Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Barbara Ford, R.N.,	)	DATE: October 18, 1991
	)	
Petitioner,	)	
	)	
- v. -	)	DOCKET No. C-289
	)	
The Inspector General.	)	Decision No. CR159
	)	

DECISION

On June 13, 1990, the Inspector General notified Petitioner, Barbara Ford, R.N., that she would be excluded from participating in Medicare and any State health care program, such as Medicaid, as defined in Section 1128(h) of the Social Security Act (Act), for a period of ten years. The I.G. advised her that the exclusion was mandated based on her conviction of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service" within the meaning of section 1128(a)(2) of the Act and that section 1128(c)(3)(B) of the Act provides that such exclusions be for a period of not less than five years. By letter dated August 13, 1990, Petitioner timely requested a hearing. On September 21, 1990, the I.G. advised Petitioner that her exclusion had been amended to five years.

The case was assigned originally to Judge Charles E. Stratton, who conducted a prehearing conference on October 16, 1990. By Prehearing Order dated October 19, 1990, a schedule was set for hearing of the case by summary disposition. On November 16, 1990, the I.G. filed his motion for summary disposition. On December 18, 1990, Petitioner filed a memorandum opposing the I.G.'s motion for summary disposition. The I.G. replied, and the Petitioner filed a sur-reply in January, 1991. Judge Stratton heard oral argument on the motion for summary disposition on February 7 and March 14, 1991. During oral argument, Judge Stratton set the case for an in-person evidentiary hearing and gave the I.G. the opportunity to file a motion to amend the June 13, 1990

notice to include section 1128(a)(1) of the Act as an additional basis to exclude Petitioner. On March 22, 1991, the I.G. filed a motion to amend and on April 12, 1991 Petitioner filed her opposition and requested oral argument.

On April 15, 1991, the case was reassigned to me. I heard oral argument on the motion to amend on April 24, 1991. In a preliminary ruling issued on April 26, 1991, I concluded that:

> 1) the I.G.'s motion to amend presents a "new issue" within the meaning of 42 C.F.R. 498.56;
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> 2) the I.G.'s motion is within the time requirements under such regulation;
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> 3) Petitioner had proper notice of the I.G.'s intent to amend the Notice;
>
> 4) Petitioner had opportunity to defend against the I.G.'s motion to amend the Notice to add section 1128(a)(1) as an additional basis for the exclusion; and
>
> 5) there is no prejudice or undue hardship to Petitioner arising from such an amendment.

My preliminary ruling was made in the interest of judicial economy. It was reasonable, practical and fair to consolidate the issues. Petitioner received notice of the I.G.'s intent to amend and had opportunity to respond both orally and in writing. Petitioner did not demonstrate that she would be prejudiced or suffer undue hardship if I permitted the I.G. to amend. I considered Petitioner's argument that the I.G. was "issue shopping", but found nothing that would have precluded the I.G. from issuing a new notice under section 1128(a)(1) at any time, even had I found on behalf of Petitioner regarding the section 1128(a)(2) exclusion. Lastly, the mandatory nature of the statute requires the Secretary, and his lawful delegate, the I.G., to seek an exclusion if the authority to do so is deemed to exist. Thus, it was in Petitioner's benefit to have the issue consolidated and resolved in the pending hearing rather than potentially have to address this issue at a subsequent future proceeding.

On May 10, 1991, in New York City, I held an in-person evidentiary hearing. At the hearing, I made final my preliminary ruling.[1]

I have considered the arguments, the evidence and the applicable law. I conclude that the five year exclusion imposed and directed by the I.G. against Petitioner is mandated by law, under both sections 1128(a)(1) and 1128(a)(2) of the Act and that the exclusion is the minimum mandatory period required by section 1128(c)(3)(B) of the Act.

ISSUES

The issues in this case are as follows:

1) Whether Petitioner was convicted of a criminal offense "related to the delivery of an item or service" under Medicare or Medicaid within the meaning of section 1128(a)(1) of the Act; and

2) Whether Petitioner 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" within the meaning of section 1128(a)(2) of the Act.

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[1] At the outset of the May 10, 1991 evidentiary hearing, I asked if Petitioner had any further argument with regard to the I.G.'s motion to amend and my preliminary ruling. Petitioner's counsel presented no further argument and accepted the amendment in light of the I.G.'s ability in the future to raise section 1128 (a)(1) as an additional basis for the mandated exclusion. Accordingly, I made final my preliminary ruling of April 26, 1991.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner, Barbara Ford, is a Registered Nurse in the State of New York and has been a health care provider for thirty years. Tr. 102-104; I.G. Ex. 15.[2]

2. On January 27, 1988, Mary Hissiger was a driver for Century Ambulance Service and Chacko Kurian, an emergency medical technician, accompanied her. Tr. 68, 75; I.G. Ex. 14.

3. Ms. Hissiger was directed by her dispatcher to go to the Clearview Nursing Home in Whitestone, New York on January 27, 1988 at approximately 4:00 a.m. to pick up an 82 year old woman named Mae Duffy. Tr. 69 - 70; I.G. Ex. 14.

4. Upon observation and examination of Ms. Duffy by the ambulance crew, her condition was congestive heart failure, dyspnea (difficulty breathing), cyanosis (bluish tinted skin due to oxygen deprivation), diaphoresis (sweating), and unresponsive to stimuli. Tr. 73-75; I.G. Ex. 10, 14. Ms. Duffy was having difficulty breathing, had audible lung sounds indicating fluid in her lungs and had an abnormally high respiration rate along with a low pulse rate. Tr. 76-78, 89; I.G. Ex. 10, 14.

5. Ms. Hissiger and Mr. Kurian were instructed by Clearview Nursing Home to take Ms. Duffy to Flushing Hospital, where Ms. Duffy's treating physician, Dr. J. Konefal, was affiliated. Tr. 79; I.G. Ex. 10, 14

6. Due to the unavailability of emergency room beds at Flushing Hospital, the ambulance crew was advised by their dispatcher to divert to Parkway Hospital. Tr. 92-93. During the transport, the crew had to administer oxygen to Ms. Duffy and suction out her airway to assist her breathing. Tr. 73, 77-78; I.G. Ex. 14.

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[2] The parties' exhibits, briefs, memoranda and the transcript of the hearing will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)
Petitioner's Exhibit	P. Ex. (number)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
I.G. Reply Brief	I.G. R. Br.(page)
Petitioner's Memorandum in Opposition to Motion for Summary Disposition	P. Mem. (page)
Transcript of hearing	Tr. (page)
My Findings and Conclusions	FFCL (number)

The ambulance arrived at Parkway at approximately 5:15 a.m. Tr. 79.

7. Century Ambulance policy dictated that if a designated hospital is on diversion, irrespective of the location or affiliation of the patient's doctor, the ambulance crew will proceed to an available hospital. Tr. 87.

8. On January 27, 1988, Petitioner was the nursing supervisor on duty at Parkway Hospital in charge of medicine, surgery and the critical care areas, which included the emergency room. Tr. 104.

9. Petitioner received a call from a Mr. Cantos, the nurse on duty, and was informed that a Century Ambulance had brought a patient to the emergency room with transfer papers designating Flushing Hospital. Parkway had no prior notification that the ambulance was bringing Ms. Duffy to its emergency room. Tr. 104.

10. Petitioner went directly to the emergency room and found Ms. Duffy on a stretcher, accompanied by an ambulance driver. Tr. 105.

11. Petitioner was informed by Mr. Cantos of the discrepancy in the transfer sheet and was informed that Ms. Duffy's doctor was affiliated with Flushing Hospital. Tr. 105.

12. Petitioner contacted Ms. Thomas, the supervisor of nursing at Clearview Nursing Home, and asked how she could locate Ms. Duffy's physician. Tr. 109-110.

13. Petitioner did not physically examine Ms. Duffy, and made no extensive assessment of her condition. Tr. 84, 106; I.G. Ex. 15. The emergency room physician was not present and Mr. Cantos did not know his whereabouts. Tr. 107. No one attempted to page the emergency room doctor to enable him to examine Ms. Duffy, nor did Petitioner make any personal effort to find him. Tr. 108, 113, 114, 122-3; I.G. Ex. 15. No hospital record was ever created reflecting Ms. Duffy's presence in the emergency room. Tr. 108, 120, 123.

14. In the criminal proceeding, Petitioner admitted under oath that when Ms. Duffy was in the emergency room she manifested "life threatening symptoms" which "would require immediate treatment". Tr. 127-128; I.G. Ex. 15.

15. No determination was made by anyone as to Ms. Duffy's financial ability to pay her expenses. Tr. 108.

16. After reviewing the transfer sheet from Clearview Nursing Home which indicated that Ms. Duffy was to be transported to Flushing Hospital and being told that Flushing was "closed", Petitioner called Ms. Thomas to determine whether Ms. Duffy's physician wanted her to remain at Parkway Hospital or go to Flushing Hospital. Tr. 105, 110. Ms. Thomas advised Petitioner that Ms. Duffy's physician wanted her taken to Flushing. Tr. 111. Thereupon, Petitioner directed the dispatcher of Century Ambulance to transport Ms. Duffy to Flushing Hospital. Tr. 111.

17. Petitioner directed the ambulance crew to take Ms. Duffy to Flushing Hospital, without her being examined by the emergency room physician, nor having a hospital report created, and without any effort to properly assess her medical stability, despite her life-threatening condition. FFCL 8-14 and 16.

18. Petitioner's principal concern after being notified of Ms. Duffy's presence in the emergency room of Parkway Hospital was to get Ms. Duffy to Flushing Hospital where her physician "was waiting to see her, or would be meeting her". Petitioner believed that having Ms. Duffy await for and receive care in Parkway's emergency room (a period of approximately one hour), which would have included being examined by a physician and the preparation of forms, would have resulted in "delaying the process of getting her to her care". Tr. 112-113.

19. The total time the patient stayed in the emergency room at Parkway was approximately 15 minutes. Tr. 112. The approximate driving time from Parkway Hospital to Flushing Hospital was 10-15 minutes. Tr. 85, 109. Ms. Duffy was received at Flushing Hospital in "very poor condition". I.G. Ex. 4. It took approximately three hours before Ms. Duffy was admitted or seen by a physician. Tr. 115-116.

20. Dr. Clark, who testified in Petitioner's criminal proceeding, opined that Ms. Duffy's condition remained the same from the time of leaving Clearview Nursing Home until she was examined and treated at Flushing Hospital. Tr. 118; P. Ex. 2.

21. Petitioner admits that technically she violated New York State Public Health Statute 2805-b(2). Tr. 112. This section provides that "any person who in any manner excludes, obstructs or interferes with the ingress of another person into a general hospital who appears there for the purpose of being examined or diagnosed or treated; or any person who obstructs or prevents such

other person from being examined or diagnosed or treated by an attending physician thereat shall be guilty of a misdemeanor and subject to a term of imprisonment not to exceed one year and a fine not to exceed one thousand dollars". I.G. Ex. 3.

22. New York State Public Health Statute 2805-b(2) contemplates circumstances where a person could be transferred from one hospital to another, but only "[a]fter examination, diagnosis and treatment by an attending physician and where, in the opinion of such physician, the patient has been stabilized sufficiently to permit it". Before any such transfer, a form must be completed indicating, among other things, the treatment the patient received at the original hospital, the identity of the physician at the receiving hospital who authorized its availability to treat the patient, and the signature of the physician ordering the transfer. I.G. Ex. 3.

23. At the time Ms. Duffy was transported to Parkway Hospital for emergency treatment, it was the hospital's policy "that every patient who is presented in the Emergency Room have a medical record made out, each and every patient is assessed by a Registered Professional Nurse and then seen, examined and treated by a physician". I.G. Ex. 4.

24. Petitioner was counseled by Joseph Fiorentino, R.N., Vice President of Patient Care Services for Parkway Hospital, in an Employee Conference Record dated January 27, 1988 (which she signed), that her actions were inappropriate "because once the patient was brought into the hospital and brought to the Emergency Room a record was not made out on this patient, and the patient was not seen and examined". She was further advised that her actions "were unsafe and put the patient's life as well as the hospital in jeopardy". Consequently, Petitioner was suspended without pay for a period of three days, January 27 through January 29, 1988. I.G. Ex. 4.

25. Ms. Duffy was a Medicaid recipient and a Medicare beneficiary at the time she was transported to Parkway Hospital. Tr. 38-42; I.G. 11, 13.

26. Petitioner's employer, Parkway Hospital, has been a participant in the Medicare Program since May of 1966. Tr. 42 - 43. I.G. Ex. 12.

27. Petitioner was convicted, in a criminal jury trial in Queens, New York, of violating New York Public Health

Law 2805-b(2) and was sentenced to 200 hours of community service and a $500 fine. I.G. Ex. 6.

28. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

29. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required by the Act. Sections 1128(a)(1), (a)(2), and (c)(3)(B) of the Act.

30. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Sections 1128(a)(1), (a)(2) and (c)(3)(B) of the Act.

RATIONALE

1. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid programs.

Petitioner, Barbara Ford, is a registered nurse, and was the emergency room supervisor at Parkway Hospital on the morning of January 27, 1988. FFCL 1, 8. Mae Duffy, a resident at the Clearview Nursing Home, was both a Medicare and Medicaid beneficiary/recipient at that time. FFCL 25. Parkway Hospital was a participant in the Medicare program at the time Ms. Duffy was transported there for emergency treatment. FFCL 26.

Petitioner was convicted of excluding, obstructing and interfering with the ingress of Ms. Duffy into Parkway Hospital for examination, diagnosis, and treatment; and for obstructing or preventing Ms. Duffy from being examined, diagnosed or treated by an attending physician at such hospital. FFCL 21, 27. Petitioner was sentenced to 200 hours of community service and a $500 fine. FFCL 27.

Petitioner admits she was convicted, but contends that her conviction is not a conviction of a criminal offense related to the delivery of an item or service pursuant to the Medicare/Medicaid program within the meaning of section 1128(a)(1) of the act. Petitioner argues that the legislative history of Section 1128(a) demonstrates that 1) it was enacted to protect the Medicare and Medicaid programs from "fraud and abuse and beneficiaries from incompetent practitioners and from inappropriate or

inadequate care". P. Br. at 8. In short, Petitioner argues that the "mere existence" of Ms. Duffy and Parkway Hospital being program participants does not make the offense "program related" and in this case there is no "impact on the integrity of the [Medicare/Medicaid] program itself". Id. at 8, 10. Petitioner misconstrues the legislative history and the factual circumstances of this case.

Section 1128(a)(1) of the Act requires the Secretary (or his lawful delegate, the I.G.) to impose and direct an exclusion against any individual or entity:

> that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under any . . . [Medicaid] program.

While the Act does not specifically define the term "criminal offense related to the delivery of an item or service", a criminal offense related to the delivery of an item or service has been held to fall within the reach of section 1128(a)(1) where:

> [T]he submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the "item" within the purview of the program.

Jack W. Greene, DAB App. 1078 at 7 (1989); aff'd sub nom. Greene v. Sullivan, 731 F.Supp 835 and 838 (1990). Under the rationale of Greene, a criminal offense is an offense which is related to the delivery of an item or service under Medicare or Medicaid where the delivery of a Medicare or Medicaid item or service is an element in the chain of events giving rise to the offense.

In H. Gene Blankenship v. Inspector General, DAB Civ. Rem. C-67 (1989), the Board stated that the determination of whether a conviction is related to the delivery of an item or service under the Medicare program "must be a common sense determination based on all the relevant facts as determined by the finder of fact, not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court."

The facts of this case are straightforward. Petitioner was convicted under New York Public Health Law section 2805-b(2) for failing to allow Ms. Duffy to utilize the services of Parkway's emergency room, including the examination, diagnosis and treatment by a physician.

Petitioner's criminal conviction involved the failure to provide the requisite care to both a program beneficiary and recipient (Ms. Duffy) by a program provider (Parkway). Therefore, Petitioner's criminal offense related to providing an item or service (emergency care) under the Medicare and Medicaid programs.

Common sense, as well as the Departmental Appeals Board (DAB) precedent, dictate that Petitioner's conviction is program related within the meaning of section 1128(a)(1). The conviction is, both under the Blankenship test of "common sense determination based on all of the relevant facts", and under the Greene test of "an act that directly and necessarily follows from the delivery of the item or service", directly related to the Medicare and Medicaid programs.

Petitioner admits that the Act applies to inadequate or inappropriate care. P. Br. at 8. Petitioner denies, however, that her conviction was program related within the meaning of the statute. Id. Petitioner's criminal conviction under the N.Y Public Health law was for failure to provide the requisite emergency services to Mrs. Duffy. Petitioner's criminal offense involved inadequate or inappropriate care because Petitioner's actions resulted in Mrs. Duffy not receiving the level of care mandated by the law. Therefore, Petitioner's criminal offense is program related, as, by Petitioner's own admission, inadequate or inappropriate care situations are covered by the Act.

2. Petitioner 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.

Century Ambulance Service was called to Clearview Nursing Home on January 27, 1988 to provide emergency transportation for Mae Duffy, an 82 year old resident of the nursing home. FFCL 3. Ms. Duffy's condition was noted by the ambulance crew as congestive heart failure, dyspnea (labored breathing); cyanosis (blue skin color due to oxygen deprivation); diaphoresis (excessive sweating); and unresponsive to stimuli. FFCL 4. She had difficulty breathing (including a high respiration rate with a low pulse rate), and audible lung sounds necessitating the crew to suction out her airways in route to the hospital and give her continuous oxygen by mask. FFCL 4, 6. In essence, a crew member concluded

that Ms. Duffy was "an elderly woman who was dying". Tr. 78-79.[3]

The transfer sheet from Clearview Nursing Home noted the destination as Flushing Hospital, the hospital where Ms. Duffy's physician, Dr. J. Konefal, was affiliated. FFCL 5. Due to the absence of available emergency room beds at Flushing Hospital causing that facility to be placed on diversion, the dispatcher for Century Ambulance, based on standard policy, directed that Ms. Duffy be transported to an alternate facility, Parkway Hospital. FFCL 6-7.

No prior notification was afforded Parkway Hospital when Ms. Duffy arrived in the emergency room. FFCL 9. The admitting nurse saw that the transfer sheet indicated that Ms. Duffy was to be transported to Flushing Hospital and contacted his supervisor, Petitioner. FFCL 9, 11. Petitioner made a cursory observation of Ms. Duffy's condition but at no time did she physically examine her. FFCL 13. The attending physician was not in the emergency room, could not readily be located, and no effort was made to page him. FFCL 13.

Petitioner did not accept the ambulance crew's statement that Flushing Hospital was "closed", but called the supervisor of nursing, Ms. Thomas, at Clearview Nursing Home for clarification and advice where to send Ms. Duffy. Tr. 105; FFCL 16. Ms. Thomas apparently contacted Ms. Duffy's physician, who indicated that she should be transported to Flushing Hospital. Based on this information, Petitioner directed the ambulance crew to transport Ms. Duffy to Flushing Hospital. FFCL 16. Apparently, Petitioner felt that Ms. Duffy would be better served by going to Flushing Hospital, where her own personal physician was affiliated, and avoid the delay caused by awaiting the presence of the Parkway physician to examine, diagnose, and treat Ms. Duffy and complete the required paper work. FFCL 18. No one at Parkway ever contacted Flushing Hospital to determine whether it was still on diversion and as a result Ms. Duffy waited three hours at Flushing for examination and

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[3] Counsel for the I.G. averred in a preliminary statement at the evidentiary hearing that Ms. Duffy was suffering from AIDS (Acquired Immune Deficiency Syndrome). Tr. 16. Implicit in this assertion is that this condition was a factor in her being denied examination and treatment at Parkway Hospital. Since the I.G. offered no proof to establish Ms. Duffy did in fact have AIDS, I make no such finding.

treatment. FFCL 13, 16, 19. Ms. Duffy's condition upon arrival at Parkway was "life threatening" and she arrived at Flushing Hospital in "poor condition". FFCL 4, 14, 19. However, her condition did not worsen during the period of time between her departure from Clearview Nursing Home and her receipt of treatment at Flushing Hospital. FFCL 20.

Pursuant to New York Public Health Law 2805-b(2) hospitals, such as Parkway, are under strict liability to provide examination, diagnosis, or treatment to anyone who arrives at the emergency room in need of medical assistance. Failure to allow such treatment will result in a misdemeanor, subjecting the guilty person to imprisonment and fine. This statutory provision contemplates the transfer of the patient to another facility but only after the patient "has been sufficiently stabilized to permit it". Prior to such transfer, the attending physician at the original hospital must attest that 1) the patient is sufficiently stable to withstand transfer; and 2) the receiving hospital is available and willing to accept the patient; and 3) an attending physician is there to admit the patient. At the time of transfer, a form must be completed, including pertinent history of the patient's condition, and treatment and other information related to the transfer of the patient. As previously indicated, Petitioner was found guilty of violating N.Y. Public Health Law 2805-b(2), sentenced to community service and fined. FFCL 21-22, 27.

The requisite criteria to support a finding of a conviction of a criminal offense relating to the neglect or abuse of patients was set forth by me in Vicky L. Tennant, DAB Civ. Rem. C-329 (1991), citing Dawn Potts, DAB Civ. Rem. C-291 (1991):

> Under section 1128(a)(2), the statutory criteria may be met in one of two circumstances. First, a party who is convicted of patient neglect or abuse will be found to have been convicted of an offense within the meaning of the section. Ronald Allen Cormier, DAB Civ. Rem. C-206 (1990). Second, a party who is convicted of an offense relating to patient neglect or abuse will be found to have been convicted of an offense within the meaning of the section. See Summit Health Limited, dba Marina Convalescent Hospital, DAB Civ. Rem. C-108 (1989).

The I.G. concedes that Petitioner's conviction did not involve "abuse", but patient "neglect". I.G. Br. at 14. The term "neglect" is not defined in the statute. Absent

a statutory definition, "neglect" should be given its common and ordinary meaning. As I indicated in Bruce Lindberg, D.C., DAB Civ. Rem. C-348 (1991), which referred to Thomas M. Cook, DAB Civ. Rem. C-106 (1989):

> "Neglect" is defined in Webster's Third New International Dictionary, 1976 Edition as "1: to give little or no attention or respect to: . . . 2: to carelessly omit doing (something that should be done) either altogether or almost altogether . . . . Lindberg at 10.

While Public Health Law 2805-b(2) does not utilize the term "neglect", a fair reading of this statutory provision demonstrates that the legislature intended that persons needing emergency care who present themselves to a general hospital, such as Parkway, will be seen, diagnosed, and treated by a physician, and anyone who interferes with that process will be guilty of a criminal offense. Moreover, prior to transfer of any such patient from the original facility to another hospital, the attending physician must attest that the patient is sufficiently stable for transfer and that the receiving Hospital is available and will treat such patient. In this case, Petitioner was convicted of interfering with Ms. Duffy's care at the emergency room of Parkway in that she was never seen by a physician and no record was created pursuant to New York law regarding her stability for transfer and the availability of Flushing Hospital to treat Ms. Duffy at the time of transfer.

As a registered nurse with supervisory responsibility over the emergency room, Petitioner had an obligation and duty to ensure that there was compliance with N.Y. Public Law 2805-b(2) at the time Ms. Duffy was transported to Parkway for emergency treatment. The New York law establishes a standard of care that each hospital must provide persons seeking emergency treatment, and Petitioner by her actions prevented Ms. Duffy from receiving the requisite care. Ms. Duffy, an 82 year old unconscious person with significant life threatening medical problems, was not in a position where she could assist herself, but was totally dependent on others for her care and welfare.

Petitioner's failure to adhere to her statutory duty to refrain from acts that prevented Ms. Duffy from receiving emergency care at Parkway Hospital constitutes "neglect" as that term has been defined by case precedent interpreting section 1128(a)(2). See, Tennant, supra. (failure to file an incident report required by Colorado Department of Health Regulation); Potts, supra. (failure

to report allegations of abuse as required by Florida law); Olian Small, DAB Civ. Rem C-272 (1991) (failure to administer medications to elderly nursing home patients); Cook, supra. (reckless conduct which placed another in imminent danger of serious bodily harm); Summit Health Limited, supra. (failure to perform duty to plan patient care and administer medications and treatment to patients); and Rosette Elliott, DAB Civ. Rem. C-200 (1990) (reckless conduct that places another in imminent danger of serious bodily harm). The statutory language of N.Y. Public Health Law 2805-b(2) is clear as to the level of care that should have been rendered to Ms. Duffy while at Parkway Hospital. Due to Petitioner's actions, that care was not provided Ms. Duffy. It has been specifically held that Congress intended the term "neglect" as used in section 1128(a)(2) to "include failure by a party to satisfy a duty of care to another person". Rosette Elliott, supra. at 7.

As supervisor of the emergency room, it was Petitioner's responsibility to see that the required care was given. Not only did Petitioner fail to ensure that the required care was provided by Parkway to Ms. Duffy, she improperly relied on her own judgment that Flushing Hospital was a more appropriate facility to treat Ms. Duffy than Parkway. This determination was based solely on conversations with Ms. Thomas, the supervisor of nursing at Clearview Nursing Home, and a cursory observation of Ms. Duffy in the emergency room. While Petitioner's intentions may have been well motivated in that she believed any care at Parkway would delay care at Flushing, the simple fact is that Petitioner had no right to exercise that determination for Ms. Duffy.[4]

Under New York Public Health law, that determination could only be made by a physician who 1) examined, diagnosed and treated Ms. Duffy; 2) concluded she was sufficiently stable to be transferred; and 3) was advised that Flushing Hospital was available to receive and treat her. Also, having failed to ascertain that Flushing Hospital could treat Ms. Duffy at the time Petitioner

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[4] Petitioner estimated that it would have taken approximately one hour for Ms. Duffy to receive examination and treatment by a physician at Parkway Hospital. In contrast, the driving time to Flushing Hospital from Parkway was approximately 15 minutes. FFCL 18-19.

directed the ambulance crew to transport her to that facility, Ms. Duffy languished for three hours at Flushing Hospital before receiving treatment. Moreover, Petitioner's actions were contrary to the policy of Parkway Hospital requiring that every emergency room patient be assessed by a registered nurse and examined and treated by a physician, and that a medical record of such examination be prepared. FFCL 23. This failure to follow hospital policy resulted in Petitioner being suspended without pay for three days. FFCL 24.

Petitioner contends that her conviction does not fall within the ambit of section 1128(a)(2), because it is not a criminal offense relating to neglect or abuse of patients. P. Br. at 11. Petitioner supports this position with the following: 1) the State statute under which she was convicted imposed strict liability without the need to find "fault, bad motive, bad intent, or failure to fulfill an obligation"; 2) her conduct relating to Ms. Duffy was intended to see that she received "better health care than that she would have received at Parkview [sic] Hospital"; and 3) her decision to have Ms. Duffy transferred to Flushing Hospital "was made after it was determined that the patient was in a sufficiently stable state to be safely transported to the correct hospital". P. Mem. at 6-15.

Petitioner cannot take comfort in that N.Y Public Health Law 2805-b(2) imposed strict liability on persons who prevented emergency room patients from receiving the level of care required by law. There is nothing in the statutory language of section 1128(a)(2) that imposes a requirement of "intent" or "scienter" to find "neglect or abuse". As the appellate panel held in Summit Health Limited, dba Marina Convalescent Hospital, DAB App. 1173 (1990) at 9:

> [T]here is no requirement in section 1128 (a)(2) that the entity or individual be convicted of an offense with a particular level of intent as a necessary element. Under section 1128 (a)(2), the level of intent of the entity or individual in committing the offense is not relevant.

I do not accept Petitioner's interpretation of the applicable provisions of the N.Y. Public Health law as imposing no duty or obligation on Petitioner regarding Ms. Duffy's receipt of the required emergency care. To the contrary, I find that such a duty or obligation is imposed by New York law.

Additionally, the contention that Petitioner believed Ms. Duffy would receive better care at Flushing Hospital than at Parkway is irrelevant to a finding of "neglect" under section 1128(a)(2). Her motivation for her actions, even if meritorious, cannot be a substitute for preventing proper treatment of a patient needing emergency room care. In this case, Petitioner has no right to impose her judgment as to the proper location of treatment for Ms. Duffy. By New York law, only an examining physician could make that determination. Petitioner prevented that from happening by directing the ambulance crew to transport Ms. Duffy to Flushing Hospital without the provisions of section 2805-b(2) being met.

Lastly, the record flatly contradicts Petitioner's assertion that she made sure that Ms. Duffy was sufficiently stable prior to transfer to Flushing Hospital. She was never examined by a physician and Petitioner only briefly observed her condition before contacting Clearview Nursing Home and directing her to be sent to Flushing for treatment. Petitioner attempts to minimize the culpability of her conduct by pointing out that Ms. Duffy's condition did not worsen from the time she left Clearview until being treated at Flushing. Tr. 25. This gratuitous circumstance cannot excuse the actions of Petitioner, which resulted in Ms. Duffy failing to receive at Parkway Hospital the level of care required under New York law.

3. The exclusion imposed and direct against Petitioner is mandated by law.

Sections 1128(a)(1), 1128(a)(2) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years, when such individuals and entities have 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. Congressional intent is clear from the express language of section 1128(c)(3)(B):

> In the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . .

The I.G. must apply the minimum mandatory exclusion of five years once a section 1128(a) violation is established.

I recognize that application of the congressionally mandated five year exclusion to Petitioner may present

the appearance of an unnecessarily harsh result. At Petitioner's Sentence Proceedings, Judge Richard Buchter indicated the following:

> Well, I think it is certainly undisputed that Mrs. Ford is an outstanding nurse. I've read all the letters that counsel has submitted to the Court. It is clear that defendant has provided a high level of service to the sick and, up until this incident, has always been an ethical and compassionate person. The Court concludes from that this was, in fact, an aberrational act, which is not consistent with the defendant's character.

I.G. Ex. 6.

Unlike cases brought under section 1128(b) of the Act, where I have the authority to consider the reasonableness of the exclusions and the trustworthiness of petitioners, I have no discretion here and must affirm the exclusion. Absence the exercise of discretion, section 1128(a) violations unfortunately may result in exclusions of a length seemingly disproportionate to the severity of the crimes upon which the exclusions are based. As stated in Dawn Potts, supra at 8:

> . . . Congress has not given the Secretary discretion to reduce exclusions under section 1128(a)(2) beneath the five year minimum mandatory period. Congress determined as a matter of legislative policy that cases of patient abuse and neglect pose such a threat to program beneficiaries and recipients that minimum exclusion of five years were necessary for the protection and well-being of beneficiaries and recipients. The inevitable consequence of that policy determination is that in some cases, such as this one, application of the Act will produce results which seem to be harsh.

CONCLUSION

Based on the law and the facts of this case, I conclude that the I.G. properly excluded Petitioner from the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(1), 1128(a)(2) and 1128(c)(3)(B) of the Act.

/s/

Edward D. Steinman
Administrative Law Judge