

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
)
Douglas Edmund Foster, L.P.N.,) DATE: September 23, 1997
)
Petitioner,)
)
- v. -) Docket No. C-97-250
) Decision No. CR495
The Inspector General.)
)

DECISION

By letter dated February 19, 1997, Douglas Edmund Foster, L.P.N., the Petitioner herein, was notified by the Inspector General (I.G.), United States Department of Health and Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.¹ The I.G. explained that the five-year exclusion was mandatory under section 1128(a)(2) of the Social Security Act (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. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. The I.G. submitted a brief with eight proposed exhibits (I.G. Exs. 1-8). Petitioner submitted a statement in response. Petitioner did not submit any proposed exhibits with his statement, nor did he object to the I.G.'s exhibits. I

¹ In this decision, I use the term "Medicaid" to refer to these State health care programs.

admit I.G. Exs. 1-8 into evidence. The I.G. also filed a motion to file a reply brief and a reply brief. Petitioner made no objection. I have therefore granted the I.G.'s motion and made her reply brief part of the record before me.

I grant the I.G.'s motion for summary disposition. I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

APPLICABLE LAW

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service to be excluded from participation in the Medicare and Medicaid programs for a minimum period of five years.

PETITIONER'S ARGUMENTS

Petitioner does not dispute the length of his exclusion, but contends that the I.G acted improperly by excluding him over three years after the date of his criminal conviction. Petitioner contends that such exclusion should have begun on the date of his conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant hereto, Petitioner had been licensed as a practical nurse in the states of Oklahoma and Michigan. I.G. Exs. 3, 8.
2. During the period relevant herein, Petitioner was employed as a licensed practical nurse at Hobart Good Samaritan Center in Hobart, Oklahoma. I.G. Ex. 3.
3. On or about January 14, 1994, a criminal information was filed in Kiowa County (Oklahoma) District Court, Case No. CRM-94-15, against Petitioner. I.G. Ex. 4.
4. The criminal information charged Petitioner with one count of aggravated assault and battery against E.P., a nursing home patient. I.G. Ex. 4; see I.G. Ex. 3.
5. The criminal information alleged that Petitioner picked up E.P. and threw her into a wheelchair, while shouting and threatening her, and repeatedly slammed her wheelchair into a wall. I.G. Ex. 4.

6. Petitioner was convicted in a jury trial for the crime of aggravated assault and battery. I.G. Ex. 5.
7. On or about March 8, 1994, the Oklahoma court entered judgment against Petitioner for the crime of aggravated assault and battery and sentenced Petitioner to pay a fine of \$250. Id.
8. Petitioner's duties as a licensed practical nurse at the Hobart Good Samaritan Center directly involved patient care and the delivery of health care services.
9. Petitioner's conviction satisfies the definition of "conviction" found in section 1128(i) of the Act for purposes of mandatory exclusion.
10. Petitioner's conviction for aggravated assault and battery was an offense relating to the abuse 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.
11. The Secretary of HHS is required under section 1128(a)(2) of the Act to exclude Petitioner from participation in the Medicare and Medicaid programs because of his conviction.
12. The mandatory minimum period of exclusion for a person convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service is five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.
13. The Secretary has delegated to the I.G. the duty to impose a mandatory exclusion when an individual is convicted of an offense, pursuant to section 1128(a) of the Act.
14. Petitioner is subject to the mandatory minimum exclusion of five years for his 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.
15. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years, pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

DISCUSSION

To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove that: (1) the excluded individual has been convicted of a criminal offense; (2) the conviction is related to the abuse or neglect of a patient; and (3) the patient neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service.

In the present case, I find, and Petitioner does not dispute, that he was "convicted" of a criminal offense within the meaning of sections 1128(i)(1) and (2) of the Act.² On March 8, 1994, the Oklahoma court entered a judgment of conviction against Petitioner, satisfying section 1128(i)(1). This judgment was based upon a jury finding of guilt within the scope of section 1128(i)(2) of the Act.

I further find that Petitioner's conviction for aggravated assault and battery against a nursing home patient must be deemed to be a conviction for abuse or neglect of a patient within the scope of section 1128(a)(2) of the Act. A conviction need not be for an offense called patient abuse or patient neglect; it need only "relate" to neglect or abuse. Patricia Self, DAB CR198 (1992). In Self, the petitioner was a nurse's aide who pled nolo contendere to a charge of battery. The petitioner allegedly struck a nursing home patient with an electrical cord in the course of performing her nurse's aide duties. The administrative law judge (ALJ) held in the decision that it was sufficient that a party is convicted of an offense based on charges of neglectful or abusive conduct even if the crime of which that party is convicted is not specifically labeled "neglect" or "abuse." Id.

Petitioner in this case is a licensed practical nurse who was employed at the Hobart Good Samaritan Nursing Home. Petitioner does not dispute that, during the course of his regular duties, he committed an aggravated assault and battery upon E.P., a nursing home patient. According to the criminal information, Petitioner picked E.P. up and threw her into a wheelchair, while shouting and

² For Petitioner to be "convicted" of a criminal offense within the meaning of section 1128(i) of the Act, it is necessary to find that one of the four subsections of section 1128(i) has been satisfied. Here, I find that Petitioner's conviction fell within two subsections.

threatening her, and repeatedly slammed her wheelchair into a wall.

Although the terms "abuse" and "neglect" are not defined within the Act, the term "abuse" is to include those situations where a party willfully mistreats another person. Thomas M. Cook, DAB CR51 (1989). In the present case, Petitioner was convicted of aggravated assault and battery for his abusive conduct towards E.P. described above. A physical assault against an individual clearly falls within the common and ordinary meaning of the term "abuse." Self, supra.

E.P. was a "patient" within the meaning of the Act. See I.G. Ex. 3. I find that Petitioner's abuse of E.P. occurred in connection with the delivery of a health care item or service. Petitioner's duties as a licensed practical nurse directly involved patient care and the delivery of health care services. Petitioner does not dispute that he was an employee of the facility and had the duty to assist in caring for E.P. when the assault and battery occurred. Where an attack occurs in a health care facility where the victim had been residing as a patient and the perpetrator was an employee of the facility whose duty was to assist in the care of patients, the conviction is deemed to be related to the delivery of health care. Patricia McClendon, DAB CR264 (1993).

In his statement, Petitioner asserts that his exclusion should have begun on March 8, 1994, the date of his conviction of aggravated assault and battery. I find no merit in this claim. As a matter of law, an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Section 1128(c); 42 C.F.R. § 1001.2002. This means that Petitioner's exclusion took effect 20 days after the I.G.'s February 19, 1997 exclusion letter and not 20 days after Petitioner's conviction. Although Petitioner asserts that his exclusion should be retroactive, an ALJ is without authority to change the effective date of an exclusion. Stanley Karpo, D.P.M., DAB CR356 (1995); Chander Kachoria, R.Ph., DAB CR220 (1992), aff'd, DAB No. 1380 (1993); Laurence Wynn, M.D., DAB CR344 (1994); Samuel W. Chang, M.D., DAB No. 1198 (1990). The effective date of Petitioner's exclusion cannot be altered in this proceeding. Furthermore, the I.G. has no authority to make exclusions retroactive. Neither the ALJ nor the I.G. can move the effective date of exclusion back to Petitioner's original March 8, 1994 date of conviction. In Kachoria, the petitioner argued that his exclusion was unreasonable because the I.G. arbitrarily delayed

imposing the exclusion. An appellate panel of the DAB ruled, however, that neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual becomes subject to exclusion due to a conviction. Kachoria, DAB No. 1330, at 10 (citing Douglas Schram, R.Ph., DAB No. 1372, at 10 (1992) and Chang, DAB No. 1198, at 13-16 (1990)). Consequently, I find that the time which has elapsed between Petitioner's conviction and the receipt of the exclusion letter from the I.G. does not violate Petitioner's due process rights.

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least 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. The five-year exclusion is therefore sustained.

/s/

Joseph K. Riotto
Administrative Law Judge