Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Selma Zimmerman,	DATE: March 16, 1995
Petitioner,	
- v. -	Docket No. C-94-414 Decision No. CR364
The Inspector General.	

DECISION

By letter dated June 10, 1994, the Inspector General (I.G.) notified Petitioner that she was being excluded for five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs specified in sections 1128(a) and 1128(h) of the Social Security Act (Act). The I.G. cited section 1128(a)(2) of the Act as the basis for imposing and directing this exclusion. Petitioner requested a hearing to contest her exclusion. With her hearing request, she filed also a Brief in Support of Request for Hearing (P. Hrg. Req. Br. at (page)).

I held a prehearing conference in this case on September 1, 1994. The parties filed the following documents pursuant to the schedule established at this conference: I.G.'s Motion for Summary Disposition; I.G.'s Proposed Findings of Fact and Conclusions of Law; I.G.'s Brief in Support of Motion for Summary Disposition (I.G. Br. at (page)); I.G.'s exhibits numbered 1 to 4 (I.G. Ex. 1 to 4)[1]; Petitioner's Response to Motion for Summary

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[1] I have re-numbered the I.G.'s exhibits to include the affidavit which the I.G. submitted as an attachment to her brief. Accordingly, I refer to the affidavit of Johanna G. Evans, Investigative Assistant for the Office of the Inspector General, as I.G. Ex. 1; the warrant of arrest and accompanying affidavit as I.G. Ex. 2; the court's entry of Petitioner's conviction as I.G. Ex. 3; and the court's entry of Petitioner's

Disposition (P. Resp. to Motion for Summ. Disp. at (page)); Petitioner's Brief in Support of Response to Motion for Summary Disposition (P. Br. at (page)); Petitioner's Proposed Findings of Fact and Conclusions of Law (P. Prop. FFCLs. at (page)); Petitioner's exhibits numbered 1 to 3 (P. Ex. 1 to 3)[2]; I.G.'s Brief in Reply to Petitioner's Brief (I.G. Reply at (page)).

Neither party has objected to the admissibility of the other's exhibits. Therefore, I have admitted into evidence all exhibits offered by the parties.

Having considered the arguments and submissions of the parties, I grant the I.G.'s summary disposition motion (summary judgment motion) for the reasons stated below.

I. ISSUES, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

I identified the following issues in my October 5, 1994 Order and Schedule for Filing Briefs and Documentary Evidence:

> A. Whether the I.G. had a basis upon which to exclude Petitioner; and
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> B. Whether the length of the exclusion imposed and directed against Petitioner is reasonable.

However, because the I.G. imposed and directed an exclusion of only five years against Petitioner, the reasonableness of the exclusion period is wholly controlled by whether the I.G. had a basis for excluding Petitioner under section 1128(a)(2) of the Act. See 42 C.F.R. § 1001.2007(a)(2). As further explained below, section 1001.2007(a)(2) specifies that the reasonableness of the exclusion period is not an issue for hearing where, as here, the I.G. has imposed an exclusion of five years under section 1128(a) of the Act. Id.

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acquittal as I.G. Ex. 4.

[2] Petitioner's exhibits were not numbered. I have numbered Petitioner's exhibits to conform with my Order of October 5, 1994. Thus, the court's entry of Petitioner's conviction is P. Ex. 1; the court's entry of Petitioner's acquittal is P. Ex. 2; and the affidavit of Selma Zimmerman is P. Ex. 3.

To resolve the controversies before me, I issue the following findings and conclusions, with citation to the parts of my decision at which I discuss each finding or conclusion in greater detail:

1. There are no material facts in dispute in this case. Thus, the case can be decided on the parties' summary judgment motions.[3] Pages 3-5.

2. Petitioner was convicted of a criminal offense. Pages 5-6.

3. Petitioner was convicted of a criminal offense which related to a "patient" and was "in connection with delivery of a health care item or service." Pages 6-7.

4. The criminal offense which Petitioner was convicted of is "related to neglect" of a patient. Pages 8-12.

5. Petitioner's five-year exclusion is reasonable as a matter of law. Page 12.

6. Petitioner is not entitled to an award of the costs she incurred in opposing the I.G.'s summary judgment motion. Page 12.

7. I grant the I.G.'s summary judgment motion in full. Page 13.

II. DISCUSSION

A. The case can be decided on the basis of the I.G.'s summary judgment motion and Petitioner's response to that motion.

As the Secretary's delegate, the I. G. has the authority to impose and direct an exclusion pursuant to section 1128(a)(2) of the Act where an individual 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." Act, section 1128(a)(2). In cases where the

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[3] Even though Petitioner has not styled her filings as a cross-motion for summary judgment, I have construed them as such.

foregoing statutory criteria are met, the I.G. must exclude the convicted individual or entity for a period of not less than five years. Act, section 1128(c)(3)(B). Therefore, in cases such as this one, where the I.G. has imposed an exclusion of only five years pursuant to what the Secretary's regulations term a "mandatory exclusion" under section 1128(a) of the Act, the excluded individual does not have a right to a hearing on whether that five-year period of exclusion is reasonable. 42 C.F.R. § 1001.2007(a)(2); 42 C.F.R. Part 1001, Subpart B. Accordingly, an exclusion of five years is mandatory and reasonable as a matter of law where the I.G. had the basis for imposing and directing an exclusion under section 1128(a)(2) of the Act. However, if the facts fail to establish the requisite basis for an exclusion under section 1128(a)(2) of the Act, then the five-year exclusion is per se invalid, and, therefore, unreasonable.

The I.G. has chosen to file a summary judgment motion in this case. The regulations authorize me to decide a case by summary judgment where there is no material fact in dispute. 42 C.F.R. § 1005.4(b)(12). In adjudicating the I.G.'s summary judgment motion, I have followed the principles contained in Rule 56 of the Federal Rules of Civil Procedure and the interpretations of administrative law judges and appellate panels of the Departmental Appeals Board (the Board).[4] See, e.g., Thelma Walley, DAB 1367 (1992).

To prevail on a summary judgment motion, a moving party must establish, by use of affidavits or other filings of record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). That is to say, the party moving for summary judgment

> has the initial burden of showing the absence of any genuine issue as to all the material facts which, under applicable principles of substantive law, entitle that party to judgment as a matter of law. If the documents before

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[4] Even though the Federal Rules of Civil Procedure have no binding force in administrative proceedings, administrative law judges have often used them for guidance. In addition, the summary judgment criterion stated in the Secretary's regulation is the same as that contained in the Federal Rules. 42 C.F.R. § 1005.4(b)(12); Fed. R. Civ. P. 56.

> the court fail to establish clearly that there is no genuine issue as to any material fact, the motion must be denied.

Walley DAB 1367 at 6 (emphasis in original) (citations omitted). When the summary judgment motion is properly supported, the adverse party may not rest upon mere allegations or denials. Fed. R. Civ. P. 56(e). The function of summary judgment is to pierce the pleadings and to assess the parties' proof to determine whether there is a genuine need for further proceedings. Therefore, summary judgment may be entered if the adverse party does not respond to a properly supported summary judgment motion or does not set forth specific facts showing that there is a genuine issue that should be reserved for trial or other disposition. Fed. R. Civ. P. 56(e).

Petitioner argues that the I.G. is not entitled to summary judgment as a matter of law. As discussed below, in her opposition to the I.G.'s summary judgment motion, Petitioner has not demonstrated any genuine issue as to any material fact. Indeed, Petitioner describes her arguments as "legal rather than factual." P. Resp. to Motion for Summ. Disp. at 1. According to Petitioner, her conviction was, "as a matter of law, unrelated to abuse or neglect." Id.

Having considered the facts and arguments of record in this case, I conclude that the I.G. is entitled to prevail as a matter of law. I have therefore resolved this case in full by entering summary judgment for the I.G.

B. Petitioner was convicted of a criminal offense.

Under Section 1128(i)(1) of the Act, an individual is considered to have been "convicted" when a judgment of conviction has been entered against the individual or entity. In this case, Petitioner has admitted that she was convicted of failing to report abuse. According to court documents supplied by both parties, Petitioner was found guilty on December 30, 1992, of failing to "report a case of suspected abuse, neglect, or exploitation . . ." in violation of ARK. CODE ANN. § 5-28-202 (1987), and a judgement of conviction was entered against her by the Municipal Court of Lonoke, Arkansas. P. Br. at 2, I.G. Br. at 1; I.G. Ex. 3. Based on these undisputed facts, I conclude that Petitioner was "convicted" of a criminal

offense within the meaning of section 1128(i) of the Act. I.G. Ex. 2, 3.

C. Petitioner was convicted of a criminal offense which was related to a "patient" and was "in connection with the delivery of a health care item or service."

Petitioner was Assistant Administrator of the Zimmerman Nursing Home in Carlisle, Arkansas. P. Hrg. Req. Br. at 1. Based on the parties submissions, I have no doubt that the Zimmerman Nursing Home was in the business of providing health care to its residents during the entire period Petitioner was its Assistant Administrator. Therefore, I find that the residents of the Zimmerman Nursing Home are its "patients," within the ordinary definition of that word.

Petitioner acknowledges that her conviction arose out of an incident involving a resident of the Zimmerman Nursing Home named "Jane Doe." P. Br. at 1; P. Prop. FFCLs. at 1. According to Petitioner, Jane Doe was a schizophrenic with delusional tendencies and a history of mental problems. Id. On the day of the incident which led to Petitioner's conviction, Jane Doe accused Petitioner of beating her. Id. Petitioner was subsequently tried and convicted of failing to report Ms. Doe's allegations of abuse. P. Br. at 2. These undisputed facts of record leave no doubt that Jane Doe was living in Zimmerman Nursing Home in order to receive health care items or services.

Even if the record before me were less clear as to the status of the individual who claimed to have been beaten by Petitioner, I could conclude from the elements of the Arkansas Code under which Petitioner was convicted that the alleged victim of suspected abuse was in the Zimmerman Nursing Home for the receipt of health care items or services. Arkansas law provides for a penalty which must be invoked against any individual "required by this chapter to report a case of suspected abuse," when such individual fails to do so. ARK. CODE. ANN. § 5-28-202 (1987) (emphasis added). Section 5-28-203, incorporated by section 5-28-202, describes the individuals who are "required by this chapter" to make a report of suspected abuse.

Section 5-28-203 describes the individuals who are under a duty to report suspected abuse. Under part (a)(1) of section 5-28-203, any "physician, surgeon, . . . resident intern, registered nurse, hospital personnel who are engaged in the administration, examination, care, or

treatment of persons," must report any "reasonable" suspicions of abuse. Part (a)(2) of section 5-28-203 provides that "[w]henever a person is required to report under this chapter in his capacity as a member of the staff [or] an employee in a facility, . . . he shall immediately notify the person in charge of the institution [or] facility, . . . or his designated agent . . . ."[5] This person in charge of the institution or facility "shall then become responsible for making a report or cause a report to be made." Id. Thus, the Arkansas Code, by its clear terms, regulates the actions of those who deliver health care services.

Section 5-28-203 imposes this duty to report whenever there is reasonable cause to suspect that an "endangered adult" may be subject to abuse. As defined by the Arkansas Code, "Endangered adults" are adults living inside or outside of a long-term care facility who are "found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to that person" and who lack the ability "to comprehend the nature and consequence of remaining in that situation or condition." ARK. CODE ANN. § 5-28-101(1)(A). In this case, Petitioner could not have been convicted absent a complaint by an endangered individual whose survival necessitated the delivery of health care services for her care and maintenance. Furthermore, Petitioner's failure to report could not have resulted in her conviction had the Zimmerman Nursing Home not been a health care facility, had Jane Doe not been an "endangered adult" patient residing there at the time of the alleged abuse, and had Petitioner not been the Assistant Administrator of the Zimmerman Nursing Home and the individual to whom Jane Doe alleged the abuse.

I find, therefore, that Petitioner's conviction related to a "patient" and was "in connection with the delivery of a health care item or service" within the meaning of section 1128(a)(2) of the Act.

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[5] This section of the statute also imposes a reporting duty on employees of the Department of Human Services and the head of the agency. However, there is no evidence that Petitioner was an employee of the Department of Human Services; nor was she the head of any agency at the time of the incident involving "Jane Doe."

D. Petitioner's offense is related to the "neglect" of a patient.

The I.G. does not contend that Petitioner's conviction is related to the abuse of any patient. I.G. Br. at 11. The I.G. contends only that Petitioner's conviction is for a criminal offense related to the neglect of a patient. Id. Having considered Petitioner's submissions to the contrary, I find that Petitioner's conviction for failure to report abuse, pursuant to section 5-28-202 of the Arkansas Code, is "related to neglect" of a patient, within the meaning of section 1128(a)(2) of the Act.

1. Petitioner's conviction establishes that Petitioner had an affirmative duty to report the abuse alleged by Jane Doe.

In an earlier decision, I analyzed the relationship between section 1128(a)(2)'s reference to patient neglect and a conviction for failure to report an incident of suspected patient abuse. Glen E. Bandel, DAB CR261 (1993). In Bandel, the petitioner was in charge of the health care facility where he worked, and, in that capacity, he had a duty under an Iowa statute to report any incident of suspected dependent adult abuse. I found that the State law under which Mr. Bandel was convicted created a duty of care to protect the health, safety, and well-being of the dependent adult patients in his charge. In failing to comply with the mandatory reporting requirements of the State statute involved, Mr. Bandel neglected a dependent adult patient's right to an aspect of care especially recognized and required by the State reporting law. Therefore, the resultant conviction in Iowa State court was related to patient neglect within the meaning of section 1128(a)(2) of the Act.

In this case, Petitioner asserts that she did not have a duty to report suspected abuse under Arkansas law because she was the one falsely accused of having abused the patient and, therefore, she did not have any "reasonable cause" to suspect abuse, as required under section 5-28-203. P. Br. at 6. Petitioner contends also that she was not "the person in charge" of the Zimmerman Nursing Home, and therefore, it was not her responsibility to report the incident pursuant to section 5-28-203(a)(2). P. Hrg. Req. Br. at 2. Petitioner alleges that "by unwritten policy," the Director of Nursing was the official responsible for reporting any incidents of suspected abuse at the Zimmerman Nursing home. Id. Moreover, Petitioner argues that since the Director of Nursing reported the incident the day after it occurred, there

was no need for Petitioner to "make a redundant reporting call." Id.

Both arguments, however, are collateral attacks on Petitioner's conviction, and I am not authorized to consider them. 42 C.F.R. § 1001.2007(d). As discussed earlier, Petitioner's conviction was for failure to report suspected abuse under section 5-28-202, which cross-references section 5-28-203. These State statutes contain the elements that must be proven for a conviction. Therefore, Petitioner's conviction means that Petitioner was found to have had a duty to report Jane Doe's allegation of abuse, and that Petitioner wilfully failed to make this report. See, e.g., I.G. Ex. 3 and State statutes cited therein.

I must accept as valid the findings of fact inherent in the conviction itself. See, 42 C.F.R. § 1001.2007(d). Petitioner's arguments to the contrary are of no legal weight. I cannot allow Petitioner to use federal exclusion hearing procedures to challenge her State conviction.

> 2. Even though Petitioner was not convicted of actual neglect, her conviction was for a criminal offense "relat[ed] to neglect," within the meaning of section 1128(a)(2).

Petitioner cites legislative history, the absence of a conviction for neglect under State law, and certain language from my decision in Bandel to support her contention that she was not convicted of a criminal offense "related to neglect." P. Br. at 3-6. For example, Petitioner argues that, because the Arkansas Code does not specifically include the offense of failure to report abuse in its definition of "neglect," Petitioner's conviction is not "related to neglect" under Arkansas law. Moreover, Petitioner contends that the Arkansas Code differs from the Iowa reporting statute I considered in Bandel; and that therefore, I may not rely on Bandel for the proposition that failure to report suspected abuse is a form of neglect. According to Petitioner, her position is supported by my observation in Bandel that "Petitioner's [i.e., Mr. Bandel's] omission might not relate to patient neglect in jurisdictions without laws similar to Iowa's [statute imposing a reporting duty]." P. Br. at 4.

I reject Petitioner's arguments.

I note first by way of background that Congress did not intend for section 1128(a)(2) of the Act to reach only those persons who have directly abused or neglected patients. Section 1128(a)(2) of the Act does not require a conviction for actual patient abuse or neglect; rather, it requires a conviction for an offense that related to, entailed, or resulted in, the abuse or neglect of a patient. Section 1128(a)(2) of the Act; 42 C.F.R. § 1001.101(b) (1992). In promulgating regulations to implement the Act, the Secretary has noted especially that, "the offense [which] is the basis for the exclusion need not be couched in terms of patient abuse or neglect." 57 Fed. Reg. 3303 (1992). The illustrative example which is given in the Federal Register to prove this point is a conviction for embezzlement of nursing home funds that resulted in the neglect of patients. Id.

In addition, Petitioner has misinterpreted a statement I made in Bandel. P. Br. at 5. My observation that Mr. Bandel's omission might not relate to patient neglect in jurisdictions without laws similar to Iowa's section 135B.1(7) does not mean that, for me to find Petitioner's conviction to be related to patient neglect in this case, the Arkansas reporting statute must be the same as Iowa's reporting statute. Nor did my statement mean that the omission committed by Mr. Bandel is the only type of offense I would consider to be related to patient neglect in Iowa or elsewhere. I made the statement quoted by Petitioner in the course of noting that I was deciding the issues in Bandel based on the facts and laws relevant to that case. In short, I was pointing out that I decide the "related to patient neglect" issue on a case by case basis.

It is true that this case differs from Bandel in that Petitioner herein was convicted of failing to report an incident in which she was the alleged abuser, whereas Mr. Bandel was convicted for failing to report an incident in which another employee was the alleged abuser. However, such a distinction is without any legal significance regarding the issue as to whether each conviction was related to the neglect of patients. Both the petitioner in Bandel and Petitioner in this case were convicted of violating a state reporting statute, and of breaching their duty to report suspected incidents of patient abuse.

In several decisions involving fact patterns and state reporting laws similar to those before me here, the Board has affirmed the I.G.'s determination that a conviction for failure to report suspected or alleged abuse is "related to neglect" of patients, within the meaning of

section 1128(a)(2) of the Act. E.g., Dawn Potts, DAB CR120 (1991); Vicky L. Tennant, R.N., DAB CR134 (1991); Carolyn Westin, DAB CR229 (1992), aff'd DAB 1381 (1993), aff'd sub nom., Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994). In Westin, the petitioner was convicted for failing to file an incident report regarding a resident of the nursing home where she was an administrator. An appellate panel of the Board found that because the Act explicitly provides for exclusion when a party is convicted of a crime "related to" patient neglect or abuse, "it does not matter that the term 'neglect' was not specifically mentioned during the criminal process." Westin, DAB 1381 at 12. On judicial review, the U.S. District Court agreed and held as follows:

> [T]here is no requirement that the Secretary demonstrate that actual neglect or abuse of patients occurred, nor is there a requirement that the individual or entity be convicted of an actual offense of patient neglect or abuse. The phrase "relating to" clearly encompasses a broader range of conduct than actual neglect or abuse.

Westin, 845 F. Supp. at 1450. The court affirmed the imposition of the five-year exclusion under section 1128(a)(2) of the Act. Id. at 1449, 1454.

For the foregoing reasons, I conclude that Petitioner was convicted of an offense related to patient neglect even though the State of Arkansas did not charge her with actually neglecting Jane Doe. Petitioner was convicted under section 5-28-202 of the Arkansas Code, which incorporates section 5-28-203 by reference. Since neither of these sections uses the term "neglect," I do not find it necessary to interpret the definition of "neglect" contained in section 5-28-101, as urged by Petitioner. P. Br. at 5-6.

> 3. Petitioner's conviction is "relat[ed] to neglect," within the meaning of section 1128(a)(2), even though she was acquitted of an assault charge.

Petitioner contends that her actions did not result in the neglect of a patient. Petitioner reasons that because the Municipal Court of Lonoke, Arkansas found her to be not guilty of abuse, her failure to report an incident of abuse was not an act of neglect within the meaning of section 1128(a)(2) of the Act. P. Br. at 4.

However, while Petitioner's evidence establishes that she was found not guilty of assault under Arkansas law, (P. Ex. 2.), I find that Petitioner's conviction "relates to neglect," even though she has not been found guilty of patient abuse. The I.G. has not contended that Petitioner's conviction for failure to report suspected abuse is related to patient abuse under section 1128(a)(2) of the Act. The I.G. argues only that Petitioner's conviction is related to patient neglect. I.G. Reply at 7.

Petitioner's acquittal of an assault charge does not negate the fact that her conviction relates to the neglect of a patient. As I explained in the preceding section, in determining whether a criminal offense is "relat[ed] to neglect" under section 1128(a)(2) of the Act, there is no requirement for proof that a patient was actually neglected or abused. E.g., Westin, 845 F. Supp. at 1450.

E. The length of the exclusion imposed and directed against Petitioner is reasonable as a matter of law.

Under the facts of this case, I cannot consider Petitioner's argument that the length of her exclusion is unconscionable. P. Br. at 7; 42 C.F.R. § 1001.2007(a)(2). Section 1128(a)(2) mandates that parties who are convicted of offenses described in that section must be excluded from Medicare and Medicaid for five years. Congress gave the Secretary no discretion to impose an exclusion of less than five years in such cases. Therefore, I must affirm the five-year exclusion imposed and directed against Petitioner by the I.G.

F. Petitioner is not entitled to an award of costs.

Petitioner requests an award of the costs she has incurred in her opposition to the I.G.'s summary judgment motion. P. Resp. to Motion for Summ. Disp. at 1. Petitioner's request is premised on her contention that she is entitled to prevail as a matter of law. Id. Therefore, my conclusion that the I.G. (and not Petitioner) is entitled to judgment as a matter of law is dispositive of Petitioner's request for costs. I do not find it necessary to consider whether Petitioner had a proper regulatory or statutory basis for having filed such a request in the first instance.

CONCLUSION

For the foregoing reasons, I have concluded that there exists no genuine issue of fact concerning the I.G.'s basis for imposing and directing an exclusion against Petitioner pursuant to section 1128(a)(2) of the Act. The I.G. is entitled to judgment on this issue as a matter of law. Also as a matter of law, the length of the exclusion in this case (five years) is proper. I therefore grant the I.G.'s summary judgment motion in full and sustain the exclusion imposed and directed against Petitioner.

/s/

Mimi Hwang Leahy
Administrative Law Judge