

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sharon Brown,
(O.I. File No. H-16-40332-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-486

Decision No. CR4717

Date: September 30, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Sharon Brown, from participating in Medicare, State Medicaid, and other federally funded health care programs for a period of at least five years.

I. Background

The I.G. excluded Petitioner because he concluded that she had been convicted of a criminal offense as described at section 1128(a)(2) of the Social Security Act (Act). Petitioner requested a hearing in order to challenge the I.G.'s determination. The I.G. filed a brief and a reply brief in support of his determination. Petitioner filed a brief in opposition. The I.G. submitted eight proposed exhibits that are identified as I.G. Ex. 1-I.G. Ex. 8. Petitioner submitted seven proposed exhibits that are identified as P. Ex. 1-P. Ex. 7. I receive the parties' exhibits into the record.

Prior to filing her brief Petitioner moved that she be allowed to take the depositions of two individuals as discovery. I deny that motion. Discovery in cases involving the I.G.

is governed by 42 C.F.R. § 1005.7. The regulation allows only for limited inspection and copying of documents. Depositions are not permitted pursuant to that regulation and, consequently, I have no authority to order that they be conducted.

Petitioner also asserts that there is a need for an in-person hearing in this case. She contends, essentially, that there are numerous errors and omissions in a State report that underlies the criminal charges that were filed against her and that testimony is necessary to elicit and explain those alleged errors and omissions. As I discuss in more detail, below, Petitioner is essentially attacking the process that led to her conviction of an excludable offense. She also seems to be arguing that she is in fact innocent of the charges to which she entered a guilty plea. These collateral attacks on her conviction comprise no legally sufficient defense to the I.G.'s determination to exclude Petitioner. 42 C.F.R. § 1001.2007(d). I find no basis to convene an in-person hearing for that reason.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether the I.G. is required by law to exclude Petitioner for a period of at least five years.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(2) of the Act mandates the exclusion of any individual who is convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service. Any exclusion imposed pursuant to this section must be for a period of at least five years. Act § 1128(c)(3)(B).

The Act does not permit exceptions. Section 1128(a)(2) does not distinguish between convictions for felonies or for lesser offenses. Nor does the Act state that actual harm or injury to a patient is a necessary element of an excludable offense. An individual who is convicted of criminal neglect of a patient must be excluded without regard to whether or not harm resulted from the neglect.

The I.G.'s duty to exclude pursuant to section 1128(a)(2) derives from a *conviction* of the crime of patient neglect or abuse. If an individual is convicted of such an offense he or she must be excluded. The actual conduct leading to the conviction is not a determinative element of the I.G.'s duty to exclude. The I.G. must exclude based on the conviction without re-adjudicating the conduct leading to the conviction. For that reason, an excluded individual may not collaterally attack his or her conviction on the grounds that

the conviction is invalid due to reversible errors in the process leading to the conviction or that he or she is not really guilty of the crime of which he or she was convicted. The governing principle is stated explicitly at 42 C.F.R. § 1001.2007(d).

The evidence in this case establishes unequivocally that Petitioner was convicted of a criminal offense as is defined by section 1128(a)(2). That is sufficient to prove that the I.G. must exclude Petitioner for at least five years.

The evidence shows that Petitioner pled guilty to specific charges of neglect of patients who had been placed under her care as a nursing supervisor. On February 27, 2015, a Florida State court filed a revised order of disposition that recited that Petitioner pled guilty to ten counts of “culpable negligence,” a criminal offense under Florida law. I.G. Ex. 8. This disposition of Petitioner’s case was the ultimate result of allegations that Petitioner, while working as a director of nursing at a skilled nursing facility, along with others, had willfully or by culpable negligence neglected the care of patients by failing to provide them with the care, supervision, and services necessary to maintain their physical and mental health. I.G. Ex. 3; I.G. Ex. 4.

Petitioner raises several arguments in opposition to the I.G.’s determination. I find these to be without merit.

Principally, Petitioner attacks the process that led to her conviction. She argues that the report that underlies her conviction is rife with errors. She contends that if she pled guilty to anything, it was to a crime that “did not exist.” Petitioner’s informal brief at 1. She asserts that she is innocent of any crime and that she entered into a plea agreement only because she feared that her status as a lawful immigrant to the United States would be jeopardized if she did not. *Id.* at 2. She asserts, additionally, that there is no evidence in this case that any act or omission that she committed caused any patient to suffer any harm. *Id.*

As I have discussed, an excluded individual may not in this forum collaterally attack the conviction that is the basis for his or her exclusion. Petitioner seems to be arguing either that she was wrongfully convicted or that the conviction is illusory because she is not really guilty of a crime. Both of those assertions are irrelevant for the reasons that I have stated. All that matters for purposes of evaluating Petitioner’s exclusion is whether she was convicted of a section 1128(a)(2) offense. That clearly is the case.

Petitioner also seems to contend that the offenses to which she entered her guilty plea have no relationship to the original charges that were filed against her. Petitioner originally was charged with felonies. These charges were dismissed, evidently as part of a plea agreement, and Petitioner subsequently pled guilty to lesser offenses. Some clerical errors were made in the process of dismissing the original charges against Petitioner and accepting her plea to lesser charges. But, none of that derogates from the

fact that Petitioner ultimately pled guilty to criminal charges of culpable negligence that derived from allegations that she had neglected the care of patients in the course of performing her duties as a supervising nurse. I.G. Ex. 5.

Moreover, and for the reasons that I have discussed previously, whether or not Petitioner's crimes caused patients to suffer actual harm is not relevant. The conviction in this case was for "culpable negligence" of patients in the course of the delivery of health care services to those patients. These are precisely the crimes for which section 1128(a)(2) mandates exclusion regardless of whether the crimes caused actual harm.

_____/s/_____
Steven T. Kessel
Administrative Law Judge