

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Aida Cantu,	)	DATE: February 24, 1997
Petitioner,	)	
- v. -	)	Docket No. C-96-204
The Inspector General.	)	Decision No. CR462

DECISION

By letter dated June 28, 1995, Aida Cantu, the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been decided to exclude her 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.<sup>1</sup> The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (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 request for review of the I.G.'s action. The I.G. moved for summary disposition.<sup>2</sup>

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<sup>1</sup> In this decision, I use the term "Medicaid" to refer to these State health care programs.

<sup>2</sup> Petitioner's hearing request is dated April 15, 1996. In her hearing request, Petitioner states that she never received the I.G.'s notice. In her brief, the I.G. did not challenge Petitioner's statement and neither party addressed the issue of timeliness in their briefs. For this reason, and also because I find for the I.G. on the merits, I make no findings as to whether Petitioner's request for hearing is timely or untimely.

Because I have determined that there are no material and relevant factual issues in dispute and 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. 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 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.

#### **PETITIONER'S ARGUMENT**

Petitioner asserts that, although a nurse's aide had reported to her witnessing an elderly patient being pushed by another employee and had also stated that she had noticed old bruises on the patient, Petitioner herself did not see any bruises or other signs of abuse when checking on this patient. Consequently, Petitioner did not believe that she had any proof or reasonable cause for acting on this information. Petitioner contends further that she checked the patient a week later and saw faded bruises. Because she did not believe these bruises related to the incident reported by the nurse aide, she did not report them. Petitioner maintains also that she was not advised at the time she entered her guilty plea that she could be excluded from participation in the Medicare and Medicaid programs under section 1128(a)(2) of the Act as a consequence of such plea.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. At all times relevant herein, Petitioner was a licensed vocational nurse at a Medicaid certified nursing facility, Harlingen Good Samaritan Center, in Harlingen, Texas. P. Ex. 1.<sup>3</sup>

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<sup>3</sup> In this case, Petitioner submitted a letter brief, with attached documents. I refer to Petitioner's letter brief as "P. Brief." I have marked Petitioner's documents collectively as "P. Ex. 1." The I.G. submitted a brief, five

2. On June 12, 1993, a criminal information was filed against Petitioner by the State of Texas charging her with one count of failure to report abuse and neglect of a patient (M.C.), in violation of Texas Health & Safety Code Ann. Art. 242.131, a misdemeanor. I.G. Exs. 1, 6.<sup>4</sup>

3. The criminal information alleged that Petitioner knowingly failed to report that M.C., a resident of the Harlingen Good Samaritan Center, was physically abused or neglected and that Petitioner had reason to know of this. I.G. Ex. 1.

4. Petitioner waived her right to a jury trial and pled guilty in open court to the offense which gave rise to the criminal information. I.G. Exs. 2, 3.

5. On November 30, 1994, the Texas State court deferred adjudication of guilt, placed Petitioner on probation for ninety days, and fined her \$400.00. I.G. Ex. 3.

6. On November 21, 1995, the Texas State court entered an order setting aside the conviction and dismissing the charge of failure to report abuse and neglect against Petitioner. I.G. Ex. 4.

7. Petitioner's guilty plea, which was accepted by the State court, falls within the definition of "convicted of a criminal offense" listed in section 1128(i)(3) of the Act.

8. The deferred adjudication arrangement Petitioner entered into with the court falls within the definition of "convicted of a criminal offense" listed in section 1128(i)(4) of the Act.

9. The fact that the court set aside Petitioner's conviction and dismissed the charge does not affect Petitioner's conviction.

10. Petitioner's criminal conviction for failure to report the alleged abuse at issue was an offense relating to neglect or abuse of a patient and is connected with the delivery of a

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exhibits (I.G. Exs. 1-5), and one attachment to her brief. I refer to the I.G.'s brief as "I.G. Brief." I have marked the attachment as "I.G. Ex. 6." Neither party has objected to the other party's exhibits. In the absence of objection, I admit both parties' exhibits into evidence.

<sup>4</sup> To protect the identity of the nursing home resident, I am using the resident's initials.

health care item or service within the meaning of section 1128(a)(2) of the Act.

11. Under section 1128(a)(2) of the Act, the fact that a conviction within the meaning of section 1128(i) has occurred mandates exclusion and an administrative law judge is not authorized to look behind the conviction.

12. The five-year exclusion imposed and directed against Petitioner by the I.G. is for the minimum period required by the Act.

13. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory five-year period of exclusion.

14. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required 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: (1) that the individual charged has been convicted of a criminal offense; (2) that the conviction is related to the neglect or abuse of patients; and (3) that the patient's 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.

I find that the facts show that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(2) and 1128(i) of the Act. Petitioner pled guilty to the offense of failure to report abuse and neglect and the State court accepted her plea. Moreover, the term "convicted of a criminal offense" includes also those circumstances in which the individual enters into a deferred adjudication arrangement with the court. Here, the Texas State court deferred adjudication of Petitioner's guilt, placed her on probation, and assessed a fine. The fact that the court, on November 21, 1995, set aside Petitioner's conviction and dismissed the charge does not affect Petitioner's conviction. There is nothing in the Act that prohibits the I.G. from excluding a Petitioner after a case has been dismissed following a deferred adjudication. For the purposes of the Act, it is the fact of the conviction itself that gives the I.G. the authority to exclude. Here, Petitioner has been convicted within the meaning of sections 1128(i)(3) and (4) of the Act. Accordingly, I find that Petitioner was convicted within the meaning of the Act.

Although Petitioner is not alleged to have abused anyone, the State of Texas has a legitimate interest in requiring health care workers to report incidents of suspected patient abuse. Towards this end, the State has a mandatory reporting requirement which Petitioner was convicted of violating. As an employee at the Harlingen Good Samaritan Center, Petitioner had a duty to maintain the health, safety, and well-being of patients at that facility. Petitioner's failure to report the alleged abuse in this case constituted an act of "neglect" within the meaning of section 1128(a)(2) of the Act. Petitioner thus breached her duty of care to a patient (M.C.) of that Center, which directly impacted the health, safety, and well-being of that patient. Thus, Petitioner's offense was related to the neglect or abuse of a patient within the meaning of section 1128(a)(2). See Dawn Potts, DAB CR120 (1991); Vicky L. Tennant, R.N., DAB CR134 (1991); Glen E. Bandel, DAB CR261 (1993); Carolyn Westin, DAB CR229 (1992), aff'd, DAB 1381 (1993).

Finally, to justify an exclusion pursuant to section 1128(a)(2), I must find that 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. Here, Petitioner was a nursing home employee who under State law had a duty to report incidents of suspected abuse or neglect which may have adversely affected a Harlingen Good Samaritan Center patient's well-being. Therefore, I conclude that Petitioner's failure to report the alleged abuse directly related to the duty of care she owed to that patient and occurred in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2). See Vicky L. Tennant, R.N., DAB CR134 (1991).

In her defense, Petitioner asserts that, since she did not personally observe the alleged abuse, and did not have any proof or "reasonable cause" to pass along the information she had been given, she is not culpable. Petitioner contends also that her criminal proceeding was unfair because she was not advised that her guilty plea might subject her to exclusion under section 1128(a)(2) of the Act. Once it is determined, however, that a conviction relating to the abuse or neglect of a patient has occurred, exclusion is mandatory under section 1128(a)(2) of the Act as a purely derivative action. The I.G. is not permitted to look beyond the fact of conviction. Peter J. Edmonson, DAB CR163 (1991), aff'd, DAB 1330 (1992). The intent of the individual committing the offense is not relevant under section 1128(a). DeWayne Franzen, DAB CR58 (1989), aff'd, DAB 1165 (1990). Assertions by a petitioner that he or she is actually innocent, that his or her trial was unfair, or that the statutory five-year minimum mandatory exclusion specified in section 1128(a)

should be modified because of mitigating circumstances cannot be addressed in this forum. Edmonson, DAB 1330 at 4-5; Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992); Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). Mitigating factors are not relevant unless the I.G. relies upon aggravating factors to exclude a petitioner for more than five years. 42 U.S.C. § 1001.102(c). The Petitioner was excluded for only the minimum period, with no aggravating factors cited. Thus in the case at hand, I am without authority to consider Petitioner's assertions that she is innocent and that the criminal proceedings were unfair.

#### 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 related to the 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/

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Joseph K. Riotto  
Administrative Law Judge