

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Gloria Phillips,	)	DATE: July 21, 1993
	)	
Petitioner,	)	Docket No. C-93-051
	)	Decision No. CR277
- v. -	)	
	)	
The Inspector General.	)	

DECISION

By letter dated January 12, 1993, Gloria Phillips, 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)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition. Petitioner was expressly afforded the opportunity to submit argument and evidence in support of her position, but she did neither. Thus, the I.G.'s case is, essentially, undisputed.

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 decided 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 relating to 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<sup>1</sup>

1. On March 3, 1992, Petitioner was charged in an information filed by the New Mexico Attorney General's office with having abused a resident on or about March 15, 1991. The prosecutors contended that Petitioner's conduct constituted a criminal violation of New Mexico statute 30-47-4 ("Abuse of a Resident"). I.G. Ex. 2.
2. The exact nature of Petitioner's misconduct was that she intentionally failed to administer medication that had been ordered for an elderly resident and patient of the Home. (She was charged with having done this to only one person, but the record of the State investigation indicates that others may have been similarly mistreated.) I.G. Ex. 5.
3. On March 3, 1992, Petitioner, relying on the legal principle enunciated in North Carolina v. Alford, 400 U.S. 25 (1970) entered a plea in the New Mexico Second Judicial District Court to the charge of "Abuse of a Resident." I.G. Ex. 3.
4. Petitioner's plea was accepted by the court. I.G. Ex. 4.
5. Petitioner's Alford plea, which was accepted by the State court, constitutes a "conviction" for purposes of section 1128(a) of the Act.

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<sup>1</sup> The I.G. submitted a brief and six documentary exhibits. I admit the exhibits into evidence and cite them as I.G. Ex. (number).

6. At the time she was convicted, Petitioner was a licensed practical nurse, employed at the Camino Vista Nursing Home (Home). I.G. Ex. 5.

7. A commonsense appraisal of Petitioner's undisputed conduct shows that her unwarranted obstruction of the care which the elderly resident had a right to expect, is, reasonably, definable as "abuse."

8. The investigation by the State Auditor's department (see I.G. Ex. 5) reveals that Petitioner's victim was receiving medical treatment while a resident of the Home. Thus, such resident was a "patient" within the meaning of section 1128(a) of the Act.

9. Petitioner's conviction for abusing a patient at the home, a crime committed while she was on duty, and at a time when she was supposed to be caring for such patient, clearly indicates that the abuse was connected with the delivery of a health care item or service.

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

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

#### PETITIONER'S ARGUMENT

Petitioner contended that her Alford plea was not intended to admit guilt. She asserted also that her lawyer had assured her there would be no other sanctions if she pled guilty.

#### DISCUSSION

The law relied upon by the I.G. to exclude Petitioner (section 1128(a)(2)) requires, initially, that the person excluded must have been convicted of a crime. Petitioner herein, a licensed practical nurse charged with the

unlawful abuse of a person in her care, entered an Alford plea in State court.<sup>2</sup>

The court accepted the plea and Petitioner was sentenced. Section 1128(i)(3) of the Act provides that when an individual enters a guilty plea or pleads nolo contendere to a criminal charge, and such plea is 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. Established case precedent holds that an Alford plea falls within this rule. Russell E. Baisley, et al., DAB CR276 (1991).

The investigation by the State Auditor's department (I.G. Ex. 5), which Petitioner has not disputed, reveals that she intentionally failed, in at least one instance, to administer medication that had been ordered for an elderly resident and patient of the Home. A commonsense appraisal of this conduct leads me to conclude that the unwarranted obstruction of care which an elderly resident had the right to expect is, reasonably, definable as "abuse."

The evidence produced by the State investigation further establishes that the person abused by Petitioner was receiving medical treatment while a resident of the Home. Thus, the victimized individual was a "patient" within the meaning of section 1128(a) of the Act.

As to the last statutory criterion, I conclude that the facts that Petitioner's misconduct took place in a nursing home where the victim had been residing as well as receiving treatment as a patient, and that the perpetrator was a health-care worker whose duty was to assist in the care of patients, establish that the criminal offense was in connection with the delivery of a health care item or service.

Based on the above facts and reasoning, I have determined that the Petitioner herein was convicted of a State criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

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<sup>2</sup> When raising an Alford plea, a criminal defendant accepts being treated as guilty by the court, while reserving the right to simultaneously proclaim his or her innocence.

## 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 of criminal patient abuse in connection with the delivery of a health care item or service. Neither the I.G. nor the judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, at 12 - 14 (1989).

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

/s/

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Joseph K. Riotto  
Administrative Law Judge