

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
Michelle Burnette, R.N.,)	DATE: September 23, 1997
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-253
)	Decision No. CR496
The Inspector General.)	
_____)	

DECISION

By letter dated February 25, 1997, the Inspector General (I.G.), United States Department of Health and Human Services (HHS), notified Michelle Burnette, R.N. (Petitioner), that she would be excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.¹ The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had 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.

Petitioner filed a request for review of the I.G.'s action. I convened a prehearing conference on May 20, 1997. During the conference, the parties agreed that the case could be heard and decided based on a written record. The I.G. submitted a brief accompanied by five proposed exhibits. (I.G. Ex. 1 - 5). Petitioner submitted a response brief. The I.G. submitted a reply brief. Petitioner did not object to the five exhibits submitted by the I.G. and I receive into evidence I.G. Ex. 1 - 5.

¹ Unless the context indicates otherwise, I use the term "Medicaid" to refer to all State health care programs from which Petitioner was excluded.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

APPLICABLE LAW

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has 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 to be excluded from participation in the Medicare and Medicaid programs for a period of at least five years.

PETITIONER'S ARGUMENT

Petitioner contends that her plea of no contest cannot be used as a basis to exclude her from program participation. She also maintains that exclusion under section 1128(a)(2) of the Act contemplates conviction of serious felonies, not simple assault (a misdemeanor) of the sort committed by Petitioner. Finally she asserts that by excluding her from program participation for a greater period than that imposed by the State Board of Nursing, the I.G. is inflicting cruel and unusual punishment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Petitioner was a registered nurse who was employed at Hosmer Senior Citizens' Home. I.G.'s Proposed Findings of Fact #1; Petitioner's Response Brief at 2; I.G. Ex. 1.
2. Petitioner's duties as a nurse at the Hosmer Senior Citizens' Home included providing care to patients at that facility. I.G.'s Proposed Findings of Fact #2; Petitioner's Response Brief at 2; I.G. Ex. 1.
3. In a proceeding before the South Dakota Board of Nursing on July 18, 1996, Petitioner stipulated that during the course of her employment as a registered nurse at Colonial Manor and Hosmer Senior Citizens' Home during the period from February 18, 1996 through June 17, 1996, she allegedly was involved in two incidents in which she engaged in abusive conduct against persons entrusted to her care. I.G. Ex. 1.
4. Petitioner waived her right to a hearing on the charges of abuse and agreed to enter into a Stipulation and Order which placed her nursing license on a probationary status for two years. The South Dakota

Board of Nursing approved the Stipulation and Order.
I.G. Ex. 1.

5. On or about September 23, 1996, a criminal Information was filed in the Fifth Judicial Circuit Court, Edmunds County, South Dakota. Count I of the Information charged Petitioner with the felony offense of abuse of a disabled adult. Count II charged Petitioner with the misdemeanor offense of simple assault, alleging that on June 17, 1996, Petitioner intentionally caused bodily injury to Reuben Holwager, a nursing home patient, which did not result in serious bodily injury. I.G. Ex. 2, 3; I.G. Proposed Findings of Fact #5 - 7; Petitioner's Response Brief at 2.

6. On November 5, 1996, Petitioner entered into a plea of no contest to the charge of simple assault, Count II of the criminal Information. I.G. Ex. 3.

7. The Fifth Judicial Circuit Court accepted Petitioner's no contest plea. Based on this acceptance, the court entered a judgment of conviction against Petitioner on the charge of simple assault, Count II of the criminal Information. I.G. Ex. 3.

8. Petitioner was sentenced to serve fifteen days in jail. The sentence was suspended on the condition that Petitioner pay court costs in the amount of \$26.50 and transcript fees in the amount of \$94.50; and that Petitioner comply with the terms of the South Dakota Board of Nursing Stipulation and Order which the court incorporated into the Judgment of Conviction. I.G. Ex. 3; I.G. Proposed Findings of Fact #10; Petitioner's Response Brief at 2.

9. Petitioner's plea of no contest, and the court's acceptance of that plea, constitutes a conviction within the meaning of section 1128(i)(3) of the Act.

10. The court's entry of judgment against Petitioner constitutes a conviction within the meaning of section 1128(i)(1) of the Act.

11. 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.

12. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act.

13. Pursuant to section 1128(a)(2) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid programs.

14. The minimum mandatory period for exclusions pursuant to section 1128(a)(2) of the Act is five years.

15. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

16. Neither the I.G. nor the administrative law judge (ALJ) has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

DISCUSSION

To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove that: (1) the individual charged has been convicted of a criminal offense; (2) the conviction is related to the neglect or abuse of patients; and (3) the patient neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. has the authority to exclude Petitioner under section 1128(a)(2) of the Act is that Petitioner must have been convicted of a criminal offense. Section 1128(i) of the Act defines when a person has been convicted for purposes of an exclusion. I find that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(i)(1) and (3) of the Act.²

In this case, Petitioner admits that she pled no contest to the charge of simple assault, but she argues that the I.G. lacks authority to exclude her because this type of plea does not constitute a "conviction" within the meaning of the Act. I disagree.

² For Petitioner to be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, it is only necessary to find that one of the four subsections of section 1128(i) has been satisfied. Here, however, I found that Petitioner's conviction fell within two subsections.

Section 1128(i)(3) of the Act expressly provides that when a person enters a plea of nolo contendere to a criminal charge and the court accepts such plea, the individual will be regarded as having been "convicted" within the meaning of the mandatory exclusion provisions of the Act. The undisputed evidence of record establishes that Petitioner pled no contest to the charge of simple assault and that the court entered a judgment of conviction against Petitioner based on her plea. The record shows that Petitioner pled no contest in order to dispose of the criminal charge against her, and that the court disposed of the case based on its receipt of Petitioner's plea. This transaction amounts to "acceptance" of a plea within the meaning of section 1128(i)(3) of the Act, and Petitioner was therefore "convicted" of a criminal offense within the meaning of that provision. Carlos E. Zamora, M.D., DAB CR22 (1989), aff'd DAB No. 1104 (1989); Anthony Tommasiello, DAB CR282 (1993).

In addition, section 1128(i)(1) of the Act provides that an individual is "convicted" of a criminal offense "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court." The undisputed evidence shows that a judgment of conviction was entered against Petitioner by the court, and this establishes that Petitioner was convicted of a criminal offense pursuant to section 1128(i)(1) of the Act.

I conclude also that the offense of which Petitioner was convicted related to the abuse of a patient within the scope of section 1128(a)(2) of the Act.

A conviction need not be for an offense called patient abuse or patient neglect; it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In that case, the petitioner was a nurse's aide who pled nolo contendere to a charge of battery. The petitioner allegedly struck a nursing home patient with an electrical cord. The ALJ held that it was sufficient that a party is convicted of an offense based on charges of abusive conduct, even if the crime of which that party is convicted is not specifically labeled "abuse."

In this case, Petitioner pled no contest to the charge of simple assault. The Information to which she pled no contest alleged that she intentionally caused bodily injury to another in an incident which occurred on June 17, 1996. In addition, the judgment of conviction incorporated the Stipulation and Order of the South Dakota Board of Nursing. That document states that in

the course of her employment as a registered nurse, Petitioner allegedly engaged in abusive conduct against a person entrusted to her care in an incident which occurred on June 17, 1996. Given that the judgment of conviction incorporated the Stipulation and Order of the South Dakota Board of Nursing and that both documents refer to an incident which occurred on June 17, 1996, I conclude that the criminal charge to which Petitioner pled no contest emanated from the alleged June 17, 1996 incident described by the Stipulation and Order of the South Dakota Board of Nursing. Moreover, Petitioner does not contest assertions made by the I.G. in her brief that the criminal charge to which Petitioner pled no contest emanated from allegations of abusive conduct against a nursing home patient.

Although the term "abuse" is not defined within the Act, the term "abuse" is intended to include those situations where a party wilfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). In the present case, Petitioner was convicted of simple assault for intentionally causing bodily injury to another person. A physical assault against an individual clearly falls within the common and ordinary meaning of the term "abuse." _____ Self, supra.

I also find that Petitioner's abuse of a patient occurred in connection with the delivery of a health care item or service. It is undisputed that Petitioner was a nurse, and that her duties as a nurse directly involve patient care and the delivery of health care services. In addition, the undisputed material facts establish that the alleged incident underlying Petitioner's no contest plea occurred in the course of Petitioner's employment duties, and that it involved an individual entrusted to her care. Based on these undisputed facts, I conclude that Petitioner was convicted of a criminal offense which occurred in connection with the delivery of a health care item or service.

Petitioner contends that the I.G. has no authority to exclude her because she was convicted only of a misdemeanor offense. I find that the fact that Petitioner was convicted of a misdemeanor crime does not negate the imposition of an exclusion pursuant to section 1128(a)(2). Congress intended that the exclusion authority set forth in section 1128(a) would apply to all convictions, regardless of class or type. Congress recognized no distinctions between felonies and misdemeanors. Patricia McClendon, DAB CR264 (1993); Joel A. Baringer, R.Ph., DAB CR397 at 4 (1995).

Petitioner points out that the South Dakota Board of Nursing placed her license to practice nursing on a probationary status for a period of two years. She asserts that by excluding her for five years, the I.G. has effectively removed her from nursing for a period of five years. She argues that by imposing an exclusion which is three years longer than the sanction imposed by the State Board of Nursing, the I.G. has inflicted cruel and unusual punishment on her in violation of her constitutional rights.

Petitioner's argument is without merit. It is well-settled that the primary purpose of an exclusion is remedial rather than punitive. The purpose of a mandatory exclusion is to protect the integrity of the Medicare and Medicaid programs, program beneficiaries and recipients, and the public from persons who have been shown to be guilty of program-related or patient-related crimes. Joel A. Baringer, R.Ph., DAB CR397 (1995). Moreover, I have no authority to rule on the constitutionality of Petitioner's exclusion. Id. See 42 C.F.R. § 1005.4.

A five-year exclusion under section 1128(a)(2) of the Act is mandatory when a petitioner has been convicted of a criminal offense relating to the abuse or neglect of patients in connection with the delivery of a health care item or service. In this case, Petitioner has been convicted of such an offense. Therefore the I.G. is required to exclude Petitioner for at least five years. Neither the I.G. nor the ALJ is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, aff'd DAB No. 1078 (1989), aff'd sub nom, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because she was convicted of a criminal offense relating to the abuse of a patient in connection with the delivery of a health care item or service. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge