

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Candace Lynn Reid,

Petitioner,

v.

The Inspector General.

Docket No. C-12-22

Decision No. CR2503

Date: February 22, 2012

**DECISION**

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Candace Lynn Reid from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination are based on section 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(2), and arise from Petitioner's state court conviction of an offense relating to patient neglect or abuse. As I shall explain below, the undisputed facts in this case require the imposition of the five-year exclusion. For that reason, I grant the I.G.'s Motion for Summary Disposition.

**I. Procedural Background**

In 2009 Petitioner Candace Lynn Reid was employed as a caregiver at an adult foster care facility known as Progressive Habilitative Services and located in suburban Minneapolis, Minnesota. At some time prior to November of that year Petitioner formed an attachment to one of the male residents identified here as R.M., whose diagnoses included brain damage to the hippocampus and frontal lobe, mild mental retardation, and histories of attention deficit disorder and intermittent explosive disorder. Eventually that attachment took on the dimension of an intimate sexual relationship conducted by

Petitioner and R.M. in his bed at the facility. Authorities learned of this activity, and on February 10, 2010 Petitioner was charged with the gross misdemeanor offense of Abuse of a Vulnerable Adult, in violation of MINN. STAT. §§ 609.2325.1(b) and 2325.3(b).

On July 16, 2010, Petitioner appeared with counsel in the District Court, Fourth Judicial District, County of Hennepin, Minnesota. She appeared there to plead guilty to the charge, and did so after executing a lengthy and comprehensive Petition to Enter Plea of Guilty.

Petitioner's plea was acted upon by the District Court, which over the prosecution's objection ordered a stay of adjudication for twelve months and seven days, and placed Petitioner on probation subject to conditions including a "no-contact" condition barring contact between R.M. and Petitioner. Petitioner was required to pay \$100.00 costs of prosecution.

Section 1128(a)(2) of the Act dictates the mandatory exclusion, for a term of not less than five years, 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." The I.G. notified Petitioner of her exclusion for the mandatory minimum period of five years on August 31, 2011.

Acting through counsel, Petitioner timely sought review of the I.G.'s action on October 3, 2011. I convened a telephonic prehearing conference on November 2, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and the procedures best suited for addressing them. The parties agreed that the case likely could be decided on written submissions, and I established a schedule for the submission of documents and briefs. The details of the conference and the schedule established in it are set out in my Order of November 3, 2011. All briefing is now complete, and for purposes of 42 C.F.R. § 1005.20(c), the record closed February 3, 2012.

There are eight exhibits in this case. The I.G. has proffered I.G.'s Exhibits 1-6 (I.G. Exs. 1-6); Petitioner has not objected to these exhibits, and they are admitted. Petitioner has proffered Petitioner's Exhibits 1 and 2 (P. Exs. 1 and 2) to which objections have been made by the I.G. Although there is some validity to the I.G.'s objections, I cannot see the admission of those proffered Petitioner's Exhibits as having the slightest prejudicial effect on the I.G.'s position in this case. Accordingly, P. Exs. 1 and 2 are admitted.

## **II. Issues**

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in

Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Section 1128(a)(2) of the Act mandates Petitioner's exclusion since her predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore reasonable as a matter of law.

### **III. Controlling Statutes and Regulations**

Section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "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." The terms of section 1128(a)(2) are restated in regulatory language at 42 C.F.R. § 1001.101(b). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of whether . . . the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act; "when a plea of guilty . . . by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

MINN. STAT. § 609.2325.1(b) defines the crime of Abuse of a Vulnerable Adult in these terms:

(b) A caregiver, facility staff person, or person providing services in a facility who engages in sexual contact or penetration, as defined in section 609.341, under circumstances other than those described in sections 609.342 to 609.345, with a resident, patient, or client of the facility is guilty of criminal abuse and may be sentenced as provided in subdivision 3.

An exclusion based on section 1128(a)(2) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

#### **IV. Findings and Conclusions**

I find and conclude as follows:

1. On July 16, 2010 in the District Court, Fourth Judicial District, County of Hennepin, Minnesota, Petitioner Candace Lynn Reid pleaded guilty to one count of the gross misdemeanor criminal offense of Abuse of a Vulnerable Adult, in violation of MINN. STAT. §§ 609.2325.1(b) and 609.2325.3(b). I.G. Exs. 5, 6.
2. In response to Petitioner's plea of guilty, the District Court ordered Petitioner to pay the costs of prosecution in the sum of \$100.00, imposed conditions of probation including a "no-contact" condition barring contact between R.M. and Petitioner, and stayed the adjudication of the remaining proceedings for 12 months and seven days. I.G. Exs. 5, 6; P. Ex. 1, at 11, 13.
3. The proceedings described above in Findings 1 and 2 constitute a "conviction" within the meanings of sections 1128(a)(2) and 1128(i)(3) and (4) of the Act, and 42 C.F.R. § 1001.2.
4. There is a nexus and a common-sense relationship between the criminal offenses of which Petitioner was convicted, as noted above in Findings 1 and 2, and the neglect or abuse of a patient in connection with the delivery of a health care item or service. I.G. Exs. 3, 4, 5; P. Ex. 1.
5. Petitioner's conviction of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(2) of the Act; 42 U.S.C. § 1320a-7(a)(2).
6. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).
7. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

## V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the conviction must have been related to the neglect or abuse of patients; and, (3) the patient neglect or abuse to which an excluded individual's conviction related must have occurred in connection with the delivery of a health care item or service. *Bruce Lindberg, D.C.*, DAB No. 1280 (1991); *Neitra Maddox*, DAB CR1218 (2004); *Maureen T. Kehoe*, DAB CR673 (2000); *Gabriel S. Orzame, M.D.*, DAB CR587 (1999); *Ann M. MacDonald*, DAB CR519 (1998); *Anthony A. Tommasiello*, DAB CR282 (1993).

The parties' pleadings do not argue the second and third elements. Petitioner does not contest that the crime to which she pleaded guilty was related to the abuse, as that term is defined by Minnesota statute, of the impaired man with whom she became sexually intimate. While Petitioner claims that R.M. "benefitted and saw his life affirmed and enhanced in a significant way," she also concedes that her crime constituted "abuse of a patient as defined by Minnesota Statute and the Act." P. Ans. Br., at 7. Nor does she deny that the incident occurred while R.M. was in her care. I note, however, that both these elements are established by the investigation that led to the charges filed on February 10, 2010, and by the language of the charges themselves. I.G. Exs. 3, 4, 5.

The parties' arguments in this case focus on the first element. Petitioner asserts that the stayed adjudication of her tendered guilty plea does not, under Minnesota state law, support the I.G.'s determination to treat it as a predicate "conviction" under the federal exclusionary statute. The I.G. relies on a long line of precedent to argue that Petitioner has been convicted for purposes of this federal litigation, and that the stayed adjudication of her guilty plea cannot operate to invalidate it as a predicate "conviction" under federal law.

Petitioner has provided no citations to Minnesota statutes or to Minnesota rules of criminal procedure that might permit an extended analysis of her position. The only reference to the authority relied on by the District Court appears in the noticeably-incomplete transcript of the proceedings on July 16, 2010, where the term "stay of adjudication" or a variant appears. P. Ex. 1, at 5, 7, 9, 11, 14, and 15. There is, moreover, an evidentiary gap in Petitioner's position: in her Answer Brief, she asserts as a fact that her year-long probationary period was successfully completed on or about August 16, 2011. P. Ans. Br., at 4. An attachment to her October 3, 2011 Request for Hearing appears to be the District Court's docket sheet or register of actions reflecting an amended disposition on August 17, 2011. That document, or the purported order of August 17, 2011, might lend support to her factual assertion if they were elucidated by some explanation or if they were part of the evidentiary record, *which by the explicit terms of paragraph 7 of my November 3, 2011 Order they are not*. As matters stand, no order of dismissal appears in the evidence before me; for purposes of this Decision,

however, I shall assume *arguendo* that an order of discharge from probation and dismissal of the charge of some sort was eventually entered, and that it entitled Petitioner to the form of relief under Minnesota law she now claims.

The prosecution opposed the stay of adjudication, and expressed its preference to a stay of imposition of sentence, pursuant to MINN. STAT. § 609.135. But whatever the incomplete transcript of the proceedings on July 16, 2010 may reveal, it is clear that Petitioner's guilty plea was accepted to the extent necessary to allow the District Court to place her on probation for a year, order that she pay \$100.00 in costs of prosecution, and impose the strict provision barring contact between Petitioner and the man whom she abused.<sup>1</sup>

Without more information on the legal authority relied on by the District Court for the stay of adjudication, and its specific application in Petitioner's prosecution, those questions remain obscure, but they are not critical to this discussion. Instead, the established law of this forum requires that the Act's definitions of "conviction" be applied in these circumstances. *Ellen L. Morand*, DAB No. 2436 (2012); *Henry L. Gupton*, DAB No. 2058 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008); *Marc Schneider, D.M.D.*, DAB No. 2007 (2005); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F.Supp. 1446 (D. Kan. 1994); *see Bethany Anne Winther-Galimore*, DAB CR2501 (2012); *Myrna Baptista*, DAB CR2410 (2011); *Theresa A. Bass*, DAB CR1397 (2006). Those specific definitions noted in sections 1128(i)(3) and 1128(i)(4) of the Act encompass the proceedings against Petitioner. By the federal definitions applicable in this federal litigation aimed at protecting the integrity of federal health care programs, the criminal proceedings against

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<sup>1</sup> The extended colloquy among prosecution, defense, and the District Judge does not clarify the legal theory underlying the stay of adjudication. The incomplete transcript of that colloquy, and several spelled-out references in it, mention a 1996 Minnesota Supreme Court decision called "Krautzer." P. Ex. 1, at 6, 7, 9. Petitioner cites that case in her brief as "State v. Krautzer, 548 NW2d252(MN 1996)[sic]." P. Ans. Br. at 6. All of these references appear to be intended citations of *State v. Billy Jim Krotzer*, 548 N.W.2d 252 (Minn. 1996). That case dealt with the inherent powers of Minnesota courts to remedy what they might perceive as the overly-harsh consequences of a conviction by staying the adjudication of criminal charges under very special circumstances. The relevance of *Krotzer* to this case is uncertain, but even if applied vigorously in Minnesota courts, *Krotzer* is an example of precisely what the Board meant when it wrote, in *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994): "Congress has defined for the ALJ and this Board what 'convicted' means for purposes of section 1128 and that definition is binding on us. Moreover, it is clear from the legislative history of this provision that Congress adopted such broad definitions to ensure that exclusions from federally funded health programs would not hinge on state criminal justice policies." *Westin*, at 6.

Petitioner ended in her “conviction” as charged on July 16, 2010. This issue has been debated in this forum and before the Departmental Appeals Board (Board) for nearly two decades, and the resolution of the issue has never varied. The Administrative Law Judges (ALJs) of this forum and appellate panels of the Board have frequently addressed petitioners’ arguments that they should not be regarded here as “convicted” because they are not considered “convicted” under state law. The Board panels and ALJs of this forum have consistently rejected those arguments for the reason that federal law — specifically section 1128(i) of the Act — and not state laws, governs the meaning of “convicted” in applying the terms of the Social Security Act.

Because the I.G. has established a basis for Petitioner’s exclusion pursuant to section 1128(a)(2), her exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096 (2007). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

## **VI. Conclusion**

For the reasons set out above, the I.G.’s Motion for Summary Disposition is GRANTED. The I.G.’s exclusion of Petitioner Candace Lynn Reid from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), is thereby sustained.

/s/

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Richard J. Smith  
Administrative Law Judge