Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert C. Hartnett,
(O.I. File No. H-15-4-2858-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-287

Decision No. CR4628

Date: June 8, 2016

DECISION

Petitioner, Robert C. Hartnett, was a licensed practical nurse (LPN) in the State of New York. He pled guilty to willful violation of state health laws, a misdemeanor. Based on this conviction, the Inspector General (IG) has excluded him for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(2) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the IG properly excluded Petitioner Hartnett and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated November 30, 2015, the IG notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because he had been convicted of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. The letter explained that section 1128(a)(2) of the Act authorizes the exclusion. IG Ex. 1. Petitioner timely requested review.

Each party submitted a written argument (IG Br.; P. Br.) and the IG submitted a reply (IG Reply). The IG submitted five proposed exhibits (IG Exs. 1-5). Petitioner submitted seven proposed exhibits (P. Exs. 1-7). In the absence of any objections, I admit into evidence IG Exs. 1-5 and P. Exs. 1-7.

The parties agree that an in-person hearing is not necessary. IG Br. at 8-9; P. Br. at 11.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years because he was 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. Act § 1128(a)(2).***[1]

Under section 1128(a)(2) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted, under federal or state law, 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. . . ." 42 C.F.R. § 1001.101(b). The "delivery of a health care item or service" includes providing any item or service to an individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed by Medicare, Medicaid, or any federal health care program. *Id*.

Petitioner Hartnett was an LPN working at a residential health care facility in Utica, New York. IG Ex. 3 at 1. On January 27, 2015, he was charged with two misdemeanor counts: endangering the welfare of an incompetent or physically disabled person (N.Y. PENAL LAW § 260.24); and willful violation of health laws (N.Y. PENAL LAW § 12-b(2)). Specifically, the criminal information charged that he "failed to call the doctor or the RN Supervisor after receiving laboratory results containing a panic-high potassium laboratory result" for one of the facility residents. That resident suffered from hepatic encephalopathy, hepatitis C, hypothyroidism, hyperlipidemia, depression, mental retardation with psychiatric disorder, anxiety, thrombocytopenia, hyper-ammonemia with diabetes mellitus, and schizophrenia. IG Ex. 3.

On July 10, 2015, Petitioner Hartnett pled guilty in state court to willfully violating health laws and the court sentenced him to a one-year conditional discharge. The court dismissed the remaining count (endangering the welfare of an incompetent or physically disable person). IG Exs. 4, 5.

[1] I make this one finding of fact/conclusion of law.

Petitioner concedes that he was convicted of a criminal offense but denies that his conviction was related to the neglect or abuse of patients and that any alleged patient neglect or abuse occurred in connection with the delivery of a healthcare item or service. P. Br. at 2. He simply denies the facts underlying his conviction, claiming that they were never proven.

But criminal convictions don't occur in a vacuum, and the facts underlying Petitioner's conviction are spelled out in the information. That he pled guilty to just one of the two counts is irrelevant because both counts stemmed from the same underlying facts, which, as Petitioner concedes (P. Br. at 10), relate to patient abuse and neglect. Petitioner thus conceded that he did not notify a doctor or RN supervisor when he received lab results showing a facility resident's "panic-high" potassium levels. He thereby acted "recklessly . . . in a manner likely to be injurious to the physical, mental or moral welfare" of a seriously disabled person. IG Ex. 3 at 1. Such a failure to act constitutes neglect.

Moreover, the regulations explicitly preclude a collateral attack on an underlying conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d); *Donna Rogers*, DAB No. 2381 at 4-5 (2011); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Petitioner's conviction thus falls squarely within the ambit of section 1128(a)(2). While charged with delivering health care services to a vulnerable patient, Petitioner neglected to report a potentially life-threatening lab result. He is therefore subject to exclusion. An exclusion brought under section 1128(a)(2) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 102(a), 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the IG properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge