Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Peter Anyakora, M.D.,	)	DATE: December 15, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-146
	)	Decision No. CR407
The Inspector General.	)	
	)	

DECISION

I conclude that Petitioner, Peter Anyakora, M.D., is subject to a five-year minimum mandatory period of exclusion from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1]

I. Procedural History

By letter dated January 24, 1995, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner that he was being excluded for five years from participation as a provider in Medicare and Medicaid. The I.G. advised Petitioner that he was being excluded as a result of his conviction of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, and that the exclusion of individuals convicted of such offenses is mandated by section 1128(a)(2) of the Social Security Act (Act).[2] The I.G. further advised Petitioner that, for exclusions imposed pursuant to section 1128(a)(2), section

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[1] Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

[2] Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

1128(c)(3)(B) of the Act mandates a five-year minimum period of exclusion.

By letter dated June 10, 1995, Petitioner filed a request for hearing. During prehearing conferences held on July 18 and 19, 1995, Petitioner requested an in-person hearing. During the conferences, I noted that the issues in the case were limited only to: 1) whether Petitioner was convicted of a criminal offense and, if so, 2) whether the offense was related to neglect or abuse of patients in connection with the delivery of a health care item or service. Based on the parties' representations at the conferences, it did not appear to me that there were disputed issues of fact relevant to the issues in the case which would require an in-person hearing. Instead, I determined that the case could be heard based on a written record. Therefore, I denied Petitioner's request for an in-person hearing and established a schedule for the parties to file briefs and documentary evidence.

The I.G. filed a brief (I.G. Br.), including a statement enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s brief was accompanied by I.G. Exhibits (I.G. Exs.) 1 through 5. Petitioner responded with a brief (P. Br.), accompanied by eight attachments he offers as exhibits in the case. These attachments are not marked in accordance with my Order of July 27, 1995. Petitioner marked only the first attachment, which he termed "Exhibit A." The Petitioner then filed a supplemental brief (P. Supp. Br.), accompanied by Petitioner's exhibits (P. Exs.) 1 through 10. To avoid confusion with Petitioner's supplemental submission, I have marked the attachments accompanying Petitioner's initial brief as P. Exs. A through H.

Petitioner has not objected to the admission into evidence of the exhibits submitted by the I.G. The I.G. has not objected to the admission into evidence of the exhibits submitted by Petitioner. In the absence of objection, I admit into evidence I.G. Exs. 1 through 5, and P. Exs. A through H and 1 through 10.

After careful consideration of the briefs and documentary evidence submitted by the parties, I conclude that there exist no facts of decisional significance genuinely in dispute and that the only matters to be decided are the legal implications of the undisputed facts. Based on these facts, I conclude that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act. Accordingly, I affirm the I.G.'s determination to exclude Petitioner

from participation in Medicare and Medicaid for a period of five years.

II. Issues

The issues are: 1) whether Petitioner was convicted of a criminal offense under federal or State law; and 2) if Petitioner was so convicted, whether the conviction relates to neglect or abuse of patients in connection with the delivery of a health care item or service.

III. Findings of Fact and Conclusions of Law

1. At all relevant times, Petitioner was a resident physician at Harlem Hospital Center in New York, New York. Currently, Petitioner is a medical doctor practicing in Florida. I. G. Ex. 1; I.G. Ex. 3 at 3; P. Br. at 1.

2. On February 10, 1993, the State of New York filed a four-count criminal indictment against Petitioner. I.G. Ex. 1.

3. The four counts of the indictment charged Petitioner with offenses occurring from about September 22, 1991 to about February 28, 1992, during Petitioner's residency at Harlem Hospital Center in New York. Specifically, Petitioner was charged with violating public health law section 2805-b(2) (Count One), falsifying business records in the first degree (Counts Two and Three), and tampering with physical evidence (Count Four). I.G. Ex. 1.

4. Following a jury trial, Petitioner was convicted of all four counts of the indictment. I.G. Exs. 4 - 5.

5. Count One of the indictment alleged that, on or about September 22, 1991, Petitioner refused to treat a person arriving at a general hospital to receive emergency medical treatment who was in need of such treatment. Count One alleged specifically that, while employed as a resident physician, Petitioner refused to treat CB[3], a woman who arrived at Harlem Hospital Center in need of emergency medical assistance in the delivery of a child. I.G. Ex. 1.

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[3] To preserve this woman's privacy, I refer to her by her initials only.

6. Petitioner's conviction of Count One of the indictment constitutes a conviction of a criminal offense. Act, sections 1128(a)(2), 1128(i)(1); Finding 4.

7. Petitioner's conviction of Count One of the indictment relates directly to neglect of a patient in connection with the delivery of a health care item or service. Act, section 1128(a)(2); Findings 4, 5.

8. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

9. The I.G. is **required** to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Act, section 1128(a)(2).

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

11. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

IV. Discussion

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

> [a]ny 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.

A. Petitioner has been convicted of a criminal offense.

I have found that Petitioner was convicted of refusing to treat a person arriving at a general hospital to receive emergency medical treatment who was in need of such treatment. Findings 2 - 5. Petitioner's conviction falls within the meaning of section 1128(i)(1) of the Act, in that a judgment of conviction has been entered against him by a State court. Thus, Petitioner has been

convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act. Finding 6.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Instead, Petitioner maintains that he should not have been convicted. Petitioner maintains that he has never refused treatment to anyone. P. Br. at 1. Petitioner asserts that Harlem Hospital Center concluded that "[t]here was NO refusal of patient care but rather, there was a delay due to overcrowding." P. Br. at 3. Petitioner asserts further that there was no "medical Emergency with respect to pregnant mother," CB. P. R. Br. at 1. Petitioner alleges that there was a "coverup on the part of the prosecutor," and asserts that his convictions are the result of "UNJUST PROSECUTION, DISCRIMINATION, SCAPEGOATING, PROSECUTORS RECKLESS VIOLATION OF HUMAN AND INDIVIDUAL RIGHTS UNDER THE CONSTITUTION, AND HIGH-TECH LYNCHING." P. Br. at 3.

Petitioner's arguments are not persuasive. Petitioner may not argue the merits of his criminal case in this administrative proceeding. His arguments amount to an impermissible collateral attack on his conviction. In this regard, an appellate panel of the Departmental Appeals Board held in the case of Peter J. Edmonson, DAB 1330 (1992):

> [i]t is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

Id. at 4.

Further, the applicable regulations provide:

> [w]hen the exclusion is based on the existence of a conviction, . . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds. . .

42 C.F.R. § 1001.2007(d).

The correct forum for Petitioner to have disputed the circumstances of his criminal case is the State court in which he was charged criminally. Paul R. Scollo, D.P.M., DAB 1498, at 14 (1994); Francis Shaenboen, R.Ph., DAB 1249, at 9 (1991).

B. Petitioner's conviction is related to neglect[4] of patients in connection with the delivery of a health care item or service.

Although the term neglect is not defined in section 1128(a)(2) of the Act, a common and ordinary meaning of the term includes the failure to satisfy a duty of care to another person. Lee G. Balos, DAB CR378, at 7 (1995), aff'd, DAB 1541, at 4 (1995); see also Summit Health Limited, dba Marina Convalescent Hospital, DAB 1173, at 8 (1990); Janet Wallace, L.P.N., DAB 1326, at 10 (1992) (a common meaning is "to fail to care for or attend to sufficiently"). Given the fact of his conviction, there can be no doubt that Petitioner breached his duty of care to this patient. Petitioner's criminal offense, refusing to treat a person arriving at a general hospital to receive emergency medical treatment who was in need of such treatment, on its face relates to neglect of a patient in connection with the delivery of a health care item or service. Thus, Petitioner's conviction relates to neglect of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

Petitioner contends, however, that his offense is not related to neglect, within the meaning of section 1128(a)(2) of the Act. In support of his contention, Petitioner alleges: 1) he was only a resident physician, and the supervising attending physician, not Petitioner, was responsible for making decisions regarding patient care (P. Br. at 2); 2) he was responding to a medical emergency pertaining to another patient (P. Br. at 3); 3) CB's emergency status was precipitated after Petitioner first saw her, by EMS personnel who used a scalpel to break her baby's bag of water (P. Br. at 3); and 4) CB's companion terrorized and threatened Petitioner, causing a delay in CB's evaluation. P. Supp. Br. at 2 - 3.

Petitioner's allegations, even if true, do not alter my conclusion that his conviction is related to the neglect of patients in connection with the delivery of a health

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[4] Petitioner's offense relates to neglect. I do not find that Petitioner's offense relates to abuse.

care item or service. Petitioner's allegations amount to an impermissible collateral attack on his conviction and are not relevant to my determination that his conviction is related to neglect of patients in connection with the delivery of a health care item or service. See Scollo, DAB 1498, at 14; Shaenboen, DAB 1249, at 9.

Petitioner argues also that no neglect occurred because neither CB nor her baby suffered physical harm. However, no actual harm is required for a conviction to relate to neglect of patients. Balos, DAB 1541, at 6.

C. Neither the I.G. nor an administrative law judge has the discretion to exclude Petitioner for less than the mandatory minimum period of five years.

After careful review of the record, I conclude that the I.G. properly classified Petitioner's conviction of the enumerated criminal offenses as falling under the mandatory exclusion authority of section 1128(a)(2) of the Act. The law requires that Petitioner be excluded for at least five years. Act, section 1128(c)(3)(B).

Once a section 1128(a)(2) violation is established, neither the I.G. nor an administrative law judge has any discretion to exclude a provider for less than the minimum mandatory period of five years. Balos, DAB 1541, at 7.

D. Other arguments advanced by Petitioner do not persuade me that I have the authority either to conclude that there was no basis for Petitioner's exclusion or to change the effective date of Petitioner's exclusion.

Petitioner alleges that he did not receive notice of the exclusion the I.G. imposed and directed against him on January 24, 1995, until his employer in Florida, the Women's Health Center of Hardee County, informed him that requests for Medicaid reimbursement for his services were being denied. June 10, 1995 Request for Hearing; July 27, 1995 Order and Schedule for Filing Briefs and Documentary Evidence; P. Supp. Br. at 1. The record reflects that the letter notifying Petitioner of his exclusion is dated January 24, 1995. The notice letter was addressed to Petitioner and was mailed to a post office box in Baltimore, Maryland. Petitioner alleges that this post office box has never been connected to him. Petitioner alleges also that he has been residing in Florida since November 1993. P. Supp. Br. at 1. For

the purposes of this decision, I accept Petitioner's allegations as true.

Based on this lack of notice, Petitioner argues that he has been denied due process under the United States Constitution, because he was excluded before receiving notice of his exclusion. Petitioner appears to argue further that, because his exclusion is unconstitutional, he should not be excluded at all. I do not have the authority to decide the constitutional validity of an exclusion imposed and directed in accordance with the Act and regulations. Balos, DAB 1541, at 9; Shanti Jain, M.D., DAB 1398, at 7 (1993). Moreover, the Act and regulations do not entitle Petitioner to a pre-exclusion hearing. The Act and regulations give Petitioner only the right to request a hearing on the issue of whether there is a basis for his exclusion. 42 C.F.R. § 1001.2007. I have afforded Petitioner the hearing (based on the written record) contemplated by the Act and regulations.

Petitioner appears to argue also that if, in fact, he must be excluded, his exclusion should not have become effective until after he received notice of the exclusion. I do not have the authority to alter the effective date of an exclusion imposed and directed in accordance with the Act and regulations. 42 C.F.R. § 1005.4(c); Samuel W. Chang, M.D., DAB 1198, at 9 - 11 (1990); Jain, DAB 1398 (1993); Kathleen M. Casey, DAB CR401 (1995).

V. Conclusion

The I.G. properly imposed and directed against Petitioner a five-year minimum mandatory period of exclusion from participation in Medicare and Medicaid.

/s/

Jill S. Clifton
Administrative Law Judge