

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Patricia Self,	)	DATE: May 19, 1992
	)	
Petitioner,	)	Docket No. C-446
	)	Decision No. CR198
- v. -	)	
	)	
The Inspector General.	)	

DECISION

On August 20, 1991, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs.<sup>1</sup> The I.G. told Petitioner that she was being excluded for five years as a result of her conviction in a Louisiana 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 the law required that the minimum period of such an exclusion be for not less than five years.

Petitioner timely requested a hearing as to her exclusion, and the case was assigned to me for a hearing and decision. The I.G. moved for summary disposition in this case, to which Petitioner responded. The parties were also given the opportunity to brief the question of what, if any, effect, the regulations recently promulgated at 57 Fed. Reg. 3298 (January 29, 1992), may

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<sup>1</sup> "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner is excluded.

have on the outcome of this case, but declined to do so.<sup>2</sup> Based on the evidence submitted, and on applicable law, I conclude that the I.G. was required to exclude Petitioner from participating in Medicare and Medicaid for at least five years. Therefore, I sustain the five-year exclusion which the I.G. imposed and directed against Petitioner.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense relating to the neglect or abuse of a patient, within the meaning of section 1128(a)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case and until July 2, 1990, Petitioner was a nurse's aide at the Harvest Manor Nursing Home, Denham Springs, Louisiana. I.G. Ex. E, G; P. Br. 1.<sup>3</sup>

2. On May 7, 1991, Petitioner was charged with the offense of simple battery in violation of Article R.S. 14:35 of the Louisiana Criminal Code, allegedly by committing a battery upon Mary Whelihan, a patient at the Harvest Manor Nursing Home. I.G. Ex. A, D, E, F, G.<sup>4</sup>

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<sup>2</sup> The dispositive issue in this case is whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act. The new regulations do not state or suggest that the Secretary intends that section 1128(a)(2) be applied in a way other than that which would be directed by its plain meaning.

<sup>3</sup> The parties' exhibits and briefs will be referred to as follows:

- |                    |                        |
|--------------------|------------------------|
| I.G.'s Exhibits    | I.G. Ex. (letter/page) |
| I.G.'s Brief       | I.G. Br. (page)        |
| Petitioner's Brief | P. Br. (page)          |

<sup>4</sup> The charges filed against Petitioner which form the basis for her conviction allege that she committed a battery upon Mary "Whelidan". The other exhibits in this case (I.G. Exs. D, E, F, G), and Petitioner's brief, refer to Mary "Whelihan". For the purposes of this

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3. On May 7, 1991, Petitioner pled nolo contendere to the criminal charge which had been filed against her in the Twenty-First Judicial District Court, Livingston Parish, Louisiana. I.G. Ex. B.
4. Petitioner was sentenced to serve 90 days in the parish jail (suspended), and placed on unsupervised bench probation for two years, with the special condition that Petitioner have no contact with her victim. Petitioner was also fined \$250 and court costs. I.G. Ex. B.
5. Petitioner's duties as a nurse's aide at the Harvest Manor Nursing Home included providing care to patients at that facility. I.G. Ex. E, F, G.
6. The criminal charge against Petitioner was based in part on Petitioner's admission that, on June 29, 1990, while she was in Ms. Whelihan's room to perform duties related to Ms. Whelihan's care, she was involved in an altercation with Ms. Whelihan. I.G. Ex. G.
7. Petitioner admitted that, during the altercation with Ms. Whelihan, she struck Ms. Whelihan with an extension cord and removed Ms. Whelihan's hand from her shirt when Ms. Whelihan grabbed her. I.G. Ex. G.
8. The Act defines a 'conviction' of a criminal offense to include a conviction of a misdemeanor or a felony. Social Security Act, section 1128(i).
9. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 3.
10. Petitioner was convicted of a criminal offense relating to 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 - 9.
11. The minimum mandatory exclusion period is five years for an individual who has been convicted of a criminal offense relating to abuse of patients in connection with the delivery of a health care item or service. Social Security Act, sections 1128(a)(2), and (c)(3)(B).
12. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to

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<sup>4</sup> (...continued)

proceeding, I find that Mary Whelidan and Mary Whelihan are one and the same person. I will refer to this person in this decision as "Ms. Whelihan."

the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

13. On August 9, 1991, the I.G. excluded Petitioner from participating in the Medicare program, and directed that she be excluded from participating in Medicaid, for five years, pursuant to section 1128(a)(2) of the Act.

14. There are no disputed issues of material fact in this case and summary disposition is appropriate.

15. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required for exclusions pursuant to section 1128(a)(2) of the Act.

16. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Social Security Act, sections 1128(a)(2) and (c)(3)(B).

#### ANALYSIS

Petitioner was employed as a nurse's aide at Harvest Manor Nursing Home in Denham Springs, Louisiana. Her duties included providing care for residents at that facility. On May 7, 1991, Petitioner pled nolo contendere to a plea of simple battery. The criminal charge against Petitioner, and her plea of nolo contendere, resulted from allegations that, in the course of performing her nurse's aide duties, Petitioner had assaulted a patient at the Harvest Manor Nursing Home. Specifically, it was alleged that Petitioner had become involved in an altercation with the patient while setting up a screen in the patient's room. It was alleged that, during the course of this altercation, Petitioner forcefully grabbed the patient by the wrist and struck the patient with an electrical cord.<sup>5</sup>

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<sup>5</sup> The State investigator summarized information gained during an interview with an eyewitness, nurse's aide Donahue, that on June 29, 1990, she and Petitioner entered Ms. Whelihan's room to put a "screen" in front of Ms. Whelihan's bed. Ms. Whelihan was agitated and cursing at Petitioner. Ms. Whelihan knocked the screen down and Petitioner got a "lamp cord" and began to strike Ms. Whelihan on her arms, hands and other parts of her body. While Petitioner was striking Ms. Whelihan, "Whelihan was calling Petitioner names and crying out for  
(continued...)

The I.G. imposed and directed an exclusion against Petitioner, pursuant to section 1128(a)(2) of the Act. This section mandates the exclusion of any party who is convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.<sup>6</sup> The I.G. excluded Petitioner for a period of five years. This is the minimum period mandated by section 1128(c)(3)(B) of the Act for parties who are convicted of criminal offenses as defined by section 1128(a)(2).

Petitioner argues that the I.G. has not proven that he had authority to exclude Petitioner pursuant to section 1128(a)(2). She contends, first, that under Louisiana law, a conviction for simple battery is not a conviction of "abuse." Therefore, according to Petitioner, her conviction was not of an offense within the meaning of section 1128(a)(2) of the Act. Quoting from State v. Schench, 513 So.2d 1159, Petitioner asserts that, under Louisiana law, the "[e]ssential element of battery is physical contact, whether injurious, or merely offensive, and may be committed by touching another through clothing." Petitioner asserts that there was no allegation of neglect or abuse in the criminal proceedings against her. Thus, Petitioner argues that her conduct does not rise to the level of conduct the mandatory exclusion provisions of section 1128(a)(2) were supposed to include, i.e. the protection of program beneficiaries and recipients from incompetent or abusive individuals who provide inappropriate or inadequate treatment, care, or services.

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<sup>5</sup> (...continued)

. . . [Petitioner] to stop." Petitioner allegedly grabbed Ms. Whelihan's hand and bent it back. Petitioner allegedly also cursed Ms. Whelihan. I.G. Ex. F.

<sup>6</sup> The legislative history of section 1128(a)(2) reflects Congressional concern that the Secretary have authority to protect program beneficiaries and recipients from individuals who have been convicted of offenses which the Secretary concludes entailed or resulted in neglect or abuse of patients, and whose continued participation in the programs would constitute a risk to the health and safety of patients in those programs. S. Rep. No. 109, 100th Cong., 1st Sess. 6, reprinted in 1987 U.S. Code Cong. & Admin. News, 686 - 687.

Second, Petitioner contends there are disputed issues of fact which operate to preclude a summary disposition in favor of the I.G. She asserts that the facts of this case do not prove that she was convicted of an offense relating to patient neglect or abuse. She argues that the State investigator's and other reports upon which the criminal charges against her were based are hearsay or otherwise unreliable evidence. Petitioner denies that she engaged in the conduct for which she was charged. She argues that her plea of nolo contendere does not amount to an admission of culpability. Petitioner asserts that, inasmuch as she is contesting the truth of the allegations which underlie the criminal charges filed against her and to which she pleaded, she should be provided a full evidentiary hearing as to those charges.

I conclude that the offense of which Petitioner was convicted related to the abuse of a patient in connection with the delivery of a health care item or service, as is proscribed by section 1128(a)(2) of the Act. I find further that there are no disputed material facts in this case which would bar entry of summary disposition in favor of the I.G. Janet Wallace, L.P.N., DAB 1326 (1992) (Wallace). Therefore, I enter summary disposition in favor of the I.G., sustaining the five-year exclusion which the I.G. imposed and directed against Petitioner.

Four statutory requirements must be satisfied in order for the I.G. to have authority to impose an exclusion under section 1128(a)(2) of the Act. Petitioner must have been: 1) convicted of a criminal offense; 2) relating to neglect or abuse; 3) of patients; 4) in connection with the delivery of a health care item or service. Wallace, DAB 1326 at 7; Norman C. Barber, D.D.S., DAB CR123 at 8 (1991) (Barber).

The first criterion, that Petitioner must be convicted of a criminal offense, is satisfied in this case by Petitioner's nolo contendere plea to criminal charges and the Louisiana court's acceptance of that plea. The Act's definition of a "conviction" includes the acceptance by a court of a party's plea of nolo contendere. Social Security Act, section 1128(i)(3). The Act does not differentiate between convictions for felonies and misdemeanors. Thus, any conviction is a conviction for the purposes of the Act. In this case, Petitioner entered a plea of nolo contendere to the criminal offense of simple battery and the court accepted her plea. FFCL 3.

To satisfy the second criterion, Petitioner's conviction must relate to an act of neglect or abuse. A conviction

need not be for an offense called patient neglect or abuse, it need only "relate" to neglect or abuse. Bruce Lindberg, D.C., DAB 1280 at 4 (1991). Thus, the second criterion will be satisfied in cases where a party is convicted of an offense based on charges of neglectful or abusive conduct even if the crime of which that party is convicted is not specifically labeled "neglect" or "abuse." That criterion is satisfied here based on Petitioner's nolo contendere plea to a criminal charge which was based on allegations of abusive conduct towards a resident at the Harvest Manor Nursing Home.

The Act does not define the term "abuse." In Thomas M. Cook, DAB CR51 (1989), I gave the term "abuse" its common and ordinary meaning by utilizing the dictionary definition, "to use or treat so as to injure, hurt or damage; MALTREAT . . .", and I further stated that abuse was intended, "to include those situations where a party willfully mistreats another person." See, Wallace, DAB 1326 at 10. Wrongfully striking or restraining another individual constitutes mistreatment of that individual. A physical assault against an individual therefore plainly falls within the common and ordinary meaning of the term "abuse."

Petitioner is correct in her assertion that the offense of which she was convicted, simple battery, does not necessarily entail abusive conduct. However, it is apparent that the criminal charges against Petitioner emanated from allegations of abusive conduct. That is apparent from the investigator's report on which the criminal charges were based.

Extrinsic evidence relevant to the nature of the charges against a party, and the offense of which that party was convicted, is admissible to establish that section 1128(a)(2) applies in a particular case. Lindberg, DAB 1280 at 3. It is consistent with congressional intent to admit evidence which explains the circumstances of the offense of which a party is convicted. Thus, I must examine all relevant facts to determine if there is a relationship between the Petitioner's criminal offense and neglect or abuse.

Here, the evidence establishes that the criminal charges against Petitioner emanated from allegations that she had assaulted a resident at the Harvest Manor Nursing Home. There is no evidence to show that the charge resulted from other allegations. Thus, there is a clear nexus between Petitioner's conviction and allegations of abusive conduct.

Petitioner asserts, however, that the facts on which the criminal charges and her conviction are based are not true. She asserts that she should be provided with the opportunity to present evidence that these allegations are not true. Petitioner appears to be arguing that, if in fact the allegations are not substantiated, she would not stand convicted of abuse of a patient.

I disagree with Petitioner's contention. The issue before me is not whether Petitioner abused another individual, but whether Petitioner was convicted of an offense related to abuse. The I.G.'s authority to impose and direct an exclusion under section 1128(a)(2) of the Act emanates from that conviction and not from Petitioner's actual guilt or innocence of the criminal charges filed against her. Bernardo G. Bilang, M.D., DAB 1295 at 7 - 8 (1992); Christino Enriquez, M.D., DAB CR119 at 11 - 12 (1991). That test is satisfied by evidence which establishes the nature of the charges to which Petitioner pleaded.

Extrinsic evidence is also relevant to establish whether Petitioner's conviction of abuse: 1) involved a patient or patients; and 2) was in connection with the delivery of a health care item or service. Barber, DAB CR123 at 11; Cook, DAB CR51 at 5 - 6; Lindberg, DAB 1280. As with evidence relevant to whether the offense concerned abuse, evidence as to these last two criteria is relevant to establishing the basis for the charges against Petitioner. It is not necessary to establish that the charges against Petitioner are true, or that the facts on which the charges were based are true, in order to decide whether Petitioner's offense related to patients in connection with the delivery of a health care item or service.

The evidence on which I have relied to decide the circumstances of Petitioner's conviction consists of the State investigator's summaries and Petitioner's own written statement with respect to the incident, in which she admits to striking Ms. Whelihan.<sup>7</sup> This evidence establishes that the charges involving Petitioner

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<sup>7</sup> I do not utilize this extrinsic evidence to prove whether or not Petitioner is guilty of the offense of simple battery. Petitioner has already pled guilty to that offense. I utilize this evidence only to explain the circumstances surrounding Petitioner's plea and to ascertain whether or not it relates to an excludable offense under section 1128(a)(2) of the Act.

emanated from an incident involving a patient and the delivery of a health care item or service.

Ms. Whelihan was a resident at the Harvest Manor Nursing Home. She was receiving health care services at the nursing home in connection with her stay at that facility. Therefore, she was a "patient" within the meaning of the Act.

Petitioner was a nurse's aide providing nursing care for patients of Harvest Manor Nursing Home. The duties of a nurse's aide include the general care of patients. I.G. Ex. F. These duties are services which are necessary and incidental to medically-related stays in a nursing home, and so are related to a health care item or service. The allegations of abuse relate to Petitioner's performance of her duties at the Harvest Manor Nursing Home, and in particular to her providing services to the patient whom she was alleged to have assaulted. Thus, Petitioner's conviction involved abuse in connection with the delivery of a health care item or service.

#### CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from Medicare, and to direct that Petitioner be excluded from participation in Medicaid, for five years, was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

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Steven T. Kessel  
Administrative Law Judge