

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Venerando S. Santos,)	DATE: June 1, 1993
)	
Petitioner,)	Docket No. C-92-134
)	Decision No. CR268
- v. -)	
)	
The Inspector General.)	

DECISION

By letter dated June 9, 1992, Venerando S. Santos, 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 him 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)(2) 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.¹

¹ On October 28, 1992, the I.G. submitted a motion for summary disposition accompanied by eight
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Thus, I affirm the I.G.'s determination to impose and direct the exclusion of 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.

PETITIONER'S ARGUMENT

Petitioner contends that any injuries suffered by the patient were accidental. Petitioner contends further that he did not intend to harm this individual, that he regrets his action, and that he has always worked hard caring for his patients. Petitioner contends also that he has never committed any other crime, and that he has complied with the terms of his probation. Finally, Petitioner contends that his family will be destitute if the effect of the exclusion is to bar him from employment in his field.²

¹(...continued)

exhibits. I refer to the I.G.'s motion for summary disposition as I.G. Br. (at page). I refer to the I.G.'s exhibits as I.G. Ex. (at page). On November 30, 1992, the I.G. requested that I.G. Ex. 2, the misdemeanor complaint against Petitioner, be replaced with a more complete copy. In the absence of objection, I am granting the I.G.'s request. Petitioner submitted his response by letter of January 28, 1993. Petitioner did not submit any exhibits. I refer to Petitioner's response as P. Br. (at page). The I.G. submitted a reply brief on March 30, 1993. I refer to the I.G.'s reply brief as I.G. R. Br. (at page).

² In his January 28, 1993 response, Petitioner states that he is asking the I.G. ". . . not to revoke [his] certified nursing assistant license. . ." P. Br. at 3. Petitioner appears to believe that the I.G. has the authority to revoke his certified nursing assistant (C.N.A.) license. However, the I.G. does not have this
(continued...)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time he committed the criminal offense which is the basis of this proceeding, Petitioner was a C.N.A., employed at the Eden West Convalescent Hospital (EWCH), in Hayward, California. P. Br. at 2; I.G. Ex. 1, 2, 3.
2. EWCH personnel informed public officials that an elderly, male patient at the facility had been observed bleeding from a head wound and accusing Petitioner of hitting him. I.G. Ex. 1, 2.
3. In September, 1991, a two count misdemeanor complaint was filed against Petitioner. Count one alleged that, on or about April 10, 1991, Petitioner did willfully and unlawfully use force and violence on the patient (a violation of California Penal Code § 242). Count two alleged that Petitioner, knowing that the patient was elderly, willfully and unlawfully caused him to suffer, by inflicting on the patient unjustifiable physical pain and mental suffering. Count two alleged further that Petitioner, who had care and custody of the patient, willfully and unlawfully caused the patient to be injured (a violation of California Penal Code § 368(b)). I.G. Ex. 2.
4. Petitioner acknowledged that the elderly male who had accused Petitioner of hitting him "was [Petitioner's] patient at Eden West Convalescent Hospital." P. Br. at 2.
5. Petitioner stated that he struck the patient with a bell cord, but that it was an accident. P. Br. at 2.
6. On September 24, 1991, in Alameda County Municipal Court, Petitioner pleaded no contest to count two of the misdemeanor complaint. Count one was dismissed. I.G. Ex. 2, 3.

²(...continued)

authority. Under section 1128(a)(2) of the Act, the I.G.'s authority is limited to excluding Petitioner from participation in the Medicare program and directing his exclusion from participation in the Medicaid program. It is up to the California licensing authorities, who granted Petitioner his C.N.A. license, to revoke that license. See, I.G. Ex. 6.

7. The court accepted the plea and sentenced Petitioner to three years' "conditional release," and five days of volunteer work. I.G. Ex. 3.

8. The State of California has revoked Petitioner's certification as a C.N.A. Furthermore, the State asserted that, based upon the serious nature of Petitioner's alleged offense, it would not hold the license revocation in abeyance pending a formal administrative hearing. I.G. Ex. 6.

9. On March 11, 1992, pursuant to Petitioner's conviction, California Medicaid indefinitely suspended Petitioner from the Medi-Cal program. I.G. Ex. 5.

10. The Secretary of HHS delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

11. Petitioner was "convicted" of patient abuse, within the meaning of the mandatory exclusion provisions of the Act. Findings 1 - 7.

12. The individual whom Petitioner abused was a "patient" within the meaning of the mandatory exclusion provisions of the Act. Findings 1, 2, 4.

13. The facts that the attack upon the elderly male for which Petitioner was convicted took place in a health care facility where the elderly male was a patient, and that Petitioner was an employee of the facility whose duty was to assist in the care of patients, establish that Petitioner's criminal offense was related to the delivery of health care within the meaning of the mandatory exclusion provisions of the Act. Findings 1 - 7.

14. The five-year exclusion imposed and directed by the I.G. against Petitioner is appropriate and federal law and regulations provide that the exclusion cannot be waived or reduced by the I.G. or by me, under the established facts. Findings 1 - 13; Act, sections 1128(a)(2) and 1128(c)(3)(B).

DISCUSSION

Section 1128(a)(2) of the Act, relied upon by the I.G. to exclude Petitioner, requires, initially, that the person to be excluded must have been convicted of a crime. Petitioner, a C.N.A., was accused of intentionally injuring an elderly patient at EWCH, during the time that

Petitioner was supposed to be performing his professional duties by caring for such individual. Finding 3.

Petitioner pled no contest to the charge contained in count two of the misdemeanor complaint. 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 to a criminal charge, 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.

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

The first point -- that the elderly male was indeed a patient at EWCH -- is conceded by Petitioner. Finding 4.

As to the last statutory criterion, I conclude that the facts that the attack took place in a health care facility where the victim was a patient, and that the perpetrator was an employee of such facility whose duty was to assist in the care of patients, establish that the criminal offense was related to the delivery of health care. Findings 1 - 7.

Lastly, Petitioner maintains that he did not intend to harm the patient, that he regrets his action, and that other than this incident he has no criminal record and is complying with the terms of his probation. However, under section 1128(a)(2) of the Act, proof that an appropriate criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is justified. Thus, this judge cannot look beyond the fact of conviction or consider evidence in mitigation of a five-year mandatory exclusion. It is also well established in case precedent that the intent of the individual committing the criminal offense is not relevant. Summit Health Limited, DAB 1173 at 9 (1990). Thus, Petitioner's explanations are not relevant or material to the outcome of this case.

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 his conviction of criminal patient abuse, related to the delivery of health care.

Accordingly, I sustain the five-year exclusion imposed by the I.G.

/s/

Joseph K. Riotto
Administrative Law Judge