

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Randall Dean Hopp, R.N., |) | Date: January 9, 2008 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-07-704 |
| |) | Decision No. CR1722 |
| The Inspector General. |) | |

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Randall Dean Hopp, R.N., from participating in Medicare and other federally funded health care programs for a period of at least five years. The exclusion is mandatory because Petitioner was convicted of a criminal offense that is described at section 1128(a)(2) of the Social Security Act (Act).

I. Background

On August 31, 2007, the I.G. sent Petitioner a notice advising him of his exclusion. 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 established a schedule for the parties to file briefs and proposed exhibits addressing the issues in this case. Additionally, I advised the parties that either of them could request that I convene a hearing in person and that I would evaluate such a request based on considerations of whether the party moving for a hearing proffered testimony that was relevant and which did not duplicate the contents of an exhibit.

The I.G. filed a brief and six proposed exhibits which he designated as I.G. Ex. 1 - I.G. Ex. 6. Petitioner filed a brief in the form of a letter (letter brief) and offered no proposed exhibits. Petitioner did not object to my receiving any of the I.G.'s proposed exhibits into evidence. The I.G. then submitted a reply brief.¹ Petitioner then submitted an undated letter, in which he stated that "I am dropping this appeal" in response to language contained in the I.G.'s reply brief, but then proceeded in other language to refute those arguments. Consequently, given the ambiguity of Petitioner's letter, I am treating the letter not as a clear intent to withdraw the hearing request, but rather as Petitioner's own reply brief. Therefore, I am issuing a decision in this case. Neither party requested that I convene a hearing in person.² I receive into evidence I.G. Ex. 1 - I.G. Ex. 6, and I close the record in this case.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner was convicted of a criminal offense that mandates his exclusion pursuant to section 1128(a)(2) of the Act.

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 With his reply brief, the I.G. submitted an additional two exhibits, I.G. Ex. 7 and I.G. Ex. 8. I exclude these additional exhibits on the ground that they were filed untimely.

² In his letter brief Petitioner stated that: "[i]f needed, I could make arrangements to speak with . . . [the administrative law judge] on this matter." Petitioner's letter brief at 3. I do not interpret this statement as a request to present testimony in person. Rather, it appears to be a suggestion by Petitioner that he might amplify on his arguments in his letter brief via a personal appearance if I concluded that his arguments were unclear or incomplete. There is no need for such an additional appearance inasmuch as Petitioner stated his arguments quite clearly in his letter brief. Furthermore, Petitioner identified no possible testimony that would add relevant evidence to the case.

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

Section 1128(a)(2) mandates the exclusion of any individual who is convicted 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 I.G. based his exclusion of Petitioner pursuant to this section on the following facts.

On March 3, 2003, Petitioner was charged in a criminal complaint issued by the State of Minnesota with crimes that included: mistreatment of a patient or a facility resident; criminal neglect of a vulnerable adult; and assault, by intentionally inflicting bodily harm on a vulnerable adult. I.G. Ex. 3, at 3. These charges were based on allegations that Petitioner intentionally struck a nursing home resident while in the course of performing his duties as a care giver at that nursing home. *Id.* at 1 - 2. On February 4, 2004, Petitioner agreed, as part of a plea bargain arrangement, to plead guilty to the third count of the indictment, the charge that he had assaulted a vulnerable adult. I.G. Ex. 5.³ A final judgment of conviction was entered against Petitioner on April 15, 2004 and Petitioner was sentenced to a fine and probation. I.G. Ex. 6.

The evidence offered by the I.G. satisfies all of the prerequisites for exclusion pursuant to section 1128(a)(2). The evidence establishes that: Petitioner was convicted of a criminal offense; Petitioner's conviction was for a crime involving physical abuse (assault); and the conviction was of a crime committed in connection with the delivery of a health care item or service (providing care while working in a nursing home).

Petitioner has not offered argument or evidence that rebuts the foregoing. His arguments and assertions consist of the following:

- The allegations against him were based on lies and mis-truths.
- He entered his plea because, at the time, he could not afford to pay for an attorney to defend him against the criminal charges.

³ Petitioner entered into what was characterized as an "Alford plea". I.G. Ex. 5, at 2. I take notice that an Alford plea is essentially a plea of nolo contendere or no contest to a criminal charge. A plea of nolo contendere or no contest is a conviction within the meaning of section 1128 of the Act and, thus, has the same consequence as a guilty plea. Act, section 1128(i)(3).

- When he subsequently sought to vacate his conviction, he discovered that the sole complaining witness had died, thereby making it impossible to convince a court to award him the relief that he sought.
- He has worked as a nurse during the approximately five years since the incident on which the criminal charges were based and has had no problems whatsoever. Consequently, to now exclude him, many years after the fact, would be unfair.
- He has petitioned for expungement of his conviction and has reason to believe that an expungement will eliminate a basis to exclude him.

An exclusion imposed pursuant to section 1128(a)(2) derives from a conviction of a criminal offense as is defined by that section. An argument by a person who is convicted of an offense for which an exclusion is mandated by the section that he or she is not really guilty of the offense of which he or she was convicted is not a basis for finding the I.G. to be without authority to exclude. The issue of underlying guilt ceases to be a factor once the excluded individual is convicted of an offense as is defined by section 1128(a)(2) because the I.G.'s duty to exclude derives from the conviction.

Similarly, it is irrelevant why an excluded individual elected to plead guilty to an offense falling within the purview of section 1128(a)(2). Once that individual is convicted of the offense, the mandatory exclusion requirement is triggered, even if that individual chose to plead guilty as part of a bargain to reduce the cost of defending himself or herself against a criminal charge.

Expungement of Petitioner's conviction – should it occur – is not a basis for me to find the I.G. without authority to exclude him. A person who pleads guilty to a crime as defined by any of the parts of section 1128 of the Act, including section 1128(a)(2), is “convicted” of a crime, and subject to exclusion, even if he or she subsequently has his or her conviction expunged. Act, section 1128(i)(1).

Finally, I am without authority to consider Petitioner's equitable argument that it is unfair to now exclude him given that several years have elapsed since the date of his conviction and that he has had an exemplary work history of a nurse during the intervening period. By regulation I am limited in a case such as this – where the I.G. has imposed an exclusion against Petitioner for a statutory minimum period – to deciding only whether the I.G. is required by the Act to impose the exclusion.⁴

⁴ I am not unmindful that a lengthy delay in imposing an exclusion – such as obviously happened here – may in fact be contrary to the intent of the Act. The purpose

2. A five-year exclusion is mandated by the Act.

The I.G. excluded Petitioner for a period of five years, the minimum period that is mandated for an exclusion that is imposed pursuant to section 1128(a)(2). Act, section 1128(c)(3)(B). I must sustain the exclusion inasmuch as it is mandatory.

/s/ Steven T. Kessel
Administrative Law Judge

of the Act is to exclude individuals who are untrustworthy to provide care. It is difficult to see how the statutory purpose is furthered by waiting years to impose an exclusion. In a recent decision, a United States District Court questioned whether a lengthy delay in imposing an exclusion violated an excluded individual's right to due process of law. *Connell v. Secretary of Health and Human Services*, slip copy, 2007 WL 1266575 (S.C. Ill. Apr. 30, 2007). But, that decision notwithstanding, the regulations preclude me from deciding whether Petitioner was denied due process as a consequence of the I.G.'s long and inexplicable delay in excluding him.