

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pamela Lindsey
(OI File No. 6-09-40317-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-179

Decision No. CR2121

Date: April 27, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Pamela Lindsey, from participation in Medicare, Medicaid, and other federally-funded health care programs for a minimum period of five years. Exclusion is mandated in this case pursuant to section 1128(a)(2) of the Social Security Act (Act), because Petitioner was convicted of a criminal offense that is related to neglect or abuse of patients in connection with the delivery of a health care item or service.

I. Background

Petitioner, a registered nurse, served as Director of Nursing for the Ozark Health Nursing Center, a long-term care facility in Clinton, Arkansas. The I.G. determined to exclude her from participation in Medicare, Medicaid, and all other federally-funded health care programs for the minimum statutory period of five years, because he concluded that Petitioner had been convicted of a criminal offense as is described in section 1128(a)(2) of the Act. This section mandates the exclusion of any individual who is convicted of a criminal offense that is related to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. Each party submitted a brief and proposed exhibits. The I.G. submitted eight exhibits, which are identified as I.G. Ex. 1 – I.G. Ex. 8. Petitioner submitted five exhibits, which are identified as P. Ex. 1 – P. Ex. 5. I receive all of these exhibits into evidence.

Both parties indicated that an in-person hearing was not necessary for me to decide this case. In addition, Petitioner indicated that she did not have any testimony she wished to offer.

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 as described in section 1128(a)(2) of the Act.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings).

1. Petitioner was convicted of a criminal offense as is described in section 1128(a)(2) of the Act.

a. Petitioner was convicted within the meaning of section 1128(i) of the Act.

The evidence offered by the I.G. establishes that on March 26, 2009, Petitioner voluntarily entered a negotiated plea of guilty or nolo contendere to a criminal charge of Failure to Report in violation of the Arkansas State Adult and Long-Term Care Facility Resident Maltreatment Act.¹ I.G. Ex. 2. ARK. CODE ANN. § 12-12-1720 (2008). This section provides that any person required to report suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make the report in the manner and time provided in this subchapter shall be guilty of a Class C misdemeanor.

As a nurse and an employee of the long-term care facility, Petitioner is a mandated reporter under this statute. That same day, the court accepted her plea, entered judgment of conviction, entered a suspended sentence of 30 days, and ordered her to pay fines and fees of \$320. I.G. Ex. 2. I find that Petitioner was convicted

¹ The court documents do not specify whether Petitioner pled guilty or pled nolo contendere, but, in her brief, she indicates that she pled guilty. I.G. Ex. 2 at 1; P. Brief.

within the meaning of section 1128(i) of the Act, because her plea of guilty was accepted by the Circuit Court of Van Buren County, Arkansas, Twentieth Judicial District, Third Division. *See* 42 C.F.R. § 1001.2.

b. Petitioner's conviction is related to the neglect of a resident.

By the very terms of Petitioner's offense, she was convicted of knowingly failing to make a report or failing to cause a report to be made of her suspicion or observation that a long-term care facility resident was subjected to conditions or circumstances that constitute adult maltreatment or long-term care facility resident maltreatment. ARK. CODE ANN. § 12-12-1720. Clearly, her conviction of the offense of Failure to Report establishes that she was convicted of an offense related to the neglect or maltreatment of a resident of a long-term care facility where she was the Director of Nursing and that the maltreatment occurred in connection with the delivery of health care services to this resident.

Petitioner does not deny she pled guilty to this offense and that her plea was accepted. Petitioner does contest that she should be excluded for this. Petitioner argues that the I.G. states that the incident was not reported. Petitioner contends that the incident was reported, just that it was reported in 36 hours and not timely (within 24 hours). P. Brief. However, there is no support for Petitioner's contentions. The I.G. stated and the evidence in the record supports that Petitioner's conviction of Failure to Report is related to the maltreatment of a long-term care resident for whom critical medical information was not reported and which caused an inappropriate treatment order to be given, which caused the resident's death. I.G. Brief at 2; I.G. Exs. 2, 5 ["Defendant purposely and knowingly advised a LPN not to document or relay critical information while notifying family members and medical staff of change of medical condition assessment . . . the failure to report this critical information caused the inappropriate treatment order to be given which caused . . . resident's death.], and 6. Petitioner also contends that the Attorney General and District Attorney offices misrepresented to her the consequences of her guilty plea, and, if she had known, she would not have pled guilty.

These assertions and contentions, however, establish no defense. I may not look behind Petitioner's conviction to decide whether she is actually guilty. The authority to exclude pursuant to section 1128(a)(2) of the Act derives from a conviction in a court and not from the underlying acts or omissions on which the criminal charges leading to the conviction are based. Here, Petitioner plainly was convicted of an offense as described in section 1128(a)(2), and the I.G. authority to exclude Petitioner derives from that conviction. As a matter of law, the I.G. in these circumstances has no discretion, because the Act requires the I.G. to exclude a person who has been convicted of an offense as described in section 1128(a)(2).

And, if the I.G. had a basis for the exclusion—in this case a conviction for which exclusion is required—I must sustain his determination.

2. Petitioner's five-year exclusion is mandatory.

Section 1128(a)(2) of the Act mandates the I.G. to exclude any individual who is convicted of an offense that falls within the reach of that section. The I.G. had no choice but to exclude Petitioner as a consequence of her conviction. Section 1128(c)(3)(B) of the Act requires that the minimum period of any mandatory exclusion be for five years.

Here, the I.G. imposed the statutory minimum exclusion period against Petitioner. The reasonableness of the period of the exclusion is therefore not at issue.

/s/

Alfonso J. Montaña
Administrative Law Judge