

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Janet Wallace, L.P.N.,)	DATE: October 11, 1991
Petitioner,)	
- v. -)	Docket No. C-358
The Inspector General.)	Decision No. CR155

DECISION

By letter dated January 22, 1991, the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), notified Petitioner that, because of her conviction of a criminal offense relating to neglect or abuse of patients, within the meaning of Section 1128(a)(2) of the Social Security Act (the Act), she was subject to a five-year exclusion from participation in the Medicare and Medicaid programs.¹

Petitioner requested a hearing, contending in her appeal that her actions were not "related to the neglect or abuse of patients." Specifically, she sought to "...explain what happened and why," insisting that the facts would show her to have had no "evil motive," malice, or recklessness, and the patient to have suffered no "harm or ill effect."

The I.G. moved for summary disposition. Petitioner opposed the motion and sought an in-person evidentiary hearing.

I have carefully considered the parties' arguments. I conclude that summary disposition is appropriate. There is no need for oral testimony or the confrontation of witnesses, inasmuch as no material facts are in dispute. I further determine that a five-year exclusion is

¹ In this decision, "Medicaid" means those health care programs enumerated in Section 1128(h) of the Act.

mandated by law and, accordingly, enter summary disposition in favor of the I.G.

ISSUE

Was Petitioner convicted of a criminal offense relating to patient abuse or neglect in connection with the delivery of health care, thus requiring her exclusion from the Medicare and Medicaid programs?

LAW

Sections 1128(a)(2) and (c) of the Social Security Act (42 U.S.C. 1320a-7(a)(2) and (c)) (1988) make it mandatory for the Department of Health & Human Services to exclude from participation in the Medicare and Medicaid programs, for a minimum period of five years, "any individual or entity that has been convicted, under federal or state law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On January 27, 1989, Petitioner was employed as a Licensed Practical Nurse at the Blossom Health Care Center, located in Rochester, N.Y. I.G. Ex. 2; P. Memo., p. 2.²
2. On January 27, 1989, despite having been instructed to do so, Petitioner willfully failed to administer a dose of Coumadin, an anticoagulant medication, to Alice Meister, a patient under her care who suffered from heart disease. I.G. Ex. 2.

² The I.G. attached eight exhibits to his motion for summary disposition. Petitioner did not contest the authenticity or relevancy of these exhibits, or deny the relevant material facts contained therein. The exhibits have been admitted. They are cited here as "I.G. Ex. 1" through "I.G. Ex. 8". Petitioner's memorandum responding to the I.G. is cited as "P. Memo". The I.G.'s brief in support of the motion for summary disposition is cited as "I.G. Memo".

3. Petitioner subsequently made a false entry on Ms. Meister's chart stating that she - Petitioner - had, in fact, given the Coumadin as prescribed. P. Memo., p. 3.

4. Petitioner pled guilty to violating Section 12b-2 of the New York State Public Health Law, in connection with Section 2803(d)(7) of the New York State Public Health Law and Part 81 of the regulations promulgated thereunder. Such laws provide, in pertinent part, penalties, including fines and imprisonment, for persons who willfully abuse, mistreat, or neglect patients. Part 81 of the regulations expressly includes failure to provide medication in its definition of neglect. I.G. Memo., p. 3 and 4; I.G. Ex. 2; P. Memo., p. 3.

5. Petitioner's plea herein satisfies the statutory requirement that there have been a conviction of a criminal offense.

6. On June 19, 1990, the Rochester City Court sentenced Petitioner to 100 hours of community service and gave her a one-year conditional discharge. I.G. Ex. 4; P. Memo., p. 4.

7. The sentencing court gave Petitioner a Certificate of Relief From Disabilities. This document states on its face, inter alia, that it relieves the holder of all "bars to employment" and that the conviction specified therein shall not cause automatic forfeiture of any license or employment. I.G. Ex. 5.

8. Such Certificate does not preclude HHS from barring Petitioner from participation in the Medicaid and Medicare programs.

9. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to Section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

10. Petitioner was convicted of a criminal offense relating to patient abuse or neglect in connection with the delivery of a health care item or service, thus justifying her five-year exclusion from participation in the Medicare and Medicaid programs.

DISCUSSION

Pursuant to Section 1128(i)(3) of the Act, a plea such as that entered by Petitioner herein satisfies the statutory requirement that there have been a conviction of a criminal offense.

Petitioner's explanations and arguments are irrelevant to the validity of her exclusion. Notwithstanding any explanation she may offer, it is well established that this appeal before me may not be utilized to collaterally attack a State criminal conviction. Richard G. Philips, D.P.M., DAB Civ. Rem. C-347 (1991). There is also no legal basis for receiving evidence relating to mitigation, inasmuch as the administrative law judge has no authority to waive or reduce the statutory five-year minimum exclusionary period which must follow an appropriate conviction. Mark E. Silver, D.P.M., DAB Civ. Rem. 336. (1991). It is true that evidence may be received to disclose the full circumstances surrounding a conviction and to resolve any ambiguities therein. Bruce Lindberg, D.C., DAB Civ. Rem. C-348 (1991). However, in the case at hand there is no ambiguity, and even based wholly upon Petitioner's version of what occurred on January 27, 1989, it is clear that her conviction did relate to patient neglect or abuse, and that she must be excluded.

Proceeding to the substance of Petitioner's conduct, it is axiomatic that, by failing to administer Ms. Meister's medication as ordered, Petitioner neglected her duty to a patient in connection with the delivery of health care. See Olian Small, DAB Civ. Rem. 272 (1991). That she may have been feeling poorly does not relieve Petitioner of her duty. That she did not intend any harm is irrelevant; her offense was negligence, not battery.

Lastly, the Certificate of Relief From Disabilities does not purport to erase the underlying criminal conviction. Furthermore, a State cannot frustrate the enforcement objectives of federal law. See, e.g., Rehman v. Immigration & Naturalization Service, 544 F.2d 71 (2d Cir. 1976); Richard G. Philips, D.P.M., DAB Civ. Rem. C-347.

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, the I.G. properly excluded Petitioner from the Medicare and Medicaid programs pursuant to Section 1128(a)(2) of the Act; the five-year minimum period of exclusion is mandated by statute; and summary disposition in favor of the I.G. is appropriate.

/s/

Joseph K. Riotto
Administrative Law Judge