

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Jacqueline L. Dennis, R.N.,)	DATE: December 1, 1995
Petitioner,)	
- v. -)	Docket No. C-95-124
The Inspector General.)	Decision No. CR404

DECISION

By letter dated April 17, 1995, Jacqueline L. Dennis, R.N., the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner filed a request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board (DAB). During the prehearing conference call with the parties on May 26, 1995, both parties agreed that the case could be decided by submission of written documentation and that an in-person evidentiary hearing was not necessary. Order and Schedule for Filing Briefs and Documentary Evidence, dated June 1, 1995.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the basis of the parties' written submissions.

I find no reason to disturb the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a registered nurse in Rochester, New York.
2. On March 16, 1994, Petitioner was charged in a criminal information, brought in the City Court of Rochester, County of Monroe, with four counts of willful violation of the health laws, in violation of section 12-b(2) and 2803-d(7) of the New York State Public Health Law and Part 81.1(c) of the regulations promulgated thereunder and three counts of falsifying business records in the second degree, in violation of section 175.05(1) of the New York State Penal Law. I.G. Exs. 1, 7.
3. The information alleged that Petitioner, while working at St. Ann's Home for the Aged in Rochester, New York, had willfully failed to provide appropriate treatment to patients in her care by failing to irrigate a patient's catheter, even though this had been ordered by the doctor, and by failing to properly treat bedsores of two other patients as had been ordered by their physicians. Allegedly, Petitioner thereupon made false entries on these patients' charts to falsely indicate that she had performed these services. I.G. Exs. 1, 4 - 6.
4. On August 31, 1994, Petitioner was found guilty after a jury trial of four counts of willful violation of the health laws and three counts of falsifying business records in the second degree. I.G. Exs. 7, 8.
5. On October 25, 1994, Petitioner was sentenced to 60 days in jail, three years' probation, and a \$500 fine. I.G. Ex. 9 at 16 - 17.
6. On June 13, 1994, in a separate criminal proceeding in the County of Monroe, Gates Town Court, Petitioner was charged with two counts of willful violation of the health laws, in violation of section 12-b(2) and 2803-d(7) of the New York State Public Health Law and Part 81.1(c) of the regulations and two counts of falsifying business records in the second degree, in violation of section 175.05(1) of the New York State Penal Law. I.G. Exs. 10, 16.

7. The criminal information in Finding 6 alleged that Petitioner, while employed as a registered nurse at Westgate Nursing Home in Gates, New York, willfully failed to provide adequate and appropriate services, treatment, and care to two patients by failing to perform a blood glucose test as ordered by these patients' physicians, and then, with intent to defraud, did make false entries in their medical charts indicating that the patients had certain blood glucose values when, in fact, these tests had not been done. I.G. Exs. 10 - 13.

8. On November 16, 1994, Petitioner pled guilty in the Gates Justice Court to one count of willful violation of the health laws in satisfaction of the four-count criminal information and was sentenced to 60 days in jail and three years' probation to run concurrently with the sentence Petitioner received in October for her previous conviction. Finding 6; I.G. Exs. 14, 15.

9. It is undisputed that the individuals neglected or abused by Petitioner were patients at either St. Ann's Home for the Aged or the Westgate Nursing Home at the time, and that Petitioner had been expressly assigned to care for them. I.G. Exs. 1 - 6, 11 - 14.

10. On April 17, 1995, the I.G. notified Petitioner that she was being excluded for a period of five years from participation in the Medicare and Medicaid programs based on her conviction, in the State of New York, Monroe County Court, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

11. The Secretary of HHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (May 13, 1983).

12. The entry of a judgment of conviction against Petitioner in the County of Monroe, in either the City Court of Rochester or the Gates Town Court, constitutes a conviction of a criminal offense within the meaning of section 1128(a)(2) and 1128(a)(i) of the Act. I.G. Ex. 8.

13. The convictions of the criminal offenses at issue here relate to the neglect or abuse of patients and is connected with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act.

14. Pursuant to section 1128(a)(2) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

15. The minimum mandatory period of exclusion pursuant to section 1128(a)(2) is five years. Act, section 1128(c)(3)(B).

16. Under section 1128(a)(2) of the Act, the fact that a conviction within the meaning of section 1128(i) has occurred mandates exclusion.

17. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory five-year period of exclusion.

18. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

DISCUSSION

The I.G. excluded Petitioner from participating in Medicare and directed that Petitioner be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Act. This section mandates the exclusion of individuals who are:

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.

The I.G.'s authority to impose and direct an exclusion under section 1128(a)(2) is based on the fulfillment of the following statutory criteria: (1) conviction of a criminal offense, (2) relating to neglect or abuse, (3) of patients, and (4) in connection with the delivery of a health care item or service.

The law relied upon by the I.G. to exclude Petitioner requires, initially, that Petitioner has been convicted of a criminal offense. Petitioner, a registered nurse, was charged with unlawfully failing to care for several elderly individuals at St. Ann's Home for the Aged who had been entrusted to her for care. A jury found Petitioner guilty of violating New York law and a judge sentenced her. Additionally, in a separate criminal proceeding, Petitioner was convicted of a willful violation of the public health laws in connection with

her failure to administer a blood glucose test to a patient in the Westgate Nursing Home.

Section 1128(i) of the Act provides that an individual will be deemed "convicted" under any of the following circumstances:

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
- (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgement of conviction has been withheld.

In the case at hand, sections 1128(i)(1) and (2) both apply and thus I find Petitioner "convicted" for purposes of the mandatory exclusion law.

Next, the statute requires that the criminal activity must have been related to the delivery of health care items or services (although not necessarily related to the Medicaid or Medicare programs). It is undisputed that Petitioner was employed as a registered nurse at both St. Ann's Home for the Aged and Westgate Nursing Home and that the victims were patients who had been formally placed in her care. It is also true that, in the circumstances surrounding each of her convictions, Petitioner failed to provide services to patients and then falsified records to indicate that she had provided these services. Thus, Petitioner's entire relationship with these individuals, including the crimes she committed against them, was based upon the delivery of health care items or services, as required by section 1128(a)(2).

The final requirement of section 1128(a)(2) is that the persons victimized have been subjected to neglect or abuse. Although neither of these terms is defined in the statute, I regard it as self-evident that Petitioner's

violation of physicians' direct orders by failing to (1) irrigate a patient's catheter; (2) properly treat two patients' bedsores; and (3) administer a blood glucose test resulted in these patients suffering pain or harm and constitutes neglect and abuse within the meaning of the statute. Petitioner's attempts to hide her misdeeds by falsifying patients' charts to give the impression that she had performed services which she did not also constitutes neglect and abuse under the statute.

Petitioner claims that she has been wrongly accused and is not guilty of the offenses of which she has been convicted. Specifically, Petitioner claims that she did not receive a fair trial in the City Court of Rochester in that the judge was biased against her, her colleagues lied under oath, and her attorney was not diligent in presenting her case. These allegations, however, are not relevant here. Petitioner may not use these administrative proceedings to relitigate questions presented to and resolved by the State court. The statute requires that the Petitioner only be "convicted." If Petitioner believes that she was unfairly convicted, she may pursue this question in the State or federal courts, but not in this forum. Under section 1128(a)(2), proof that a relevant criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is justified. DeWayne Franzen, DAB 1165 (1990). I am not authorized to look beyond the fact of conviction, or entertain claims of innocence, or consider evidence intended to mitigate the minimum exclusionary period. Consequently, Petitioner's explanations are not relevant or material to the outcome of this case.

CONCLUSION

Petitioner's exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act because of either of her convictions of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

/s/

Joseph K. Riotto
Administrative Law Judge