

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Martha Michele Frank, A.K.A. |) | |
| Martha Michele Horton, A.K.A. |) | Date: August 04, 2009 |
| Martha Michele Eisenbach, |) | |
| |) | |
| Petitioner, |) | |
| |) | Docket No. C-09-405 |
| - v. - |) | Decision No. CR1983 |
| |) | |
| The Inspector General. |) | |

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Martha Michele Frank, A.K.A. Martha Michele Horton, A.K.A. Martha Michele Eisenbach, from participating in Medicare, Medicaid and other federally funded health care programs for a minimum period of five years. I find the exclusion to be mandatory in this case because Petitioner was convicted of a criminal offense described at section 1128(a)(2) of the Social Security Act (Act).

I. Background

Petitioner is a licensed practical nurse (L.P.N.). On February 27, 2009, the I.G. notified Petitioner that she was being excluded. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I directed the parties to file briefs and proposed exhibits addressing the issues in the case. I advised the parties that either of them could request that a hearing be held in person and I advised them further that I would convene an in-person hearing if a party requesting an in-person hearing satisfied me that there existed relevant testimony that did not duplicate the contents of an exhibit.

The parties filed briefs and the I.G. filed six proposed exhibits which it identified as I.G. Ex. 1 – I.G. Ex. 6. Petitioner filed a response brief but did not offer any exhibits. Petitioner did not object to my receiving any of the I.G.'s proposed exhibits into evidence. The I.G. elected not to file a reply brief. Consequently, I receive into evidence I.G. Ex. 1 – I.G. Ex. 6.

The I.G. stated in his brief that an in-person hearing is unnecessary. Petitioner requested that I convene an in-person hearing to hear testimony. Petitioner stated that she would be the sole witness and explained her proposed testimony as:

1. I feel that I haven't worked in nearly 3 years & this should be considered.
2. There is a conflict between state & fed law.
3. I have the constitutional right to face my accusers.

Informal Brief of Petitioner at 3.

Petitioner has not established a basis for me to hold an in-person hearing. My authority to hear and decide a case such as this one in which the I.G. has imposed an exclusion for a minimum statutory period of five years is limited to deciding whether there exists a statutory basis for an exclusion. In this case, the governing law is set forth at section 1128(a)(2) of the Act. Evidence which does not address the statutory criteria is irrelevant and I must not consider it.

Petitioner's arguments for an in-person hearing fail to address the statutory criteria for exclusion and thus she has provided me with no reason to convene a hearing. Whether or not Petitioner must be excluded depends on whether she 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. Act, section 1128(a)(2). Petitioner's employment history over the past three years is simply irrelevant. Petitioner has not identified any actual conflict between State and federal law but, even if one existed, federal law would clearly control. Consequently, even a potential conflict would not be a basis for an in-person hearing. Moreover, a possible conflict, if one existed, raises issues of law and not fact and these would certainly be decided without a hearing. Finally, I agree with Petitioner that she has the right to due process and this right includes confronting the arguments and evidence that are offered against her. But, due process does not automatically include holding an in-person hearing where, as is the case here, there is nothing that could be accomplished in person that cannot be addressed by the parties' written submissions.

The evidence that is relevant to deciding this case is contained entirely within the exhibits that were submitted by the I.G. Petitioner has made no showing that she possesses additional relevant evidence. It is thus appropriate that I decide this case now without conducting an in-person hearing.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner was convicted of a criminal offense as described at section 1128(a)(2) of the Act, thereby mandating that she be excluded for a minimum of five years.

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 as a separate heading.

1. Petitioner was convicted of a criminal offense.

“Convicted” is defined at section 1128(i) of the Act to include all of the following circumstances:

- (1) when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . . ;
- (2) when there has been a finding of guilt . . . by a Federal, State, or local court . . . ;
- (3) when a plea of guilty or nolo contendere . . . has been accepted by a Federal, State, or local court; or
- (4) when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act, section 1128(i)(1)-(4).

The I.G. asserts that Petitioner was convicted of a criminal offense as defined by section 1128(i)(4). The I.G. offered evidence that on August 7, 2008, Petitioner pled guilty in the Iowa District Court of Polk County to “wanton neglect of a resident of a healthcare facility” in violation of Iowa Code section 726.7(3). I.G. Exs. 2, 3. Adjudication of guilt was deferred pending Petitioner’s successful completion of conditions of probation. Upon successful completion of probation Petitioner’s record was to be expunged. I.G. Ex. 3.

Petitioner asserts that she was not convicted of a criminal offense or an offense for which exclusion is required because “[a]ccording to my Attorney deferral isn’t a conviction” and “[d]ue to what my Attorney & the County Attorney both say it’s not a conviction.” Informal Brief of Petitioner at 2.

Petitioner’s guilty plea and deferred judgment fits within the definition of a conviction as stated at section 1128(i)(4) of the Act. Section 1128(i)(4) makes it clear that a deferred adjudication program or a program in which an individual pleads guilty to an offense but where a final judgment of conviction has been withheld is nonetheless a conviction for purposes of section 1128(a)(2) of the Act.

2. Petitioner’s conviction was of an offense described at section 1128(a)(2) of the Act.

The evidence offered by the I.G. establishes that Petitioner was convicted of a crime described at section 1128(a)(2) of the Act. Petitioner has offered no evidence in rebuttal.

Petitioner does not dispute that she pled guilty to resolve criminal charges that were made against her in an Amended Trial Information filed on August 12, 2008, charging her with wanton neglect of a resident of a healthcare facility.¹ I.G. Ex. 2, at 2. The Amended Information alleged that:

[O]n or about the 26 day of April, 2006, in the County of Polk and State of Iowa, the defendant did unlawfully and willfully: Knowingly acted in a manner likely to be injurious to the physical or mental welfare of . . . a resident (dependent adult) of a Healthcare Facility in violation of Section 726.7(3) of the Code of Iowa.

Id. Section 726.7(3) states that “[a] person who commits wanton neglect not resulting in serious injury to a resident of a health care facility is guilty of an aggravated misdemeanor.”

Petitioner does not dispute that the criminal offense to which she pled guilty involved an incident which occurred during her employment as an L.P.N. by Valley View Village, a skilled nursing facility in Des Moines, Iowa.² I.G. Exs. 5, 6. Investigations by the Iowa

¹ The original Trial Information charged Petitioner with dependant adult abuse, a felony. I.G. Ex. 2, at 1.

² Petitioner stated in her hearing request that she had “witnesses to the fact that during the course of this case that the truth was not told about the events in the night of question.” In her brief Petitioner did not list these witnesses or expound on her statement.

(continued...)

Medicaid Fraud Control Unit and the Des Moines Iowa Police Department found that on April 25, 2006³, while performing her duties as an L.P.N., Petitioner physically restrained a 92-year-old resident in order to forcibly cut her fingernails. *Id.* Petitioner nicked and caused bleeding to the end of the resident's left ring finger and bruising to both wrists. *Id.* Petitioner also forcibly removed the resident's dentures without consent. *Id.*

For purposes of exclusion under section 1128(a)(2) of the Act, Petitioner's criminal offense need only relate to neglect or abuse of a patient in connection with the delivery of a health care item or service. There is no question that Petitioner's criminal offense was so related. The resident in question was Petitioner's patient (*see* 42 C.F.R.

§ 1001.2) and Petitioner was providing health care services to her in her position as an L.P.N. at the nursing facility. Petitioner's criminal conviction was specifically for wanton neglect of the resident and her actions reflect abuse of that resident under any common definition of the term.

3. Petitioner's five-year exclusion is the minimum mandated by law.

An exclusion of at least five years is mandatory for an individual who has been convicted of an offense that is described at section 1128(a)(2) of the Act. Act, §1128(c)(3)(B). Thus, Petitioner's exclusion is reasonable as a matter of law inasmuch as she was excluded for the minimum mandatory period.

²(continued...)

However, even if Petitioner had attempted to bring forth such witnesses, I would have no authority to hear them. The I.G.'s mandate to exclude Petitioner derives from her conviction of a crime described at section 1128(a)(2). The derivative nature of the exclusion requirement bars Petitioner from arguing before me that she is not, in fact, guilty of the crime to which she pled.

³ The Amended Trial Information notes that the incident occurred on or about April 26, 2006 and Petitioner's Guilty Plea and Deferred Judgment notes the offense date as April 6, 2006. The Criminal No. (205883) is the same for both documents and the inconsistency between these documents and the reports of the Iowa Medicaid Fraud Control Unit and the Des Moines Iowa Police Department that the offense occurred on April 25, 2006 are not material.

4. I am not authorized to consider Petitioner's other arguments or they are otherwise irrelevant.

In her hearing request Petitioner asserts that "Constitutional Laws . . . have been violated in this case. I feel that my rights to the Miranda Laws were violated and that during this time evidence was suppressed in this case as well." She also states "I also need to show that not everyone here is treated equally under the law in this state. I mean that two people can do the same thing but only one gets accused of a crime." Petitioner did not expound on her assertions in her brief, only stating that there was a conflict between state and federal law and that she has the right to face her accusers. I am unable to address Petitioner's arguments both because Petitioner does not explain what they are and because as an administrative law judge I have no authority to hear arguments concerning constitutional issues. Moreover, with regard to her argument that evidence may have been suppressed, I am, as noted previously, unable to look behind her conviction as her exclusion is derivative of her conviction.

Petitioner also asserts that her attorney and the district attorney handling her case gave her "wrong information" based on which she "made decisions that I might not have made regarding this case." It is irrelevant why an excluded individual elects to plead guilty to an offense falling within the purview of section 1128(a)(2). Once an individual is convicted of an offense under section 1128(a)(2), the mandatory exclusion requirement is triggered.

/s/ Steven T. Kessel
Administrative Law Judge