

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Kathy Marie Hayes,)	DATE: July 22, 1992
)	
Petitioner,)	Docket No. C-92-065
)	Decision No. CR216
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letter dated December 3, 1991, Kathy Marie Hayes, the Petitioner herein, was notified by the Inspector General (I.G.) of the Department of Health & Human Services (HHS) that it had been determined to exclude her for a period of five years from participation in the Medicare program and the State health care programs defined in section 1128(h) of the Social Security Act (the Act). (I refer to those State health care programs collectively as Medicaid). This exclusion, the I.G. stated, was mandated by section 1128(a)(2) of the Act and arose out of Petitioner's conviction of a criminal offense involving the neglect or abuse of patients.

The I.G. moved for summary disposition. Inasmuch as there is no dispute as to any material and relevant fact, summary disposition is appropriate.

Law

Section 1128(a)(2) of the Act makes it mandatory for the Secretary of HHS (or his designee) to exclude any person who has been convicted, under federal or state law, of a criminal offense relating to the neglect or abuse of patients, in connection with the delivery of health care, from participation in the Medicare and Medicaid programs.

Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for a offense of this nature is five years.

Findings of Fact and Conclusions of Law¹

1. On June 7, 1990, Petitioner was employed as a nursing assistant at the Autumn Woods Resident Health Care Facility (the home) of Warren, Michigan. (I.G. Ex. 1; P. Ex. 1).
2. On September 19, 1990, a complaint was filed in the Michigan District Court, 37th Judicial District, charging Petitioner with having mistreated and abused a female patient residing at the home by slapping her on the leg, and handling her roughly, on June 7, 1990. (I.G. Ex. 1).
3. Petitioner's superior stated, under oath at an unemployment appeal, that the patient could be hard to deal with, and that the patient might have been trying to kick Petitioner when Petitioner slapped her leg. (P. Ex. 1).
4. On December 18, 1990, following a bench trial in the District Court, Petitioner was found guilty of patient abuse. (I.G. Ex. 2).
5. Petitioner was sentenced to 15 days imprisonment, required to pay a fine of \$200, and placed on probation for one year. (I.G. Ex. 2).
6. 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).
7. Section 1128(a)(2) of the Act mandates the exclusion, for a minimum period of five years, of any person who has been convicted of a criminal offense relating to the neglect or abuse of patients.
8. Petitioner's conviction of criminal patient abuse is within the scope of section 1128(a)(2) of the Act.
9. An excluded person cannot use the HHS administrative appeal process as a vehicle for collaterally attacking a

¹ The record of this case consists of briefs submitted by both parties, supported by exhibits. I admit the exhibits and refer to them as I.G. Ex. (number) or P. Ex. (number).

prior criminal conviction. Thus, it does not avail Petitioner, who was convicted of an offense requiring criminal intent, to offer to prove that she was merely trying to ward off a kick or that she did not slap the patient.

10. The Act requires persons who violate section 1128(a)(2) to be excluded for a minimum of five years, which period cannot be waived or lessened.

Argument

Petitioner denies having abused the patient in question. She asserts that she had merely tried to protect herself against being kicked. Petitioner introduced a transcript of her Michigan unemployment hearing to show that her treatment of this individual was justified.

Discussion

Petitioner's conviction of having mistreated and abused a patient residing at the home who was in her care clearly satisfies the statutory requirement of section 1128(a)(2) that there be a conviction ". . . of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

This section of the Act is invoked by the mere fact of conviction, and the law does not permit HHS to look beyond such conviction. Peter J. Edmonson, DAB 1330 (1992). Petitioner cannot utilize the present proceeding to collaterally attack such criminal conviction by arguing that she was, in fact, not guilty because she was merely trying to ward off a kick, or because she did not actually slap the patient. See Richard G. Philips, D.P.M., DAB CR133 at 5 - 6 (1991) aff'd DAB 1279 (1991).

Once section 1128(a)(2) is determined to be applicable, the statute requires that the guilty individual be excluded for a minimum period of five years; there is no authority in law or regulation for an administrative law judge's waiving or reducing this minimum sanction. Jack W. Greene, DAB 1078 (1989), aff'd DAB 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835 and 838 (E. D. Tenn. 1990).

Conclusion

Petitioner's conviction of a criminal offense involving patient abuse mandates her exclusion from the Medicare and Medicaid programs for a period of five years.

/s/

Joseph K. Riotto
Administrative Law Judge