**Department of Health and Human Services**
**DEPARTMENTAL APPEALS BOARD**
**Civil Remedies Division**

Marie J. Jeanty
(OI File No. H-16-41849-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-389

Decision No. CR4970

Date: November 16, 2017

# DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Marie Jeanty, for five years from participating in Medicare, Medicaid, and all other federal health care programs. The IG based his exclusion on Petitioner's conviction of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). Petitioner requested a hearing to dispute the exclusion, arguing she was not convicted of a felony or alternatively, that her conviction was not related to the abuse of a patient. For the reasons discussed below, however, I affirm the IG's determination to exclude Petitioner for a period of five years.

## I. Procedural History

In a December 30, 2016 letter, the IG notified Petitioner he was excluding her for a period of five years from participation in Medicare, Medicaid, and all other federal health care programs under 42 U.S.C. § 1320a-7(a)(2). The IG advised Petitioner that the exclusion was based on her conviction, in the Criminal Court of New York City, Queens

County of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. IG Exhibit (Ex.) 1.[1]

Petitioner timely requested a hearing to dispute her exclusion. The case was docketed and assigned to Administrative Law Judge Scott Anderson for hearing and decision. On March 2, 2017, he issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order). On May 17, 2017, Judge Anderson held a pre-hearing conference by telephone. He subsequently issued an Order summarizing the pre-hearing conference. On June 27, 2017, this case was transferred to me.

Consistent with Judge Anderson's scheduling order, the IG's counsel submitted a brief (IG Br.) and three proposed exhibits. On August 22, 2017, Joseph Carbonaro entered his appearance on behalf of Petitioner, and subsequently submitted a brief (P. Br.).[2] The IG filed a reply brief on September 20, 2017 (IG Reply).

## II. Admission of Exhibits and Decision on the Record

In the absence of an objection from Petitioner, I admit I.G. Exs. 1 through 3.

Because neither party has offered witness testimony, an in-person hearing is unnecessary and I issue this decision on the basis of the record provided.

## III. Issue

Whether the IG had a basis to exclude Petitioner for five years under 42 U.S.C. § 1320a-7(a)(2). *See* 42 C.F.R. § 1001.2007(a)(1).

## IV. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the Secretary of Health and Human Services (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the IG to participate in a hearing are specified by 42 C.F.R. § 1005.3. The parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. *See* 42 C.F.R. § 1005.6(b)(5).

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[1] Document 9b in the official case file maintained in the DAB E-file system; for clarity and simplicity, I will cite to the exhibits attached to the parties' respective briefs by the exhibit numbers therein, not the document numbers assigned by DAB.

[2] While Mr. Carbonaro has been electronically filing documents on behalf of Petitioner since the inception of this case, he did not participate in the pre-hearing conference or otherwise act in a representative capacity prior to the entry of his appearance.

The Secretary must exclude from participation in federal health care programs "…[a]ny individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(a)(2).[3]

Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld. The statute does not distinguish between misdemeanor and felony convictions. There may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(d).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. The exclusion is effective twenty days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b). The period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). Mitigating factors are considered as a basis for reducing the period of exclusion only if aggravating factors justify an exclusion of longer than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors; the IG bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

## V. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold and followed by pertinent findings of fact and analysis.

### A. Petitioner's request for hearing was timely and I have jurisdiction.

There is no dispute that Petitioner timely requested a hearing. I therefore have jurisdiction to hear and decide this case. *See* 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

[3] The Secretary has promulgated regulations implementing these provisions of the Act at 42 C.F.R. § 1001.101(a).

### B. 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 mandated by section 1128(a)(2) of the Act where an individual has been convicted of a criminal offense relating to the neglect or abuse of patient in connection with delivery of health care items or services. 42 U.S.C. § 1320a-7(a)(2); 42 C.F.R. § 1001.101(b). The IG has established these elements by a preponderance of the evidence.

#### *1. Petitioner was convicted of a criminal offense under federal or state law.*

As Petitioner concedes in her opening brief, the pertinent facts are not in dispute. P. Br. at 1. Petitioner worked as a certified nurse aide at the West Lawrence Care Center in Queens county, New York. In April 2015, New York's Attorney General filed a complaint against Petitioner in the Queens County criminal court for New York City alleging she committed felony and misdemeanor offenses that took place on or about August 15, 2014.[4] IG Ex. 2 at 1. Petitioner subsequently pled guilty to one count of disorderly conduct on October 15, 2015. IG Ex. 3.

The primary dispute between the parties is legal, not factual. Petitioner first contends she was not convicted of a criminal offense because New York classifies the offense of disorderly conduct as a "non-criminal violation." P. Br. at 2, *citing* NY Penal Law § 55.10(3).[5] The IG argues that New York's categorization of its criminal offenses does not supersede the meaning of that term within the Act, and that federal law controls the meaning of the term 'criminal offense.' IG Br. at 4.

The IG is correct. Federal law controls the determination of a criminal offense within the meaning of the Act, and is not subject to the vagaries of fifty states' worth of penal codes. In defining a conviction for a criminal offense for the purposes of exclusion, Congress did not distinguish between grades or categories of criminal offense, but instead only required a judgment of conviction, a finding of guilt, an entry of a guilty plea or nolo contendere, or participation in an arrangement that results in withholding of judgment of conviction. 42 U.S.C. § 1320a-7(i); *see also Carolyn Westin,* DAB No. 1381 (Jan. 1993)

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[4] Assault in the Second Degree, Endangering the Welfare of a Vulnerable Elderly Person or an Incompetent or Physically Disabled Person in the Second Degree, Endangering the Welfare of an Incompetent or Physically Disabled Person in the First Degree, and Willful Violation of Health Laws.

[5] Petitioner does not fully articulate the distinction, but New York's penal code categorizes offenses into four categories: felonies, misdemeanors, violations, and traffic infractions. Violations include offenses that are punishable by fine or up to fifteen days of imprisonment. NY Penal Law § 55.10(3)(a). Petitioner also mischaracterizes violations, which are not described in the New York penal code as "non-criminal."

¶ 1 (discussing Congressional intent to broadly define convictions for purposes of exclusion).

Petitioner argues that the violation to which she pled guilty was not a criminal offense but instead a "non-criminal violation." P. Br. at 2, 3. Accepting this argument would require me to ignore the following: (1) that offenses described as violations are housed in New York's penal code; (2) that offenses described as violations are subject to the imposition of imprisonment as a possible sentence; (3) that Petitioner appeared in the "Criminal Court of the City of New York" upon the filing of a criminal complaint sworn out by a member of law enforcement; and (4) that she subsequently "Pled Guilty," was convicted by the "Queens Criminal Court," and subject to a year of conditional discharge. *See* IG Ex. 3.

It is difficult to imagine a scenario where an individual, charged via criminal complaint in a criminal court and subject to a conviction from that court upon pleading guilty, would later claim he or she had committed a "non-criminal violation." It is similarly difficult to imagine Congress did not intend to include exactly this sort of proceeding and outcome as a trigger for exclusion. Petitioner herself has difficulty describing the disposition of her case without using terms of art that are unique to criminal cases. P. Br. at 3 ("Nothing about the *plea* or *sentence* smacks of a criminal sanction….") (emphasis added).

Other petitioners have attempted to argue in this forum that a conviction for a "violation" under New York law is not a criminal offense; this argument has been roundly rejected. *See Tara Lyn Justin*, DAB CR4689 (Aug. 2016) at 3 (finding a conviction in New York for disorderly conduct constituted a criminal offense and that New York views violations as criminal in nature); *Natalie Galbo, R.N.*, DAB CR4347 (Oct. 2015) (two disorderly conduct convictions in New York constituted criminal offenses); *Eleanor D'Angelo, L.P.N.*, DAB CR748 (Mar. 2001) (finding conviction for violation housed under New York Public Health Law a criminal offense conviction, in part because the offense was punishable by imprisonment or fine); *Carmencita Alhabsi,* DAB CR555 (Nov. 1998) at 5 (finding a conviction in New York for disorderly conduct constitutes a criminal offense within the meaning of the Act).

In short, Petitioner has no reasonable basis to assert the offense to which she pled guilty was not criminal in nature. I find Petitioner was convicted of a criminal offense within the meaning of the Act.

***2. Petitioner's conviction related to abuse of a patient in connection with the delivery of a health care item or service.***

Petitioner argues that "strictly speaking," her conviction was not related to patient abuse or neglect, because she did not make an admission of guilt to any allegation of abuse or neglect when she pled to a lower charge of disorderly conduct. P. Br. at 4.

Petitioner's argument is unpersuasive. I am not bound to the four corners of her conviction in making this determination. The conviction that provides the basis for exclusion does not need to be couched in terms of patient abuse or neglect; instead, I must look beyond the charge to the facts underlying Petitioner's conviction to determine whether her offense is related to patient abuse or neglect. *See Bruce Lindberg, D.C.*, DAB 1280 (Nov. 1991) at § 1 ("…even if there is nothing on the face of the counts of which Petitioner was convicted or in related court documents which establishes that section 1128(a)(2) applies, other evidence is certainly admissible to establish this."); *see also Alhabsi* at 6, *citing Patricia Self,* DAB CR198 (May 1992) at 7.

Petitioner asserts her conviction for disorderly conduct is "wholly unrelated to abuse or neglect," but at the same time concedes "the original allegations in the Criminal Court complaint are related to abuse and/or neglect…" P. Br. at 4-5. Petitioner's attempt to isolate her conviction from the alleged conduct that resulted in that conviction is overly formalistic. Her disorderly conduct charge and subsequent plea and conviction did not occur in a vacuum; instead, they represent the terminal actions taken by the state of New York and herself to dispose of her case, which originated in the criminal complaint filed against her.

That complaint very clearly lays out allegations which show Petitioner's conviction is at least related to abuse or neglect of a patient. Specifically, the Special Investigator who swore out the complaint relied on the testimony of a nursing supervisor at the facility where Petitioner worked. The nurse supervisor reported that Petitioner had attempted to change the clothing and bed linens of an 80-year old patient, and in so doing, hit her in the arm and shoulder with a closed fist, and pushed the patient into the side of a bed rail hard enough to cause a black eye and significant bruising. IG Ex. 2 at 2.

The terms 'abuse' and 'neglect' are not defined by section 1128 of the Act. The Board has observed that where these terms are not defined by statute, they should be given their ordinary meaning within the purpose of the statute. *See Janet Wallace, L.P.N.,* DAB No. 1326 (Apr. 1992) at § III.B.

The IG correctly observes that some judges have applied the definition of 'abuse' found

in the regulations governing standards of compliance for skilled nursing facilities.[6] *See* IG Br. at 6, FN1. The definition found in those regulations for 'abuse' includes an intent requirement which may or may not be consistent with the ordinary meaning of that term, but in any case I find that Petitioner's alleged conduct resulted in harm, pain, or anguish to a patient under her care that meets the ordinary meaning of abuse or neglect. Even applying the regulatory definitions, Petitioner's failure to provide proper services (changing clothes and bed linens) resulted in harm and anguish to her patient that amounts to neglect, and her intent to willfully cause harm and pain to her patient by striking her and causing injury meets the regulatory standard for abuse. Accordingly, her actions constituted abuse or neglect of a patient within the meaning of the Act.

Finally, Petitioner has not contested that her actions took place at a nursing home where she was employed to provide health care services and involved a patient in the context of delivering a health care item or service. As such, I have no difficulty finding Petitioner's conviction was related to abuse or neglect of a patient in the delivery of health care item or service.

***3. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).***

Because I have concluded that a basis exists to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(2), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

## VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for a period of five years, pursuant to 42 U.S.C. § 1320a-7(a)(2).

/s/
Bill Thomas
Administrative Law Judge

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[6] Under those regulations, abuse is "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301. Neglect is "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." *Id.*