

Department of Health and Human Service

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Edna Bata Wilkerson,)	Date: April 3, 2009
)	
Petitioner,)	Docket No. C-09-95
)	Decision No. CR1934
v.)	
)	
The Inspector General.)	

DECISION

Petitioner, Edna Bata Wilkerson, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)), effective November 20, 2008, based upon 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. There is a proper basis for exclusion. Petitioner’s exclusion for the minimum period¹ of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated October 31, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(2) of the Act. The basis cited for Petitioner’s exclusion was her conviction in the 22nd Judicial District Court of the State of Michigan of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. Act § 1128(a)(2) and 42 C.F.R. § 1001.101(a). Petitioner timely requested a hearing by letter dated November 10,

¹ Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

2008. The case was assigned to me for hearing and decision on November 20, 2008. On December 8, 2008, I convened a telephonic prehearing conference, the substance of which is memorialized in my Order dated December 12, 2008. The parties agreed that this matter can be decided based on their written submissions, without the need for an in-person hearing. P. Brief § III.

On January 7, 2009, the I.G. filed its brief (I.G. Brief) with I.G. exhibits (I.G. Exs.) 1 through 5. Petitioner filed her brief in response (P. Brief) with Petitioner's exhibits (P. Exs.) 6 through 10 and copies of I.G. Exs. 2, 3, and 5.² The I.G. filed a reply brief on February 23, 2009 (I.G. Reply). The I.G. did not object to my receiving into evidence Petitioner's proposed exhibits and P. Exs. 6 through 10 are admitted. Petitioner objected to I.G. Ex. 2, page 2, and I.G. Ex. 5, pages 1 through 5³, on grounds that they are "inaccurate and unfair." P. Brief § IV, ¶ 2. The I.G. filed a response to Petitioner's objections on February 23, 2009. Petitioner's objections to I.G. Exs. 2 and 5 are overruled. There is no issue that the documents are authentic and relevant and are therefore admissible. The fact that Petitioner characterizes the documents as "inaccurate and unfair" are not grounds for their exclusion. My review of Petitioner's request for hearing and her brief reveals that the basis for her objection is her belief that there was an error in the Michigan law or the interpretation and application of that law that resulted in her conviction. She does not deny that she was convicted or that I.G. Exs. 2 and 5 accurately reflect her conviction. Accordingly, I.G. Exs. 1 through 5 are admitted.

II. Discussion

A. Findings of Fact

1. On August 27, 2007, in the 22nd Judicial District Court of the State of Michigan, Petitioner was convicted of Failure to Report Patient Abuse, in violation of Mich. Comp. Laws § 333.21771(2). I.G. Ex. 2, at 1.
2. Petitioner was sentenced by the 22nd Judicial District Court in the State of Michigan to 12 months probation and ordered to pay a \$1500 fine and \$95 in court fees. I.G. Ex. 2, at 2.

² Petitioner did not offer P. Exs. 1-5.

³ I.G. Ex. 5 includes only pages 1 through 4.

3. The I.G. notified Petitioner by letter dated October 31, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(2) of the Act. I.G. Ex. 1.
4. Petitioner timely requested a hearing by letter dated November 10, 2008.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Petitioner was convicted of a criminal offense related 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.
3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.
4. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act and that period is not unreasonable as a matter of law.

C. Issue

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to one issue:

Whether there is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

There is no issue of whether the period of exclusion is unreasonable in this case as five years is the minimum period authorized. 42 C.F.R. § 1001.2007(a)(1)-(2).

D. Law Applicable

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in Medicare and Medicaid programs any individual 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 statute does not distinguish between felony convictions and

misdemeanor convictions as a basis for mandatory exclusion and does not require that the health care item or service be delivered under Medicare, Medicaid, or a federal or state healthcare program.

The Act defines “conviction” to include those circumstances “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” or “when there has been a finding of guilt against the individual or entity by a Federal, State, or local court.” Act § 1128(i)(1) and (2) (42 U.S.C. § 1320a-7(i)(1) and (2)).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a)(2) of the Act shall be for a minimum period of five years. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c).

E. Analysis

1. There is a basis for Petitioner’s exclusion pursuant to section 1128(a)(2) of the Act.

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(2) of the Act when: (1) the individual was convicted of a criminal offense; (2) the conviction was related to the neglect or abuse of patients; and, (3) the patient neglect or abuse occurred in connection with the delivery of a health care item or service.

a. Petitioner was convicted of a criminal offense.

Petitioner does not dispute that she was convicted of a criminal offense. P. Brief § I. The evidence before me shows that following a bench trial in the 22nd Judicial District of the State of Michigan, Petitioner was found guilty of a misdemeanor offense of Failure to Report Abuse or Mistreatment, in violation of Mich. Comp. Laws § 333.21771(2). I.G. Ex. 2. The court found Petitioner guilty of the offense and sentenced her to 12 months probation, and ordered her to pay a fine of \$1500 and court fees of \$95. I.G. Ex. 2.

These facts satisfy the definition of “conviction” under section 1128(i)(1) and (2) of the Act.

b. Petitioner’s conviction was related to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner argues that her misdemeanor conviction was a “reporting and technical violation” of a Michigan statute and that there was no connection to the delivery of a health care item or service that resulted in the abuse or neglect of a patient. P. Brief § II, ¶ 1.

Petitioner provides the statement of the facts underlying her conviction. On August 5, 2001, an inebriated employee tipped a resident out of a wheelchair causing some facial injuries to the resident but without any significant change in the resident’s condition. Petitioner was the director of nursing for the facility and she conducted an immediate investigation, prepared a complete and thorough report, and terminated the employee for misconduct. She concluded however that the misconduct was not abuse, neglect, or misappropriation and did not involve injuries of unknown source. The report of investigation that she prepared was kept on file by the facility, but she did not notify the state agency about the incident, having concluded it was not abuse. P. Brief § II, ¶ 2; Request for Hearing; P. Ex. 1.

Petitioner submitted exhibits in support of her arguments. P. Ex. 6 is a letter from Chief Judge Sylvia A. James, who presided over Petitioner’s August 27, 2007 bench trial, in which she states Petitioner had no malicious intent, but her failure to report was based upon a mistake in her interpretation of the applicable law. P. Ex. 7 is a copy of a Michigan Court of Appeals decision issued August 5, 2008 in the case of another defendant who was also charged with violating Mich. Comp. Laws § 333.21771(2). P. Ex. 8 is a Program Clarification Letter from the Michigan Bureau of Health Systems dated May 14, 2001, that states that “[n]either state nor federal laws require the reporting of suspected-only abuse, neglect, misappropriation of resident property or injuries of unknown source to” the state agency. P. Ex. 8, at 3. P. Ex. 9 is a copy of the recommendation of the Board of Nursing, Disciplinary Subcommittee to dismiss a complaint against Petitioner on grounds that Petitioner investigated the incident, did not substantiate abuse, took appropriate steps to prevent incidents, and reasonably believed that she did not have to report alleged abuse; and a July 24, 2008 order dismissing the

complaint. I.G. Ex. 3 is the May 21, 2008 recommendation of the Board of Nursing, Disciplinary Subcommittee to dismiss a complaint against Petitioner on grounds that she reasonably believed that she did not have to report the alleged abuse; and a June 25, 2008 order dismissing the complaint.

Petitioner does not deny that she was convicted of violation of Mich. Comp. Laws § 333.21771(2) for failure to report the incident described above to the state agency. P. Brief §§ I, II, ¶¶ 1 and 2. Rather, the gist of Petitioner's argument is that her failure to report the incident should not have been prosecuted because she did an immediate investigation and concluded that no abuse or neglect occurred, and her failure to report the incident was based upon her erroneous but good faith interpretation of the Michigan law that reporting was not required. The Michigan Court of Appeals decision, the Program Clarification Letter from the Michigan Bureau of Health Systems dated May 14, 2001, and the two Board of Nursing Disciplinary Subcommittee recommendations and decisions certainly support Petitioner's argument that the Michigan law on reporting was the subject of confusing interpretation and application. P. Exs. 7-9, I.G. Ex. 3.

The difficulty for Petitioner in this proceeding is that the regulation is clear that she may not obtain review of the basis for her conviction or collaterally attack her state conviction before me. 42 C.F.R. § 1001.2007(d). More plainly stated, because Petitioner had a state trial where the facts were determined and a judgment of conviction entered, she is prohibited from obtaining review of the basis for the conviction in this proceeding. Further, I have no jurisdiction or authority to review the basis for her conviction.⁴

Congress requires that Petitioner be excluded if she was convicted of an offense "relating to neglect or abuse of patients" if the neglect or abuse was "in connection with the delivery of a health care item or service." Act § 1128(a)(2). The Michigan statute that Petitioner was convicted of violating prohibits a "licensee, nursing home administrator, or employee of a nursing home" from physically, mentally, or emotionally abusing, mistreating, or harmfully neglecting a patient. Mich. Comp. Laws § 333.21771(1). The statute further requires that a nursing director who becomes aware of an act prohibited by the section must immediately report the matter by telephone to the state agency. Mich. Comp. Laws § 333.21771(2). Petitioner was convicted of violating the mandatory reporting requirement of the Michigan statute that prohibits abuse, mistreatment, or neglect of a nursing home resident. Thus, her conviction was clearly related to the neglect or abuse of patients under Michigan law and this element of section 1128(a)(2) of

⁴ It is not clear from Petitioner's written submissions whether she appealed her criminal conviction. If Petitioner did appeal and if her conviction is subsequently overturned, the I.G. should be contacted for reinstatement pursuant to 42 C.F.R. § 1001.3005(a)(1).

the Act is satisfied. The undisputed facts are that Petitioner was the director of nursing of the facility where the incident occurred and an employee of the facility tipped a resident out of his or her wheelchair causing injury. It is reasonable to infer that the resident was receiving a health care service at the facility when the incident occurred. Accordingly, I conclude that the incident was also related to the delivery of a health care service. The elements of section 1128(a)(2) are satisfied and the I.G. and I have no discretion not to exclude Petitioner.⁵ See *American Healthcare Management*, DAB CR1278 (2005); *Charles Kaiser, a/k/a Charles Benjamin Kaiser, III*, DAB CR1209 (2004).

2. Exclusion for five years is not unreasonable as a matter of law.

The I.G. was required to impose the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all federal health care programs. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act, effective November 20, 2008.

/s/
Keith W. Sickendick
Administrative Law Judge

⁵ Petitioner comments that the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank (HIPDB) contain inaccurate information about her. P. Brief § IV, ¶ 1; P. Ex. 10, at 2. I have no authority to oversee the information NPDB and HIPDB post on their website. The dispute process for the NPDB and HIPDB is described at: www.npdb-hipdb.hrsa.gov/faq-DisputeProcess_SecretarialReview.html.