

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Annie S. Fine,)	Date: March 11, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-434
)	Decision No. CR523
The Inspector General.)	
)	

DECISION

By letter dated June 12, 1997, the Inspector General (I.G.), United States Department of Health and Human Services (HHS), notified Annie S. Fine, Petitioner, that she was being excluded for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.¹ The I.G. explained that an exclusion of at least five years is mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted in the District Court, Garfield County, Oklahoma, 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 request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. The I.G. submitted a brief in this matter and Petitioner submitted a statement. The I.G. submitted five proposed exhibits (I.G. Exs. 1-5) Petitioner did not object to these exhibits, and I admit them into evidence.

¹ I use "Medicaid" to refer to these State health care programs.

I grant the I.G.'s motion for summary disposition. I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of at least 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 five years.

PETITIONER'S ARGUMENT

Petitioner contends that she was not informed at the time of her criminal conviction that she could be excluded from participation in the Medicare and Medicaid programs. Thus, she asserts that it is unfair to take such action against her.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was a certified nurse's aide in the State of Oklahoma. I.G. Ex. 4.
2. Petitioner was employed as a nurse's aide at United Methodist Home of Enid, a nursing home in Oklahoma, from April 1996 until February 1997. I.G. Ex. 4.
3. On February 12, 1997, a criminal indictment was filed in Garfield County District Court, State of Oklahoma, Case No. CM-97-98, against Petitioner, charging her with one count of assault and battery. I.G. Ex. 5.
4. The February 12, 1997 indictment charged that Petitioner unlawfully, willfully, and wrongfully committed an assault and battery upon a mentally impaired nursing home patient, by grabbing him and shaking him with her hands, with force and violence, and the unlawful intent to do him corporal hurt and bodily injury. I.G. Exs. 4 and 5.
5. On February 14, 1997, Petitioner entered a plea of nolo contendere to one count of assault and battery as charged in the indictment, in violation of OKLA. STAT. tit. 21, § 644 (B). I.G. Ex. 2.

6. Based on the acceptance of Petitioner's plea, the court sentenced Petitioner to serve 90 days of incarceration, with execution of sentence suspended, and to pay costs, fees, and restitution in accordance with the court's schedule. I.G. Ex. 2.

7. On June 12, 1997, the I.G. notified Petitioner that she was being excluded from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act. I.G. Ex. 1.

8. Petitioner's nolo contendere plea, and the court's acceptance of that plea, constitutes a conviction within the meaning of section 1128(i)(3) of the Act.

9. Petitioner was convicted of assault and battery upon a patient in her care. This was a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act.

10. The mandatory minimum period for exclusions pursuant to sections 1128(a)(2) of the Act is five years. Act, section 1128(c)(3)(B).

11. The Secretary has delegated to the I.G. the duty to determine and impose exclusions pursuant to section 1128(a) of the Act.

12. A defendant in a criminal proceeding does not have to be advised of all possible consequences, such as temporarily being barred from government reimbursement for professional services, which may flow from the defendant's plea of nolo contendere.

13. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

14. Neither the I.G. nor the administrative law judge (ALJ) has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

DISCUSSION

To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove that: (1) the individual has been convicted of a criminal offense; (2) the conviction is related to the neglect or abuse of patients; and (3) the patient neglect or abuse to which an excluded individual's conviction is related

occurred in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act is that Petitioner must have been convicted of a criminal offense. The term "convicted" is defined in section 1128(i) of the Act. This section provides that an individual or entity will be convicted of a criminal offense:

(1) when a judgment of conviction has been entered against the individual or entity by a federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, State, or local court; or

(4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(i) of the Act.

This section establishes four alternative definitions of the term "convicted." An individual or entity need satisfy only one of the four definitions under section 1128(i) to establish that the individual or entity has been convicted of a criminal offense within the meaning of the Act.

In the present case, I find that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i)(3) of the Act. Section 1128(i)(3) of the Act expressly provides that when a person enters a plea of nolo contendere to a criminal charge and the court accepts such plea, the individual will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act. The undisputed evidence of record establishes that Petitioner pled nolo contendere to the charge of assault and battery and that the court adjudged Petitioner guilty of the offense based on her plea. The evidence establishes that Petitioner pled nolo contendere in order to dispose of the criminal charge against her, and the court disposed of the case based on its receipt of Petitioner's nolo

contendre plea. This transaction amounts to "acceptance" of a plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore "convicted" of a criminal offense within the meaning of that provision. Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd, DAB No. 1104 (1989); Anthony Tommasiello, DAB CR282 (1993).

I further find that the offense of which Petitioner was convicted related to neglect or abuse of a patient within the scope of section 1128(a)(2) of the Act. A conviction need not be for an offense called patient abuse or patient neglect; it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In Self, the petitioner was a nurse's aide who pled nolo contendere to a charge of battery. The petitioner allegedly struck a nursing home patient with an electrical cord. The ALJ held that it was sufficient that a party is convicted of an offense based on charges of neglectful or abusive conduct.

Petitioner in this case is a certified nurse's aide who was employed at the United Methodist Home of Enid. Petitioner did not dispute in her statement that she was convicted of the offense of committing assault and battery upon a nursing home patient during the course of her regular duties. The conviction was based on charges that the abuse occurred when Petitioner shook the patient and pulled his chest hair. Although the terms "abuse" and "neglect" are not defined within the Act, the term "abuse" includes those situations where a party willfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). In the present case, Petitioner was convicted of assault and battery. A physical assault against an individual clearly falls within the common and ordinary meaning of the term "abuse." Self.

I also find that Petitioner's abuse of a patient occurred in connection with the delivery of a health care item or service. Petitioner's duties as a nurse's aide directly involve patient care and the delivery of health care services. Petitioner does not dispute that she was employed by the facility as a nurse's aide and had the duty to assist in caring for the patient when the assault allegedly occurred. Based on these undisputed facts, I conclude that Petitioner was convicted of a criminal offense which occurred in connection with the delivery of a health care item or service.

Petitioner also argues that she should not be subject to exclusion under section 1128(a)(2) of the Act because she was not advised in the criminal proceeding that she would be excluded from the Medicare and Medicaid programs as a result of her conviction. I reject this argument. It is well-established that

arguments regarding the process leading to a petitioner's criminal conviction are irrelevant for purposes of an exclusion proceeding. Charles W. Wheeler, DAB No. 1123 (1990); Douglas Schram, R.Ph., DAB CR215 (1992), aff'd, DAB No. 1372 (1992); Paul Karsch, DAB CR454 (1997). In Schram, the petitioner argued that because he was not given adequate notice concerning the consequences of his plea, his right to due process had been violated. The Departmental Appeals Board (DAB) rejected this argument, relying on the proposition in U.S. v. Suter, 755 F.2d 523 (7th Cir. 1985), that a defendant does not have to be advised of all of the possible consequences of his plea. Suter, at 525. In essence Petitioner's argument amounts to a collateral attack on her conviction. The DAB has previously held this to be an ineffectual argument in the context of an exclusion appeal as the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter Edmonson, DAB No. 1330 (1992).

A five-year exclusion under section 1128(a)(2) of the Act is mandatory when a petitioner has been convicted of a criminal offense which occurred in connection with the delivery of a health care item or service. Aida Cantu, DAB CR462 (1997). Therefore, the I.G. is required to exclude Petitioner for at least five years. Neither the I.G. nor the ALJ is authorized to reduce a five-year mandatory period of exclusion. Jack W. Greene, DAB CR19, aff'd, DAB No. 1078 (1989) aff'd sub nom, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn 1990).

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because she was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge