

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Patricia Ann Muhammad,  
(OI File No. H-16-42997-9),

Petitioner,

v.

Inspector General,  
U.S. Department of Health and Human Services.

Docket No. C-17-664

Decision No. CR4974

Date: November 22, 2017

**DECISION**

Petitioner, Patricia Ann Muhammad, L.P.N., is excluded from participating 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 March 20, 2017. Petitioner's exclusion, for a minimum period of five years, is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).<sup>1</sup>

---

<sup>1</sup> 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.

## **I. Background**

The Inspector General (I.G.) for the U.S. Department of Health and Human Services notified Petitioner by letter dated February 28, 2017, that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. I.G. Exhibit (Ex.) 1 at 1. The I.G. cited section 1128(a)(2) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her conviction in the Tallahatchie County Justice Court of Mississippi of a criminal offense related to the neglect or abuse of patients, in connection with the delivery of a health care item or service. CMS Ex. 1 at 1.

Petitioner timely requested a hearing on May 5, 2017 (RFH). The case was assigned to me on May 16, 2017. On June 5, 2017, I convened a prehearing conference by telephone, the substance of which is recorded in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence issued the same day. The I.G. filed a motion for summary judgment with a supporting brief (I.G. Br.) and four exhibits marked I.G. Exhibits 1 through 4 on August 3, 2017. Petitioner filed her response in opposition to the I.G.'s motion (P. Resp.) and a separate brief (P. Br.) with no exhibits on September 11, 2017. On October 18, 2017, the I.G. filed a reply brief (I.G. Reply). There have been no objections to my consideration of I.G. Exs. 1 through 4 and all are admitted as evidence.

## **II. Discussion**

### **A. Applicable Law**

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in any federal health care program an individual convicted under federal or state law of a criminal offense related to the neglect or abuse of a patient, in connection with the delivery of a health care item or service. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(b).<sup>2</sup>

---

<sup>2</sup> References are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the I.G. action, unless otherwise indicated.

Pursuant to section 1128(i) of the Act, an individual is “convicted” of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

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

## **B. Issues**

The Secretary has by regulation limited my scope of review to two issues:

Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and

Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(2) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R.

§ 1001.2007(a)(2). The I.G. proposes to exclude Petitioner for five years, the minimum authorized period. Therefore, the length of the proposed exclusion is not at issue in this case.

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

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

#### **1. Petitioner timely filed her request for hearing, and I have jurisdiction.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

#### **2. Summary judgment is appropriate in this case.**

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. § 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12).

Summary judgment is appropriate in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary judgment, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *Foderick*, DAB No. 1125. In opposing a properly-supported motion for summary judgment, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's prima facie case or might establish a defense. *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

There are no genuine issues of material fact in dispute in this case. Petitioner argues that she was not convicted of a criminal offense within the meaning of section 1128(i) of the Act but that issue is an issue of law that must be resolved against her. Petitioner argues that she was not convicted of misdemeanor abuse or neglect of a vulnerable person within

the meaning of section 1128(i) of the Act, because her conviction was by a non-jury trial that was presided over by a non-lawyer judge. She further argues that she is entitled to a trial de novo in the Tallahatchie County Circuit Court, First District of Mississippi. Petitioner argues that her conviction is suspended or superseded pending her trial de novo as she has filed the required appeal bond. P. Br., P. Resp., RFH. Whether or not Petitioner's conviction satisfies the requirements of section 1128(i) of the Act is a question of law which is discussed in detail in the analysis section of this decision. Petitioner has not identified and I conclude that there are no genuine disputes of material fact that require a trial in this case. I conclude that summary judgment is appropriate.

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

#### **a. Facts**

The material facts in this case are undisputed.

On July 19, 2016, Petitioner was charged with a misdemeanor violation of Miss. Code Ann. § 43-47-19(1) and (2)(a) (2013).<sup>3</sup> It was alleged in the affidavit in support of the charge that Petitioner:

---

<sup>3</sup> The state statute provides:

(1) It shall be unlawful for any person to abuse, neglect or exploit any vulnerable person.

(2) (a) Any person who willfully commits an act or willfully omits the performance of any duty, which act or omission contributes to, tends to contribute to, or results in neglect, physical pain, injury, mental anguish, unreasonable confinement or deprivation of services which are necessary to maintain the mental or physical health of a vulnerable person, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed One Thousand Dollars (\$ 1,000.00) or by imprisonment not to exceed one (1) year in the county jail, or by both such fine and imprisonment. Any accepted medical procedure performed in the usual scope of practice shall not be a violation of this subsection.

Miss. Code Ann. § 43-47-19 (2013).

[W]illfully and unlawfully [committed] an act or willfully omit[ted] the performance of a duty, which act or omission contributed to, tended to contribute to, or resulted in the neglect, physical pain, injury, mental anguish, unreasonable confinement, or deprivation of services necessary to maintain the physical health of [redacted], a vulnerable person as defined by *Miss. Code Ann. § 43-47-5(q) (1972, as amended)*, in that [redacted] was then a resident of Tallahatchie Extended Care Facility, a care facility within the meaning of the aforementioned statute, at a time when [Petitioner] was employed by Extended Care Facility as a licensed practical nurse (LPN).

I.G. Ex. 4 at 1 (emphasis in original). It was further alleged in the affidavit that Petitioner was charged with the care and supervision of the resident who was confined to a wheelchair. It was alleged that because the resident was operating his wheelchair recklessly, Petitioner locked the wheelchair so it would not move, the resident fell or slid out of the wheelchair, and Petitioner delayed rendering aid and assistance to the resident, neglecting him and depriving him of services necessary for him to maintain his physical health, in violation of *Miss. Code Ann. § 43-47-5*. On July 25, 2016, a Mississippi Justice Court judge issued a warrant for Petitioner's arrest. I.G. Ex. 3.

On October 19, 2016, the Tallahatchie County Justice Court judge found Petitioner guilty, contrary to her not guilty plea, of abuse and neglect of a vulnerable person, a misdemeanor offense in the State of Mississippi, and ordered Petitioner to pay a fine and court costs of \$716.00. I.G. Ex. 2.

### **b. Analysis**

The I.G. cites section 1128(a)(2) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

(a) MANDATORY EXCLUSION. — The Secretary shall exclude the following individuals and entities from participation in any federal health care program (as defined in section 1128B(f)):

\* \* \*

(2) Conviction relating to patient abuse. — Any 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.

Act § 1128(a)(2). The plain language of section 1128(a)(2) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual or entity: (1) convicted of a criminal offense; (2) where the offense related to neglect or abuse of patients; and (3) where the offense is related to the delivery of a health care item or service.

In this case, the undisputed facts show that Petitioner was convicted of a misdemeanor criminal offense; the Mississippi offense of which Petitioner was convicted involved neglect or abuse of a patient; and the neglect or abuse was in connection with the delivery of a health care item or service. Accordingly, I conclude that the elements of section 1128(a)(2) of the Act are satisfied and there is a basis for exclusion.

Petitioner's argument is that she has not been convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner's theory is that the judgment of conviction is not a basis for exclusion because the conviction was by a Mississippi Justice Court, presided over by a non-attorney judge, and without a jury. Petitioner asserts that because she has appealed her conviction, she is entitled to a trial de novo, and her conviction by the Justice Court is "suspended" or "superseded." P. Resp. at 1-2; P. Br. at 2-3; RFH. Petitioner's argument is without merit. Pursuant to the Mississippi statutes, a justice court is a court of record with all powers incident thereto, including the power to impose a fine and imprisonment for contempt. Miss. Code Ann. § 9-11-15 (2013). Petitioner does not cite any authority to support an argument that the justice court was without authority to convict and sentence her in this case. Further, pursuant to 42 C.F.R. § 1001.2007(d), Petitioner may not collaterally attack her conviction before me and I have no authority to engage in a review of the authority of the court that imposed her conviction.

Furthermore, contrary to Petitioner's assertions that her justice court conviction is either suspended or superseded, the Mississippi statute provides that the justice court judgment is stayed pending her trial de novo by the circuit court on appeal. Miss. Code Ann. § 99-35-1 (2013). The Mississippi statute does not provide that a justice court conviction is either suspended or superseded by the filing of an appeal, only that execution of the judgment of conviction is stayed.

An individual is "convicted" of an offense when a judgment of conviction has been entered against the individual by a state court, regardless of whether there is an appeal pending. Act § 1128(i)(1). The justice court issued a judgment of conviction and sentenced Petitioner for the offense of which she was convicted. I.G. Ex. 2. I accept as true that Petitioner filed an appeal of her conviction that is pending a trial de novo. But the filing of that appeal did not affect her current conviction which satisfies the definition

of a conviction under section 1128(i) of the Act. The I.G.'s regulations provide that if Petitioner is successful in the appeal of her criminal conviction, she will be reinstated in Medicare, Medicaid, and other federal health care programs retroactive to the effective date of the exclusion. 42 C.F.R. § 1001.3005.

Petitioner argues that there is no factual basis for the I.G.'s determination that Petitioner's conduct constitutes a criminal offense related to the neglect or abuse of a patient because the actions captured by a camera in the health care facility do not indicate that such abuse or neglect took place. RFH. To the extent Petitioner seeks review of the facts underlying her conviction, her argument is an impermissible collateral attack upon her conviction. 42 C.F.R. § 1001.2007(d). The charge of which Petitioner was convicted establishes on its face that Petitioner's conviction was related to the neglect or abuse of her patient. Section 1128 of the Act does not define either abuse or neglect. However, definitions of abuse and neglect are established by the regulations applicable to long-term care facilities in 42 C.F.R. pt. 488. 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.* Applying the definitions of abuse and neglect at 42 C.F.R. § 488.301 to the charge of which Petitioner was convicted, I have no trouble concluding that Petitioner's criminal conviction related to abuse or neglect of her patient. Petitioner's conviction establishes beyond a reasonable doubt that Petitioner willfully committed an act or omitted the performance of an act that contributed to the physical pain, injury, mental anguish, unreasonable confinement or deprivation of services that were necessary to maintain the mental or physical health of her patient, a vulnerable person. I conclude that Petitioner was convicted of a state offense involving the neglect or abuse of her patient.

Petitioner's arguments may be construed to raise the issue of whether or not the conduct for which she was convicted was in connection with the delivery of a health care item or service. RFH. This issue must also be resolved against Petitioner. Petitioner's conduct was clearly in connection with the delivery of a health care item or service. The charge of which she was convicted clearly shows that Petitioner was a nurse working in a long-term care facility, and that her patient was a resident of that facility. I.G. Ex. 4. The fact that the neglectful conduct was committed on a resident of a health care facility by an employee of that health care facility shows a clear nexus or connection between the offense and the delivery of a health care item or service. I conclude that Petitioner was convicted of a criminal offense related to the neglect of a patient in connection with the delivery of a health care item or service.

Accordingly, I conclude that all elements of section 1128(a)(2) of the Act are met and there is a basis for Petitioner's exclusion. The I.G. has no discretion under the Act not to exclude Petitioner when the elements of section 1128(a)(2) are satisfied, as they are in this case.



**4. Five years is the minimum authorized period of exclusion pursuant to section 1128(a) of the Act.**

**5. Petitioner's exclusion for five years is not unreasonable as a matter of law.**

Congress established five years as the minimum period of exclusion for exclusions pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G. imposes an exclusion pursuant to section 1128(a) of the Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law. I have no authority to reduce the period of exclusion below the mandatory minimum of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective March 20, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
Keith W. Sickendick  
Administrative Law Judge