

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Karen R. Morgan,

Petitioner,

v.

The Inspector General.

Docket No. C-14-1038

Decision No. CR3331

Date: August 14, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Karen R. Morgan, from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a minimum period of five years. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Social Security Act (Act), and this section mandates her exclusion.

I. Background and Ruling on Petitioner’s Objection to Admission of Exhibits

Petitioner requested a hearing to challenge the I.G.’s exclusion determination. I ordered the parties to file briefs and proposed exhibits. The I.G. filed a brief and four proposed exhibits that he identifies as I.G. Ex. 1 – I.G. Ex. 4. The I.G. also filed a reply brief. Petitioner filed a brief. Neither party requested that I convene an in-person hearing.

Petitioner objects to my receiving I.G. Ex. 3 and I.G. Ex. 4 into evidence. I.G. Ex. 3 is an Amended Criminal Information that was filed against Petitioner in the Superior Court of Washington for King County. I.G. Ex. 4 is a “Certification for Determination of Probable Cause” authored and signed by a detective with the King County Sheriff’s Office. Petitioner objects to my receiving these exhibits on two grounds: that they

contain hearsay; and that they are prejudicial. I overrule these objections and receive these exhibits, along with I.G. Exs. 1 and 2, into evidence.

The fact that a document contains hearsay is no ground for me to exclude it. I do not hear this case pursuant to the Federal Rules of Evidence and there is no automatic hearsay exclusion rule.

Petitioner's more serious objection goes to the contents of the exhibits – particularly of I.G. Ex. 4 – and the purpose for which the I.G. seeks to offer them into evidence. Petitioner was convicted, after a jury trial, of “Criminal Mistreatment in the Third Degree,” which is a crime under Washington State Law. I.G. Ex. 2. That conviction, on its face, doesn't say much of significance about the elements of Petitioner's crime. However, the two exhibits, especially I.G. Ex. 4, contain a detailed description of the allegations that were made against Petitioner.

I.G. Ex. 4 is an accusation in which the specifics of Petitioner's alleged criminal conduct are laid out. Petitioner asserts that it is now of no value because, although she was charged with “Criminal Mistreatment in the Second Degree,” she was actually convicted of a different offense, “Criminal Mistreatment in the Third Degree.” Petitioner asserts that the statutory definition of this crime is broad enough to subsume crimes against family members and other individuals and, therefore, the law is so vague that there is no way that one can infer the elements of a section 1128(a)(2) conviction from the face of the law.

That may be so, but I.G. Ex. 4 plainly explains what were the elements of Petitioner's crime. The exhibit describes how Petitioner, a registered nurse, was hired by another individual to serve as a nurse delegator in an adult family home. I.G. Ex. 4 at 1. Petitioner's job was to examine the residents of the home at least every 90 days and, if appropriate, to train and delegate specific nursing care tasks to qualified and appropriately trained nursing assistants. *Id.* Among the residents under Petitioner's care at the home was an 89-year-old, demented and dependent woman. During her stay at the home this resident developed several severe and life-threatening pressure sores. I.G. Ex. 4 alleges that Petitioner's neglect of her duties was a contributing factor in the resident's development of pressure sores and her decline. It charges that Petitioner failed to provide adequate guidance to the employees at the home and that Petitioner failed to examine the resident, to recognize the seriousness of her sores, to report the presence of the sores, and to comprehend the need for advanced medical treatment.

These allegations clearly comprise the essential elements of “Criminal Mistreatment in the Third Degree” under Washington State law. The statute describes the crime as follows:

- (1) A person is guilty of the crime of criminal mistreatment in the third degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:
 - (a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life; or
 - (b) With criminal negligence, causes substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life

RCW 9A.42.035. The elements of the crime of which Petitioner was convicted are that: Petitioner, as a nurse, was a person employed to provide to a dependent, elderly resident the basic necessities of life; and committed criminal negligence as is described in either subparagraphs (a) or (b) of the statute. I.G. Ex. 4 is thus highly relevant to explaining the elements of Petitioner's conviction and is admissible for that reason. Additionally, the exhibit is relevant because it explains that Petitioner's criminal negligence was related to Petitioner's providing health care items or services to a dependent resident, an essential element of crimes covered by section 1128(a)(2) of the Act, as I shall discuss below.

The exhibits are not prejudicial to Petitioner. The allegations laid out in I.G. Ex. 3 and 4 were presented to a jury and Petitioner was convicted after a trial. I.G. Ex. 2. She was given an opportunity to challenge those allegations and to present evidence refuting them. Therefore, I can discern nothing unfair about allowing the exhibits into evidence in this case as a way of explaining the elements of Petitioner's crime.

Traditionally, the Departmental Appeals Board and administrative law judges have allowed extrinsic evidence to be admitted that explains the elements of the crime of which a party stands convicted. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Dewayne Franzen*, DAB No. 1165 (1990). My ruling here is consistent with the holdings of these cases.

II. Issues, Findings of Fact and Conclusions of Law.

A. Issue

The issue is whether Petitioner was convicted of a crime within the meaning of section 1128(a)(2) of the Act.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(2) mandates the exclusion of any individual who is convicted of a federal or State criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. All of the elements of an 1128(a)(2) crime are present here. First, and as Petitioner admits, she was convicted of a crime. Second, she was convicted of neglect. Criminal negligence is an essential element of any crime that falls within the meaning of the Washington State statute of which Petitioner was convicted. There is no distinction in the law between “criminal negligence” and “neglect.” Both terms describe a criminal failure to perform duties that were assigned to the convicted individual. Third, Petitioner’s crime involved neglect of a patient. Petitioner was assigned the responsibility of examining and providing and/or supervising nursing care to a resident of an adult family home and her crime consisted of criminal negligence in providing care to this resident. Finally, Petitioner committed her crime in connection with the delivery of health care items or services. Petitioner was charged with supervising delivery of health care services to the resident in question, including preventing the development of, identifying, assessing, and treating, her pressure sores. Petitioner was convicted of criminally failing to carry out these duties.

Petitioner’s arguments boil down to her assertion that it is unclear what misconduct she was actually convicted of and arguing from this alleged lack of clarity that it cannot be inferred that she was convicted of a section 1128(a)(2) crime. This assertion is unpersuasive. The elements of Petitioner’s crime are laid out explicitly in I.G. Ex. 4.

The I.G. excluded Petitioner for a minimum of five years. That is the minimum mandatory exclusion period for exclusions imposed pursuant to section 1128(a)(2). Act, section 1128(c)(3)(B). Consequently, there is no issue in this case concerning the reasonableness of the length of Petitioner’s exclusion.

/s/
Steven T. Kessel
Administrative Law Judge