Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christine Dusenberry
(O.I File No. 7-10-40432-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-11-645

Decision No. CR2491

Date: January 17, 2012

DECISION

Petitioner, Christine Dusenberry, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)), effective June 20, 2011. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated May 31, 2011, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(2) of the Act. The basis cited for Petitioner's exclusion was her conviction in the District

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

Court for Lee County, in Keokuk, Iowa, of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. Act § 1128(a)(2); 42 C.F.R. § 1001.101(a). Petitioner timely requested a hearing on July 29, 2011. The case was assigned to me for hearing and decision on August 1, 2011. On August 16, 2011, I convened a prehearing conference by telephone, the substance of which is memorialized in my Order dated August 17, 2011. During the prehearing conference, Petitioner did not waive an oral hearing, and the I.G. requested to file a motion for summary judgment for which I set a briefing schedule.

The I.G. filed its motion for summary judgment and supporting brief (I.G. Br.) on September 15, 2011, with I.G. exhibits (I.G. Exs.) 1 through 3. Petitioner filed a brief in opposition to the I.G. motion (P. Br.) on October 17, 2011, with Petitioner's exhibits (P. Exs.) 1 through 6. The I.G. filed its reply brief (I.G. Reply) on November 1, 2011. On November 15, 2011, Petitioner requested leave to file a sur-reply with the sur-reply attached (P. Reply). Petitioner's motion for leave to file is granted, and her sur-reply is accepted. No objections have been made to my consideration any of the exhibits, and I.G. Exs. 1 through 3 and P. Exs. 1 through 6 are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services.

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in any federal health care program any individual or entity convicted of a criminal offense under federal or state law, related to neglect or abuse of patients in connection with the delivery of a health care item or service. The statute does not distinguish between felony convictions and misdemeanor convictions and does not require that the health care item or service be delivered under Medicare, Medicaid, or a federal or state healthcare program. The Act defines "conviction" to include those circumstances: "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" or "when there has been a finding of guilt against the individual or entity by a Federal, State, or local court" or when a plea of guilty or no contest is accepted by a court; or when an individual enters "a first offender, deferred adjudication, or other arrangement or program where a judgment of conviction has been withheld." Act § 1128(i)(1), (2).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c).

B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate, and no hearing is required where either: there are no disputed issues of material fact, and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law, even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts that, if true, would refute the facts that the

moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

There is no dispute that Petitioner was convicted of the criminal offense of disorderly conduct under Iowa Code section 723.4. The issue that must be resolved is whether Petitioner's offense and the underlying facts amount to abuse or neglect under an applicable legal definition of abuse or neglect. The facts underlying the conviction are not subject to dispute before me. Thus, there is no genuine dispute as to any material issue of fact. All that remains to be determined is the issue of law of whether or not the undisputed facts meet the applicable definition of abuse and neglect. Accordingly, summary judgment is appropriate.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(2) of the Act when: (1) the individual was convicted of a criminal offense under federal or state law; (2) the conviction was related to the neglect or abuse of patients; and (3) the patient neglect or abuse occurred in connection with the delivery of a health care item or service.

a. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

There is no dispute that on August 4, 2010, Petitioner was convicted, contrary to her plea, in the Iowa District Court for Lee County in Keokuk, Iowa of disorderly conduct in violation of Iowa Code § 723.4. Petitioner requested a bench trial. The complaint and affidavit by which Petitioner was charged were introduced by the prosecution. Petitioner presented no evidence. The court found Petitioner guilty of the crime of disorderly conduct; ordered a deferred judgment; placed Petitioner on unsupervised good conduct probation for one year; and ordered Petitioner to pay a civil penalty of $135.00 and court costs. I.G. Ex 2; P. Exs. 1, 2, 3.

Petitioner does not dispute that she was convicted of a criminal offense under state or federal law within the meaning of section 1128(a)(2) of the Act. P. Br. at 3. The term "conviction" as defined in the Act includes the entry of a finding of guilty, as there was in this case, as well as deferred adjudications and similar programs where a judgment of conviction is withheld by the court. Act § 1128(i)(4). Accordingly, I concluded that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

b. Petitioner's conviction was related to abuse of a nursing home resident in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

Petitioner admits that when the incident for which she was convicted occurred on May 26, 2008, she had been instructed in her capacity as a restorative aide at Montrose Health Center, to assist the resident. P. Ex. 5, at 2. Thus, there is no genuine dispute that Petitioner's conviction related to the delivery of a health care item or service to a patient under her care. Petitioner asserts, however, that the I.G. has failed to prove that Petitioner's conviction was related to the abuse of a patient, in this case a resident of a nursing home. P. Br. at 7. Petitioner argues that the Iowa court did not find that Petitioner abused the nursing home resident involved. P. Br. at 3. Indeed, the evidence before me does not show that the court that convicted Petitioner of disorderly conduct made any specific legal conclusions about whether or not Petitioner abused the nursing home resident. I.G. Ex 2; P. Exs. 1, 2, 3. However, the characterization of the offense by the state is not controlling. Rather, the circumstances surrounding the offense need only show a relation to neglect or abuse of a patient to fall within the ambit of section 1128(a)(2) of the Act. *Narendra M. Patel,* DAB No. 1736, at 8 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991). Petitioner also argues that an Iowa ALJ found that Petitioner's conduct did not amount to abuse or neglect. P. Br. at 6, 12. Petitioner is correct that the Iowa ALJ concluded that Petitioner did not abuse the resident involved under Iowa law. P. Ex. 4. Petitioner's theory is that the I.G. has failed to meet its burden to show that the crime for which Petitioner was convicted was related to abuse of the nursing home resident.

The controlling facts are found in the compliant and affidavit that Petitioner did not dispute at trial and upon which Petitioner was convicted. The complaint and affidavit state that from May 26 through 28, 2008, Petitioner, while a restorative aide at the Montrose Health Center, repeatedly told a 93-year-old resident that she was "pathetic" and that "wheelchairs are for cripples" after she lowered the resident to the floor. The complaint also stated that: the resident was crying and sobbing; Petitioner was loud and raucous; and Petitioner caused distress to the occupants of the Montrose Health Center. I.G. Ex. 3. When the I.G. proposes to exclude an individual based on a criminal conviction by a federal, state, or local court in which the facts were adjudicated, the basis for the conviction is not reviewable and not subject to collateral attack on substantive or procedural grounds in this proceeding. 42 C.F.R. § 1001.2007(d). Therefore, Petitioner is bound before me by the facts upon which she was adjudged guilty in the Iowa court. There is also no dispute in this case that Montrose Health Center was a nursing home, subject to the requirements for participation in Medicare as a skilled nursing facility (SNF) or in Medicaid as a nursing facility (NF). P. Br. at 4, 7-9.

The real dispute before me is whether or not Petitioner's conduct as found by the Iowa criminal court is "abuse" within the meaning of an applicable definition of abuse. The parties disagree as to where the applicable definition for "abuse" is found.

The I.G. concedes that the term "abuse" is not defined by section 1128(a)(2) of the Act. I.G. Br. at 2. In fact, the Act provides no definition for the term abuse. There is also no definition for the term abuse found in the Secretary's regulations implementing the Congressional mandate and the Secretary's authority to exclude providers and suppliers from participation in Medicare. 42 C.F.R. Part 1001. The I.G. advocates that the he is free to apply the common definition of abuse citing numerous prior decisions by ALJs. I.G. Br. at 2. Petitioner advocates for the definition of abuse and neglect found at 42 C.F.R. § 488.301 (P. Br. at 8-9) or in the state law (P. Br. at 11-12). Petitioner argues that her conduct did not amount to abuse or neglect under any definition.

The I.G.'s assertion that he may elect to apply the common meaning of abuse rather than the definition adopted by the Secretary is in error. Congress tasked the Secretary, not the I.G., with prescribing the regulations necessary to carry out the insurance programs under the Act. Act § 1871(a)(1), (2) (42 U.S.C. § 1395hh(a)(1), (2)). Congress required that nursing homes (skilled nursing facilities and nursing facilities) protect and promote a residents right to be free from physical or mental abuse. Act §§ 1819(c)(1)(A)(ii), 1919(c)(1)(A)(ii) (42 U.S.C. §§ 1395i-3(c)(1)(A)(ii), 1396r(c)(1)(A)(ii)). The Secretary promulgated regulations as Congress required. The Secretary's regulations establish standards for participation by nursing homes in Medicare and Medicaid. It is also the Secretary and not the I.G. that Congress tasked to exclude individuals pursuant to section 1128 of the Act. The Secretary promulgated regulations that set forth the standards and procedures for the I.G. to following in excluding providers and suppliers from participation under the insurance programs that the Secretary was tasked to control. The I.G. has only such authority to exclude individuals as is delegated by the Secretary to the I.G. pursuant to 42 C.F.R. Part 1001. The Secretary has promulgated one regulation that defines the term abuse and that definition is found at 42 C.F.R. Part 488, subpart E, among the standards with which all nursing facilities must comply. There is no definition of abuse under the exclusion regulations. It is logical that the Secretary would promulgate only one regulation establishing a definition of the term abuse applicable to the insurance programs the Secretary is tasked to administer to avoid, for example, inconsistent definitions. It would be illogical for the Secretary to promulgate multiple different regulations defining the term abuse. Even if it was deemed necessary to define the term abuse in multiple regulations related to the various aspects of the insurance programs the Secretary is charged to administer, it would be illogical for the term abuse to be given different meanings for different programs. Thus, the I.G.'s argument that the absence of a specific definition of abuse in 42 C.F.R. Part 1001 frees the I.G. to adopt the most favorable common definition that can be found, is not persuasive. The I.G. cites no authority for the proposition that he is not bound to follow the Secretary's regulations. I am certainly bound by all the Secretary's regulations, and I have no authority to find

them invalid or to refuse to follow them. 42 C.F.R. § 1005.4(c)(1). Accordingly, I conclude that the definition of the term abuse that the Secretary promulgated at 42 C.F.R. § 488.301 must be applied to the facts in this case.

> *Abuse* means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

42 C.F.R. § 488.301 (emphasis in original).

Applying the definition of abuse at 42 C.F.R. § 488.301 to the facts, I have no trouble concluding that Petitioner's criminal conviction related to abuse of a resident. The complaint states that Petitioner repeatedly told a 93-year-old resident that she was "pathetic" and that "wheelchairs are for cripples." I.G. Ex. 3. There is no dispute that the words were said intentionally. In the context in which the words were uttered, including the fact that Petitioner was loud and raucous (I.G. Ex. 3), the words were intimidating and by Petitioner's own admission were intended to compel action by the resident. P. Ex. 5, at 2. The complaint also states that the resident was crying and sobbing, a fact which Petitioner cannot now dispute, which shows that it was more likely than not that the resident was suffering some mental anguish. Of course, the complaint also establishes that Petitioner caused distress to the occupants of the Montrose Health Center. I.G. Ex. 3. Petitioner argues that, even though she used loud language, she only meant to encourage the resident. She argues that her conduct did not amount to confinement, intimidation, or punishment. She argues that the I.G. has not shown she acted willfully or intentionally. Petitioner argues that there is a material dispute as to whether the resident suffered mental anguish. Petitioner's arguments ignore that her exclusion is based upon her conviction, and she cannot retry her case before me. Rather, she is bound by the facts related to her conviction. 42 C.F.R. § 1001.2007(d). The facts show that Petitioner's conviction for disorderly conduct was related to her treatment of the resident, and the facts established before the criminal trial court show that Petitioner abused the resident within the meaning of 42 C.F.R. § 488.103.

If I had authority not to comply with the Secretary's regulations and if I concluded that the I.G. was also not bound to follow the Secretary's regulations so that the I.G. could apply whatever definition of abuse he deemed most suitable, the result would be no different. Various ALJs have elected to apply the common meaning of the terms "abuse" and "neglect" in exclusion cases under section 1182(a)(2) of the Act rather than the definition adopted by the Secretary in 42 C.F.R. § 488.301. Various appellate panels of the Departmental Appeals Board (the Board) have reviewed and affirmed ALJs decision in which the common meaning of abuse or neglect was applied by the ALJ rather than the Secretary's regulatory definition. *See e.g., Lee G.Balos*, DAB No. 1541 (1995); *Janet Wallace, L.P.N.*, DAB No. 1326 (1992); *Summit Health Ltd., d/b/a Marina Convalescent Hosp.*, DAB No. 1173, at 8 (1990). The Board was not called upon in any of those cases

to approve or disapprove of the use of the common meaning rather than the definition adopted by the Secretary. Of course, it is no simple matter to determine which common meaning is appropriate and none of the prior decisions explain how one definition is more appropriate than another. Merriam-Webster[2] provides the following definitions: (1) a corrupt practice or custom; (2) improper or excessive use or treatment, misuse (such as drug abuse); (3) a deceitful act, deception; (4) language that condemns or vilifies usually unjustly, intemperately, and angrily; and (5) physical maltreatment. Dictionary.com[3] provides the following definitions: (1) to use wrongly or improperly, misuse; (2) to treat in a harmful, injurious, or offensive way; (3) to speak insultingly, harshly, and unjustly to or about, revile, mailing; (4) to commit sexual assault upon; and (5) to deceive or mislead. Black's Law Dictionary defines the noun "abuse" as: (1) a departure from legal or reasonable use, abuse; (2) physical or mental maltreatment, often resulting in mental, emotional, sexual or physical injury. *Black's Law Dictionary* 10 (8th ed. 2004). Applying any of these common definitions, I also have no difficulty concluding that Petitioner's conviction related to abuse of the resident. Petitioner clearly acted intentionally when using the words "pathetic" and "wheelchairs are for cripples." I.G. Ex. 3. In the context in which the words were uttered, including the fact that Petitioner was loud and raucous (I.G. Ex. 3), the words were intimidating and by Petitioner's own admission were intended to compel action by the resident. P. Ex. 5, at 2. Petitioner was improper and excessive in her treatment. Her words condemned the resident and were insulting. The resident was crying and sobbing, indicating that she was suffering mental harm. Petitioner also caused distress to the occupants of the Montrose Health Center. I.G. Ex. 3.

Petitioner argues, citing principles of comity and the Tenth Amendment to the United States Constitution that the I.G. must defer to the determination of the Iowa ALJ. Petitioner's theory is that by failing to define abuse in section 1128(a)(2) of the Act, Congress reserved the power to the states to determine whether a conviction under state law is related to abuse. Petitioner wants me to conclude that the state definition of abuse applies and that the I.G. must defer to the state agency determination that Petitioner did not abuse the resident. P. Br. at 11-14; P. Reply at 2-3; P. Ex. 4. As already noted, Congress granted authority to the Secretary to administer the insurance programs under the Social Security Act and to exclude providers and suppliers from participating in those programs under certain conditions. The states have only such authority related to the administration of the insurance programs under the Social Security Act as granted by Congress or as contracted or delegated by the Secretary. The fact that the Iowa ALJ concluded that Petitioner's conduct did not amount to abuse under Iowa state law has no

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[2] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/abuse.

[3] Dictionary.com, http://www.dictionary.reference.com/browse/abuse.

controlling effect regarding the Secretary's exclusion of Petitioner, and Petitioner has presented no persuasive argument that it should. *Summit Health Ltd.*, DAB No. 1173 (1990). Petitioner's arguments based on principles of comity and the Tenth Amendment are without merit.

However, if I applied the definition of abuse found in Iowa law, I would nevertheless conclude that Petitioner committed abuse based upon the facts related to her criminal conviction, which I hasten to point-out are binding upon her in this proceeding though they were not before the Iowa ALJ. I concur with the Iowa ALJ that the definition applicable under Iowa law is that for "dependent adult abuse" found at Iowa Code § 235B.2(5)(a)(1)(d) (2008). P. Ex. 4 at 9. Dependent adult abuse occurs under Iowa law as a result of the willful or negligent acts or omissions of a caretaker that causes physical injury, unreasonable confinement, unreasonable punishment, or assault of a dependent adult. The Iowa ALJ concluded that there was no physical injury or confinement. He analyzed in detail whether Petitioner's conduct amounted to unreasonable punishment, struggling with the fact that unreasonable punishment is not actually defined by the Iowa statute. The Iowa ALJ commented that Petitioner's conduct crossed the "dignity line" (P. Ex. 4, at 9); he likened her conduct with the resident to the conduct of a "NFL football coach" (P. Ex. 4, at 10); and he commented that Petitioner's language was demeaning (P. Ex. 4, at 10). The Iowa ALJ concluded, however, that there was no unreasonable punishment and, therefore, no dependent adult abuse. Inexplicably, the Iowa ALJ did not test Petitioner's conduct against all the elements of the Iowa definition of dependent adult abuse. In addition to physical injury, unreasonable confinement, and unreasonable punishment, dependent adult abuse also occurs under the Iowa statute when due to willful or negligent acts or omissions a caretaker commits an assault upon a dependent adult. Assault is a criminal offense and it is defined by the Iowa criminal code at Iowa Code § 708.1 (2002). An assault under the Iowa law is a general intent crime. A person commits an assault under Iowa law when, without justification, the person does any of the following:

> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1 (2002). The crime of assault under Iowa law also includes harassment, the definition of which includes:

> A person commits harassment when the person, purposefully and without legitimate purpose, has personal contact with another person, with the intent to threaten, intimidate, or alarm that other person. As used in this section, unless the context otherwise requires, *"personal contact"* means an encounter in which two or more people are in visual or physical proximity to each other. *"Personal contact"* does not require a physical touching or oral communication, although it may include these types of contacts.

Iowa Code § 708.7(1)(b) (emphasis in original). Applying the definitions of assault and harassment under Iowa law, I have no difficulty concluding that Petitioner committed elder adult abuse under the Iowa definition of the phrase based upon her assault of the resident. The facts by which Petitioner is bound, show that she intended to place the resident in fear of physical contact, i.e. compelling her to walk, that would be painful, injurious, insulting, or offensive, and Petitioner had the ability to execute the act. Furthermore, Petitioner's conviction establishes she had no legitimate purpose for her threatening, intimidating and alarming conduct toward the resident, and no physical contact was required.

Petitioner had a state trial where the facts were determined and a judgment of conviction entered, she is prohibited from obtaining review of the basis for the conviction in this forum and I have no jurisdiction to review the basis for her conviction.[4] Congress requires that Petitioner be excluded if she was convicted of an offense relating to neglect or abuse that was in connection with the delivery of a health care item or service. Act § 1128(a)(2). Petitioner's conviction was clearly in connection with the delivery of a health care service given her status as a restorative aide at the Montrose Care Center nursing facility at the time and the fact she was directed to assist the resident. Under any definition proposed by the parties, Petitioner's conduct, as established by the Iowa criminal court, amounted to abuse. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(2) of the Act. The elements of section 1128(a)(2) are satisfied, and I have no discretion not to exclude Petitioner.

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[4] If Petitioner appeals her conviction and it is subsequently overturned, Petitioner should contact the I.G. for reinstatement pursuant to 42 C.F.R. § 1001.3005(a)(1).

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a) of the Act, and the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act, effective June 20, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge