

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Patricia McClendon,)	DATE: May 21, 1993
)	
Petitioner,)	Docket No. C-93-038
)	Decision No. CR264
- v. -)	
)	
The Inspector General.)	

DECISION

By letter dated December 11, 1992, Patricia McClendon, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare program and from participation in the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to patient abuse, in connection with the delivery of health care.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition.

Because I have determined that there are no material and relevant factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the case on the basis of written submissions in lieu of an in-person hearing.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs 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 related to the neglect or abuse of patients, in connection with the delivery of a health care item or service, to be excluded from participation in the Medicare and Medicaid programs for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a nurse's aide, employed by the Vicksburg Trace Haven (VTH), a health care facility participating in the Medicare and Medicaid programs, located in Vicksburg, Mississippi. I.G. Exhibits (Ex.) 1 and 2.
2. Petitioner was charged with having committed "abuse and battery" upon an elderly patient at VTH, by physically striking such individual on or about September 29, 1991. I.G. Ex. 2.
3. Petitioner entered a plea of nolo contendere (no contest) to "misdemeanor abuse of a vulnerable adult" in the Circuit Court of Warren County on July 1, 1992. I.G. Ex. 3.
4. The court accepted the plea and sentenced Petitioner to one year's probation, court costs, a fine and assessments. I.G. Ex. 3.
5. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).
6. Petitioner was "convicted" of abuse, within the meaning of the mandatory exclusion provisions of the Act.
7. The individual Petitioner abused had been a "patient" within the meaning of the mandatory exclusion provisions of the Act.
8. Petitioner's conviction was related to the delivery of health care, within the meaning of the mandatory exclusion provisions of the Act.

9. Mandatory exclusion is invoked by relevant misdemeanor convictions as well as by convictions for felonies; Congress was not obliged to make distinctions between classes of criminal offenses and did not do so.

PETITIONER'S ARGUMENT

Petitioner contends that a misdemeanor is not a crime and that a statute which fails to distinguish between a crime and a misdemeanor is unconstitutionally vague. In the case at hand, she insists, the exclusion law's failure to properly define what constitutes a crime and what constitutes a misdemeanor deprives her of due process. She maintains also that certain statutory language regarding mandatory exclusion shows that such sanction was intended to apply to crimes, but not to misdemeanors.

Petitioner's remaining arguments are that her no contest plea was not an admission of wrongdoing, and that she had not received the necessary training and support from her employer to enable her to deal with abusive patients.

DISCUSSION

Section 1128(a)(2) of the Act requires, initially, that the person to be excluded must have been convicted of an offense. Petitioner herein, a nurse's aide, was convicted of unlawfully abusing, by doing violence to an elderly patient of VTH, during the time Petitioner was supposed to be performing her professional duties there.

Petitioner pled no contest to the charge. The court accepted the plea and Petitioner was sentenced. Section 1128(i)(3) of the Act expressly provides that when an individual enters a no contest plea, and such plea has been accepted by the court, the individual in question will be considered to have been "convicted" within the meaning of the mandatory exclusion provisions of the Act.

Petitioner's assertions that certain statutory language regarding mandatory exclusion shows that such sanction was intended to apply to felony crimes, but not to misdemeanors, and that the exclusion law's failure to define what constitutes a crime and what constitutes a misdemeanor deprives her of due process, are without legal merit. The language to which Petitioner apparently refers is the subsection caption for section 1128(a)(1) of the Act, which reads "Conviction of Program-Related Crimes."

While it is evident that this caption does indeed utilize the word "crimes," examination of the full text of this and related provisions indicates that Congress intended mandatory exclusion to apply to convictions of all types and that it recognized no distinction of the sort upon which Petitioner relies. In Glen E. Bandel, DAB CR261 (1993), the ALJ expressly held that a misdemeanor conviction is sufficient to invoke mandatory exclusion.

Petitioner's contention that the federal statute is defective because it does not define what shall be considered a crime, and what a misdemeanor, is also without merit. The mandatory exclusion law is derivative in nature, meaning that it requires exclusion when there has been a relevant conviction by a state or federal court. It was entirely proper for Congress to decide, as it evidently did, that all such convictions should trigger exclusion actions. It was not necessary for Congress to have attempted to catalogue and define the myriad variety of criminal offenses and convictions which might be conceived of by numerous court systems and legislatures. Moreover, even if there were some merit to the due process issue raised by Petitioner, the regulations proscribe me from finding federal statutes invalid. 42 C.F.R. § 1005.4(c)(1).

Petitioner's remaining arguments - that her no contest plea was not an admission of wrongdoing and that she had not received the necessary training and support from her employer to enable her to deal with abusive patients -- are also unavailing. As noted supra, the Act explicitly provides that the entering of a no contest plea is sufficient, when the other requirements of section 1128(a)(2) of the Act also are met, to warrant mandatory exclusion. Her attempt to shift some of the blame to VTH, thereby suggesting, by implication, that she did not mean to harm the patient, is irrelevant. This is because section 1128(a)(2) of the Act is always applicable when an appropriate criminal conviction has occurred. Dewayne Franzen, DAB 1165 (1990). I am not empowered to look beyond the fact of conviction, and, indeed, it has been held that the intent of the individual committing the offense is not a factor to be considered in imposing a section 1128(a) exclusion. Summit Health Limited, DAB 1173 (1990); Richard G. Philips, D.P.M., DAB CR133 (1991). Thus, the explanations of her conduct advanced by Petitioner do not affect the outcome of this case.

Section 1128(a)(2) of the Act requires further that the individual who has been neglected or abused must have been a "patient" and that the criminal offense must have been related to the delivery of health care. In this

regard, the affidavit which was submitted by the State to the Mississippi court when Petitioner was charged (I.G. Ex. 2) -- and which was not disputed by Petitioner or her counsel at the state trial or in the instant proceeding - identifies Petitioner's victim as a patient of VTH and indicates that VTH is a health care facility. Furthermore, Petitioner's counsel, in her letter requesting a hearing, confirms also that the person Petitioner abused had indeed been a patient ("she had not received the necessary training and support from her employer to enable her to deal with abusive patients").

As to the last criterion, I conclude that because: 1) the attack took place in a health care facility where the victim had been residing as a patient; and 2) the perpetrator was a facility employee whose duty was to assist in the care of patients, the conviction was related to the delivery of health care.

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act require that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of her conviction for patient abuse, related to the delivery of health care.

The I.G.'s five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge