

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Jean Gaddy Johnson,	)	Date: August 9, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-275
	)	Decision No. CR1635
The Inspector General.	)	
_____	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Jean Gaddy Johnson, from participating in Medicare and other federally-funded health care programs for a period of five years. The exclusion in this case is mandated under section 1128(a)(2) of the Social Security Act (Act) by Petitioner's conviction of a criminal offense relating to patient abuse in connection with the delivery of a health care item or service.

**I. Background**

On December 29, 2006, the I.G. notified Petitioner that he was excluding her for five years pursuant to section 1128(a)(2) of the Act. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference by telephone at which I identified the issues in the case. I directed the parties to submit briefs and proposed exhibits addressing these issues and I gave the I.G. a reply brief opportunity. I also provided each party with the opportunity to request to present testimony in person. The I.G. and Petitioner then each submitted briefs and proposed exhibits. Neither party requested that I receive testimony in person, nor did either party object to my receiving any of the proposed exhibits. The I.G. filed 13 proposed exhibits which it identified as I.G. Ex. 1 - I.G. Ex. 13. Petitioner submitted a single exhibit which she identified as P. Ex. 1. I receive I.G. Ex. 1 - I.G. Ex. 13 and P. Ex. 1 into evidence.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issues**

The issues are whether:

1. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act; and
2. The five year exclusion imposed by the I.G. is reasonable as a matter of law.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

#### ***1. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.***

The prerequisite elements for a mandatory exclusion under section 1128(a)(2) are that: an individual must be: (1) convicted of a criminal offense; (2) relating to patient neglect or abuse in connection with the delivery of a health care item or service. The evidence in this case unequivocally establishes the presence of both elements. Consequently, the I.G. must exclude Petitioner.

First, Petitioner was convicted of a criminal offense. On August 23, 2006, Petitioner pled no contest to two misdemeanor charges of disturbing the peace, in violation of the California penal code. I.G. Ex. 8, at 2. As a consequence Petitioner was sentenced to 24 months' probation and was ordered to attend an anger management class. I.G. Ex. 9; I.G. Ex. 10.

Second, the evidence establishes that Petitioner's conviction was of a criminal offense relating to patient neglect or abuse in connection with the delivery of a health care item or service. Petitioner worked as a certified nursing assistant (CNA) at a nursing facility in California. On June 27, 2006 she was charged in a criminal complaint with a single count of the crime of elder and dependent adult abuse. I.G. Ex. 7. The factual premise of this complaint consisted of allegations that Petitioner, in the course of performing her CNA duties, shoved the wheelchair of an elderly, dependent resident, causing the wheelchair, with the resident seated in it, to roll freely for a distance, and then yelled and directed profane language at the resident. I.G. Ex. 2; I.G. Ex. 3; I.G. Ex. 4; I.G. Ex. 5; I.G. Ex. 6, at 2 - 3.

The criminal charge against Petitioner was subsequently modified to two counts of disturbing the peace, thereby eliminating explicit charges that Petitioner physically abused the resident. I. G. Ex. 8, at 2. Petitioner pleaded no contest to these modified charges and not the original complaint. However, the modified charges clearly are based on allegations that Petitioner abused a resident while performing her duties as a CNA. The disturbing the peace charges would be based on abuse allegations even if they rested only on allegations that Petitioner yelled at and directed profanity towards the resident. Verbal abuse is “abuse” under section 1128(a)(2) as is physical abuse.<sup>1</sup> Thus, Petitioner’s conviction of disturbing the peace constitutes a criminal conviction pursuant to section 1128(a)(2) for which exclusion is mandatory.

Petitioner makes three arguments to support her contention that no basis exists in this case for an exclusion. First, she contends that her conviction is in no sense connected with abuse. In effect, Petitioner asserts that her conviction was simply a way of disposing of the charges against her, but does not have as its basis the charge of abuse. This argument is belied by the undisputed record of Petitioner’s conviction. It is evident from that record that the two counts of disturbing the peace to which Petitioner entered her no contest plea related to allegations of at least verbal abuse of a resident by Petitioner while she was performing her CNA duties.

Second, Petitioner asserts that her agreement to plead no contest is in no sense an admission by her that she is guilty of the underlying allegations of abuse. But, it is clear as a matter of law that Petitioner’s no contest plea is a “conviction” for purposes of section 1128(a)(2) as much as would be a guilty verdict after a trial. Section 1128(i) of the Act explicitly defines as a conviction circumstances where a person pleads nolo contendere (no contest) to a criminal charge without expressly admitting his or her guilt to the charge. Act, section 1128(i)(3). And, such a conviction is a conviction for purposes of the Act even where it is subsequently expunged. *Id.*, section 1128(i)(1).

Finally, Petitioner argues at length that she is not, in fact, guilty of the charges to which she pled no contest. She contends, among other things, that allegations by various witnesses are false or inaccurate. I find this argument to be without merit because the Act makes it explicit that the I.G.’s duty to exclude an individual convicted of a crime falling within section 1128(a)(2) derives from that individual’s conviction. Because the

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<sup>1</sup> There is nothing in the record of this case to suggest that there was some other conduct outside of that abuse that formed the basis for the modified criminal charges to which Petitioner pleaded no contest. Therefore, the only allegations on which the disturbing the peace charges could have been based were allegations of Petitioner’s abusive conduct.

exclusion derives from the conviction, an individual may not challenge his or her exclusion by arguing that he or she is not really guilty of the crime of which he or she was convicted.<sup>2</sup>

***2. The length of Petitioner's exclusion is, in this case, mandated by law.***

The minimum period for an exclusion mandated by section 1128(a)(2) of the Act is five years. Act, section 1128(c)(3)(B). Petitioner's five year exclusion is for the statutory minimum period and is, therefore, reasonable.

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/s/  
Steven T. Kessel  
Administrative Law Judge

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<sup>2</sup> There would be no basis for an exclusion if a conviction is reversed on appeal. However, if a person wishes to challenge the basis for his or her conviction he or she must do so through the appropriate State or federal appeals process.