

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Henry Marrero,

Petitioner

v.

The Inspector General.

Docket No. C-10-709

Decision No. CR2260

Date: October 1, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Henry Marrero, from participating in Medicare and other federally funded health care programs for a minimum period of five years.

I. Background

Petitioner resides in New York and has worked as a nurse aide. The I.G. notified Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs. The I.G. stated that the basis for his exclusion determination was that Petitioner had been convicted of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service, as is described at section 1128(a)(2) of the Social Security Act (Act). Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

I ordered the parties to submit written exchanges. The I.G. submitted a brief and nine proposed exhibits, which are identified as I.G. Ex. 1 – I.G. Ex. 9. Petitioner submitted a brief. Neither party requested that I convene an in-person hearing. I receive into evidence I.G. Ex. 1 – I.G. Ex. 9.

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

A. Issues

The issues are whether:

1. Petitioner was convicted of a crime for which exclusion is mandated by section 1128(a)(2) of the Act;
2. The five-year exclusion imposed by the I.G. is mandatory.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law.

1. Petitioner was convicted of a crime for which exclusion is mandated by section 1128(a)(2) of the Act.

There is no dispute as to the facts of this case. On April 24, 2009, Petitioner pled guilty in a New York State court to the crime of willful violation of health laws, an unclassified misdemeanor under New York law. I.G. Ex. 3 at 4-6; I.G. Ex. 8; I.G. Ex. 9. Petitioner's plea was the consequence of an incident in which Petitioner, while working as a nurse aide in a residential health care facility, slapped and struck an elderly resident who was resisting care that Petitioner was attempting to provide. I.G. Ex. 5 at 1-2; I.G. Ex. 6 at 1.

Section 1128(a)(2) of the Act mandates the exclusion of any individual who is convicted of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service. The facts of this case plainly prove that Petitioner was convicted of such an offense. Willfully striking a patient – in this case a very elderly individual – is abuse under any definition of the word. Petitioner committed his crime in the course of providing care to the victim of his abuse, and, thus, his crime is related to the delivery of a health care item or service.

2. An exclusion of at least five years is mandatory.

The I.G. must exclude any individual who is convicted of a crime that is described at section 1128(a)(2) of the Act for a minimum of five years. Act § 128(c)(3)(B). The five-year exclusion that the I.G. determined to impose here is reasonable as a matter of law.

Petitioner argues that I should take into account circumstances that he contends require special consideration. He asserts, essentially, that he engaged in no malicious or premeditated abuse but that he struck the patient in a moment of stress and while Petitioner was under duress. He expresses remorse for his act. However, Petitioner's

assertions, while perhaps heartfelt, raise no issues that I may address. As I have stated, the five-year exclusion that the I.G. determined to impose is mandatory. The Act does not permit this mandatory period to be reduced or waived based on equitable considerations, such as those raised by Petitioner.

/s/
Steven T. Kessel
Administrative Law Judge