, the Inspector General (the I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs for a period of five years.¹ The I.G. told Petitioner that she was being excluded as a result of her conviction in a Texas court 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 was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(2) of the Social Security Act (Act). The I.G. further advised Petitioner that section (c)(3)(B) of the Act required that the minimum period of such an exclusion be for not less than five years.

Petitioner timely requested a hearing and this case was assigned to me for a hearing and a decision. The I.G. moved for summary disposition, and Petitioner opposed the

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

motion. I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. Based on the record before me, I conclude that the five year exclusion imposed by the I.G. is required by section 1128(a)(2) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(2) of the Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service". Section 1128(c)(3)(B) provides for a five year minimum period of exclusion for those excluded under section 1128(a)(2).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1988). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to give a party written notice that he or she is excluded from participation in Medicare, beginning 15 days from the date on the notice, whenever the I.G. has conclusive information that a practitioner or other individual has been convicted of a crime related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or the social services program.²

²The I.G.'s Notice allows an additional five days for receipt.

ISSUES

The issues are:

1. Whether Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.
2. Whether Petitioner was convicted of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service," within the meaning of section 1128(a)(2) of the Social Security Act.
3. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ³

1. On March 29, 1989, Petitioner was charged under Texas law with committing a criminal offense of negligence that caused bodily injury to an elderly individual over the age of 65. I.G. Ex. 1,2.
2. Petitioner was accused of causing injury to a nursing home patient. I.G. Ex. 1,2,3,4,6,7.
3. Petitioner was a nurse's aid in the nursing home in which the allegedly injured party resided. I.G. Ex. 1,2,6.

³ The citations to exhibits and briefs are as follows:

I.G.'s Exhibit	I.G. Ex. (number)
I.G.'s Brief in Support of Motion for Summary Disposition	I.G. Br. (page)
Petitioner's Opposition and Brief	P. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)

4. The incident which led to criminal charges being filed against Petitioner occurred in the course of Petitioner's duties and involved a nursing home patient. I.G. Ex. 6,7; P. Br. 2.
5. On July 17, 1989, Petitioner pleaded nolo contendere in a Texas court to the criminal offense of injury to the elderly, as alleged in the criminal information. I.G. Ex. 2,3.
6. Petitioner's nolo plea was made in lieu of a trial of the criminal charges against Petitioner. I.G. Ex. 3.
7. On July 17, 1989, the Texas court accepted Petitioner's nolo plea and entered an Order (attached to the nolo plea) accepting the plea. I.G. Ex. 3.
8. On July 17, 1989, the Texas court entered an Order deferring adjudication, fining Petitioner, ordering Petitioner to pay court costs, and placing Petitioner on probation. I.G. Ex. 4.
9. Petitioner was "convicted" of a criminal offense as defined by section 1128(i) of the Act. FFCL 7.
10. Petitioner was convicted of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service" within the meaning of section 1128(a)(2) of the Act. FFCL 1-7.
11. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).
12. On December 21, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that she be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Act.
13. The exclusion imposed and directed against Petitioner by the I.G. was for five years, the minimum period required by law for exclusions imposed and directed pursuant to section 1128(a)(2) of the Act.
14. The five year exclusion imposed and directed against Petitioner by the I.G. is mandated by federal law. FFCL 1-12; Act, sections 1128(a)(2); 1128(c)(3)(B), 1128(i).

15. Summary disposition is appropriate in this case. See 56 F.R.C.P.; Wheeler and Todd, DAB App. 1123 (1990).

DISCUSSION

I. Petitioner was "Convicted" of a Criminal Offense as a Matter of Federal Law.

The I.G.'s authority to exclude an individual from Medicare and Medicaid programs under section 1128 (a)(2) of the Act is based upon a "conviction" of a petitioner of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of an item or service" as defined in sections 1128(a)(1) and 1128(i) of the Act. Without such a "conviction," there is no authority to exclude an individual.

Section 1128(i) of the Act provides that an individual has been "convicted" of a criminal offense when:

- (1) 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) there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
- (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) 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.

In this case, the record contains evidence that Petitioner pled nolo contendere to one misdemeanor count of injury to the elderly. FFCL 1-7. Petitioner admits that she pleaded nolo to the criminal information and admits that the Texas court "accepted" her plea and that she was placed on 12 months of "deferred adjudication." I.G. Ex. 7. Petitioner argues that the criminal court withheld adjudication, did not enter a final judgment, and did not pronounce sentence. Petitioner argues that,

under Texas law, her plea of nolo contendere was not a conviction. She argues that Texas law requires a formal entry of judgment by the criminal court in order for a plea to constitute a conviction. P Br. 1-4.

Based on Petitioner's admissions and the court's order, I conclude that the criminal court "accepted" Petitioner's plea. Thus, Petitioner's plea of nolo contendere, having been "accepted" by a State court, constitutes a "conviction" within the meaning of the sections 1128(a)(2) and 1128(i)(3) of the Act.

Although it is only necessary that I find that Petitioner be convicted as defined by one of the subsections of section 1128 (i), I also conclude that Petitioner was "convicted," as defined by section 1128 (i)(4) of the Act. Petitioner's state court arrangement was one where judgment of conviction was withheld and she received probation. These facts constitute a "conviction"; this is a type of arrangement that Congress meant to include within its federal definition of "conviction" for purposes of exclusions from Medicare and Medicaid.

II. Petitioner Was Convicted Of A Criminal Offense "Relating To Neglect Or Abuse Of Patients In Connection With The Delivery Of A Health Care Item Or Service," Within The Meaning Of Section 1128(a)(2) Of The Act.

Having concluded that Petitioner was "convicted" of a criminal offense, I must determine whether the evidence demonstrates a relationship between the conviction and "neglect or abuse of patients in connection with the delivery of a health care item or service."

The State statute of which Petitioner was convicted does not specifically refer to neglect or abuse. Petitioner was convicted of the offense of criminal negligence. I conclude that, as a matter of federal law, Petitioner was convicted of an offense relating to "neglect or abuse" of another individual, as that term is used in section 1128(a)(2) of the Act.

The terms "neglect" and "abuse" are not defined in section 1128(a)(2). In the absence of a definition, they should be given their common and ordinary meaning.

"Neglect" is defined in Webster's Third New International Dictionary, 1976 Edition, as "1: to give little or no attention or respect to:. . . 2: to carelessly omit doing

(something that should be done) either altogether or almost altogether: leave undone or unattended" "Abuse" is defined as "4: to use or treat so as to injure, hurt, or damage; MALTREAT"

I conclude from these common definitions that Congress intended the statutory term "neglect" to include 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.

Petitioner was convicted of violating section 22.04 of the Texas Penal Code and the criminal information to which she pleaded nolo contendere stated, in relevant part, that:

unlawfully and with criminal negligence, by act, cause bodily injury; to wit: injury to the head; to a person; to wit: Opal Thompson and said Opal Thompson being at that time 65 years of age or older; said criminally negligent act being leaving said Opal Thompson in a bathroom.

I conclude that reckless conduct that places another in imminent danger of serious bodily harm falls within the common definition of "neglect." Therefore, a conviction under section 22.04 of the Texas Penal Code is plainly a conviction related to "neglect" within the meaning of section 1128(a)(2).

Thus, Petitioner's guilty plea and the statute under which Petitioner was convicted establish that she was convicted of an offense relating to neglect of another. However, it is not clear from Petitioner's guilty plea or from the statute under which Petitioner was convicted whether the offense related to patient neglect in connection with the delivery of a health care item or service. That raises the issue of whether there is relevant evidence concerning the facts upon which Petitioner's conviction was predicated to determine if Petitioner was convicted of an offense related to patient neglect. I conclude that it is consistent with Congressional intent to admit limited evidence to establish whether the individual who was the subject of the offense for which Petitioner was convicted is a "patient," and to determine whether the incident which led to Petitioner's conviction was "in connection with the delivery of a health care item or service." Dewayne Franzen, DAB No. 1165 (1990).

In this case, the only evidence that is necessary for me to consider to decide whether Petitioner was convicted of an offense within the meaning of section 1128(a)(2) is evidence establishing the identity of the person Petitioner was convicted of injuring through her criminal neglect and Petitioner's relationship to that individual.

The undisputed material facts of this case establish that Petitioner was a nurse's aid at a nursing home, that the incident that resulted in Petitioner's guilty plea occurred in the course of Petitioner's duties, and that the incident involved a nursing home patient. FFCL 1-4. These undisputed facts establish that Petitioner was convicted of a criminal offense relating to neglect of a patient in connection with the delivery of a health care item or service, satisfying the requirements of section 1128(a)(2).

III. Summary Disposition Is Appropriate In This Case.

The issue of whether the I.G. was required to exclude Petitioner under section 1128(a)(2) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of her exclusion is mandated by federal law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See Wheeler and Todd, DAB No. 1123 (1990) and Rule 56 F.R.C.P.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s five year exclusion was mandated by federal law. The five-year exclusion imposed and directed against Petitioner by the I.G. is required by section 1128 of the Act.

/s/

Charles E. Stratton
Administrative Law Judge