Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Corey V. Penner, a.k.a., Corey Vaughn Penner,	)	Date: January 11, 2007
Petitioner,	)	
	)	Docket No. C-06-589
-v.-	)	Decision No. CR1553
	)	
The Inspector General.	)	
	)	

DECISION

There is no basis to exclude Petitioner, Corey V. Penner, from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(2)) because of his March 21, 2002 conviction by the District Court of Harvey County, Kansas.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated June 30, 2006, that he 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 his conviction in the District Court of Harvey County Kansas of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health care item or service. *See* Act, section 1128(a)(2); 42 U.S.C. § 1320a-7(a)(2); and 42 C.F.R. § 1001.101(b).

Petitioner timely requested a hearing by letter dated July 21, 2006. The case was assigned to me for hearing and decision on August 1, 2006. On August 16, 2006, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated August 17, 2006.

During the prehearing conference on August 16, 2006, the parties agreed to waive oral hearing and that the case may proceed to decision on the briefs and documentary evidence. Despite the I.G.'s waiver of an oral hearing and agreement that this case may be decided on the documents, the I.G. filed a motion for summary judgment and supporting brief on September 28, 2006 (I.G. Brief), with I.G. Exhibits (Exs.) 1 through 15. Petitioner filed a "Brief in Support of Motion to Deny Summary Judgment" on November 13, 2006 (P. Brief), with copies of some I.G. exhibits attached but no Petitioner's exhibits. The I.G. filed a reply brief on November 28, 2006 (I.G. Reply). No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 15 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. Petitioner was a pharmacist licensed by the State of Kansas.

2. On February 21, 2002, Petitioner was charged with 31 counts of battery between March 1999 and February 2002, upon women from whom he drew blood representing that he was doing so for purposes of a research project. P. Brief at 3; I.G. Ex. 5.

3. On March 21, 2002, Petitioner pled guilty to misdemeanor battery of 16 different women, each charged as a violation of Kansas Statutes Annotated 21-3412(a)(1) a Class B Person Misdemeanor. P. Brief at 3; I.G. Exs. 5, 13, 14, 15.

4. On April 19, 2002, Petitioner was sentenced to four, consecutive, six-month sentences and twelve, concurrent, six-month sentences; he was placed on supervised probation for two years, ordered to pay court costs, and ordered to obtain a mental health evaluation and treatment. I.G. Ex. 15.

5. The I.G. notified Petitioner by letter dated June 30, 2006, that he 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. I.G. Ex. 1.

6. Petitioner timely requested a hearing by letter dated July 21, 2006.

7. The evidence reflects that some of his victims recognized Petitioner as a pharmacist, some were co-workers at Dillon's, some had contact with Petitioner at Dillon's, but the evidence does not show that any received prescriptions or related counseling from Petitioner.

8. The evidence does not show that any of Petitioner's victim were customers or patients of Dillon's Pharmacy.

9. Petitioner's victims were not seeking or receiving care or treatment from Petitioner, nor is there evidence that they ever did.

10. The evidence does not show any relationship between Petitioner in his capacity as a pharmacist and any of the victims named in the charges of which he was convicted.

11. The evidence shows that Petitioner sought out and solicited his victims, but not that he used his position as a pharmacist to locate his victims or to convince them to permit him to draw blood.

12. The evidence does not show that Petitioner's victims were receiving needed care for the maintenance, improvement, or protection of their health or treatment for the prevention or lessening of an illness, disability, or pain.

13. Petitioner's victim's statements in the investigator's reports show that they believed that blood was being drawn for research, not their care or treatment.

14. Petitioner obtained supplies from Dillon's Pharmacy for his purported research and not for delivery as a health care item or service to his victims.

15. The evidence does not show that any of Petitioner's victims believed or that Petitioner ever suggested that he was providing his victims either health care items or health care services.

B. Conclusions of Law

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

2. The parties waived an oral hearing during the prehearing conference, the waiver has not been withdrawn, and this decision is not a "summary judgment," but rather a decision on the merits based upon the briefs of the parties and the documentary evidence they have filed.

3. Petitioner was convicted of criminal offenses of misdemeanor battery under Kansas law.

4. Petitioner's plea of guilty to "battery" is an admission that he inflicted bodily harm upon his victims pursuant to the law of Kansas, the jurisdiction where his plea was accepted.

5. Petitioner abused, within the meaning of section 1128(a)(2) of the Act, the victims of the criminal offenses of battery of which he was convicted because he inflicted bodily harm.

6. The victims of the criminal offenses of battery of which Petitioner was convicted were not his patients within the meaning of section 1128(a)(2) of the Act.

7. Petitioner's abuse of his victims was not in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

8. There is no basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

9. No period of exclusion is reasonable in this case as there is no basis for exclusion under section 1128(a) of the Act.

C. Issues

The Secretary of the Department of Health and Human Services (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).

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

D. Law Applicable

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in Medicare and Medicaid programs any individual 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.

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. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

E. Analysis

1. The parties waived oral hearing and this decision is not a summary judgment.

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. § 1005.2 and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 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).

During the August 16 prehearing conference, the parties waived appearance at an oral hearing and agreed that this case can be decided on the briefs and documentary evidence. However, the I.G. filed a motion for summary judgment and Petitioner filed a brief in support of a motion to deny summary judgment. The I.G. recognizes in its brief at page 2 that during the prehearing conference it was determined that the case would proceed on the written submissions of the parties. Petitioner includes a similar recitation in its brief but requests that I "deny the I.G.'s motion for summary judgment and overturn the exclusion." P. Brief at 2. The parties' reference to summary judgment is confusing as it could be construed to be inconsistent with the parties' waiver of oral hearing. However, I

find no indication in the parties' briefs that either desires to withdraw the waiver of an oral hearing. Rather, the parties' briefs show that they intend that this case be resolved on the briefs and documentary evidence and the use of the phrase "summary judgment" is simply in error. Due to the waiver of an oral hearing during the prehearing conference this decision is clearly not a "summary judgment." Rather this is a decision on the merits based upon the briefs of the parties, and the documentary evidence they have filed as agreed during the prehearing conference.

2. There is no basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

The I.G. cites section 1128(a)(2) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> > (2) Conviction relating to patient abuse. – 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 statute requires the Secretary to exclude from participation any individual or entity: (1) convicted of a criminal offense; (2) where the offense is **related** to neglect or abuse; (3) the neglect or abuse was of a patient; and (4) the neglect or abuse occurred in connection with the delivery of a health care item or service. This section, unlike section 1128(a)(1), does not require that the delivery of the health care item or service was under the Medicare or Medicaid programs.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner was a pharmacist licensed by the State of Kansas. Between November 2000 and February 2002, Petitioner drew blood from multiple women falsely representing that he was conducting a research project. Petitioner was charged with 31 counts of battery upon the women from whom he drew blood. On March 21, 2002, Petitioner pled guilty to misdemeanor battery of 16 different women, each charged as a violation of Kansas Statutes Annotated 21-3412(a)(1) a Class B Person Misdemeanor. P. Brief at 3; I.G. Exs. 5, 13, 14, 15. On April 19, 2002, Petitioner was sentenced to four, consecutive, six-month sentences and 12, concurrent, six-month

sentences. Petitioner was placed on supervised probation for two years, ordered to pay court costs, and ordered to obtain a mental health evaluation and treatment. I.G. Ex. 15. Thus, the first element for an exclusion pursuant to section 1128(a)(2) is satisfied. Petitioner argues that the remaining three elements are not satisfied by the facts of this case.

a. Petitioner abused his victims within the meaning of the Act.

The Kansas statute that Petitioner was found guilty of violating provides that battery is "[i]ntentionally or recklessly causing bodily harm to another person . . . ." Kan. Stat. Ann. 21-3412(a)(1) (2001). Thus, Petitioner was convicted pursuant to his guilty plea of causing "bodily harm" to his victims and this fact is not subject to challenge before me. 42 C.F.R. § 1001.2007(d). Petitioner argues however, that the bodily harm he caused his victims does not amount to abuse within the meaning of section 1128(a)(2) of the Act. The parties agree that the regulations do not provide a definition of abuse and that in prior cases decided by appellate panels of the Departmental Appeals Board (the Board) and ALJs the term has simply been given its ordinary meaning. I.G. Brief at 7-8; P. Brief at 5.

Although 42 C.F.R. Part 1001 (the I.G.'s exclusion regulations) does not include a definition of "abuse," the Secretary has defined abuse in another regulation promulgated under the Act. "Abuse" is defined at 42 C.F.R. § 488.301 as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." This definition of abuse is found in the Secretary's regulations governing the survey and certification of long-term care facilities, 42 C.F.R. Part 488, subpart E. While the Secretary may not have intended its application in exclusion cases, I see no need to resort to common meanings and dictionary definitions where the Secretary has provided a workable definition that he promulgated under authority of the Act that the I.G. seeks to enforce against Petitioner.

Petitioner's plea of guilty to "battery" is an admission that he inflicted bodily harm upon his victims pursuant to the law of the jurisdiction where his plea was accepted. There is no dispute that he willfully punctured the skin and the vein of each victim in order to draw a blood sample and I have no hesitation concluding that that was the willful infliction of an injury which resulted in some physical harm and perhaps some pain. Accordingly, I conclude that Petitioner, in fact, abused each victim within the meaning of the Act and regulations. I am not persuaded by Petitioner's arguments that there was no abuse because the way he drew blood was "acceptable and expected" (P. Brief at 5) or that it was not abuse because it was not "grossly inappropriate or unwanted physical

contact" (P. Brief at 6). I am also unswayed by the fact that the victims all originally consented to the venous puncture and any associated risk. The Secretary's definition of abuse only requires physical injury and harm or pain. Petitioner admitted by his pleas that he inflicted bodily harm and I find he is bound by that admission.

b. Petitioner's victims were not his patients.

Petitioner argues that his conduct did not involve dispensing drugs or medication or providing counseling regarding drugs or medication to any of the victims, thus, they were not Petitioner's patients. Petitioner also argues that the I.G. has not shown that any of his victims were patients of Dillon's Pharmacy[1] where Petitioner was employed. Petitioner urges me to conclude that his victims were not patients within the meaning of the Act and he is not subject to exclusion for this reason. P. Brief at 7. The I.G. argues that Petitioner's victims were his patients because they were examined and had their blood drawn by him.[2] I.G. Brief at 9; I.G. Reply at 1. The I.G. does not specifically assert in its opening brief that any of Petitioner's victims were customers or patients of the Dillon's Pharmacy where Petitioner worked, that Petitioner actually dispensed any drugs or medications to the victims, or that he provided them with any advice or monitoring related to any health care items or services. The I.G. does assert in its reply brief that some of Petitioner's victims were customers of Dillon's Pharmacy (I.G. Reply at 5), but that assertion is not proven by the evidence as discussed hereafter.

Whether Petitioner's victims may be characterized as his patients is significant because the third element that must be proved to trigger the required exclusion pursuant to section 1128(a)(2) is that Petitioner's criminal conviction related to the abuse or neglect of a "patient." The I.G. bears the burden of showing that Petitioner's victims were, in fact, his patients. *Bruce Lindberg, D.C.*, DAB No. 1280 (1991) (*Lindberg I*), at 3 (when the I.G.

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[1] According to the investigator's statement, Petitioner was a "Pharmacist with Dillons," but the investigator does not clarify which Dillons. There is evidence that Petitioner worked at the "South Dillons" (I.G. Ex. 9, at 5) and that he worked at the "Downtown Dillons Pharmacy" (I.G. Ex. 11, at 3). For those who travel the Midwest, it is common knowledge that Dillon's is part of a large supermarket chain that has a pharmacy operation at its stores. However, the evidence in this case does not reveal if the Dillon's Pharmacy where Petitioner worked were actually part of the Dillon's supermarket chain.

[2] The I.G. also argues that Petitioner's victims received "health care items" from Petitioner including syringes, blood containers, and rubbing alcohol. I.G. Brief at 9. This argument is discussed hereafter under the issue of whether or not there was delivery of a health care item or service.

"invokes section 1128(a)(2), the I.G. must establish that these elements are present").[3] In this case, Petitioner was not convicted of an offense of neglect or abuse of a patient. Thus, it is necessary to determine whether or not his victims were patients within the meaning of section 1128(a)(2).

Neither the Act nor the I.G.'s exclusion regulations provide a definition of the term "patient." The I.G. cites *Merriam-Webster's Collegiate Dictionary* for the definition that a patient "is an individual awaiting or receiving medical care or treatment." I.G. Brief at 8; I.G. Reply at 5. The I.G. also cites various decisions of the Board and ALJs for the proposition that a patient is one who is "under the care of a medical practitioner." I.G. Brief at 8. The Secretary has provided a definition of "patient," albeit in the context of the Medicaid program:

> *Patient* means an individual who is receiving needed professional services that are directed by a licensed practitioner of the healing arts toward the maintenance, improvement, or protection of health, or lessening of illness, disability, or pain.

42 C.F.R. § 440.2(a) (italics in original).[4]

The I.G., who bears the burden of persuasion on the elements of a violation of 1128(a)(2), waived the opportunity for an oral hearing electing in this case to rely upon the documentary evidence rather than to elicit testimony from Petitioner's victims or the police investigator. The documents offered include the I.G. notice (I.G. Ex. 1) and Petitioner's request for hearing (I.G. Ex. 2). The I.G. also had admitted as evidence some investigators' reports (I.G. Exs. 3, 8, 9, 10, 12); Petitioner's consent agreement with the Kansas Board of Pharmacy in which Petitioner admits nothing (I.G. Ex. 4); the criminal

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[3] The I.G. asserts that Petitioner has failed to "disprove the legal sufficiency" of the I.G.'s decision to exclude him. I.G. Reply at 1. The I.G. cites no authority for the proposition that Petitioner bears such a burden and the argument is contrary to both the regulation and prior decisions of the Board. 42 C.F.R. § 1005.15(b); *Lindberg I.*

[4] The Secretary has also defined "patient" in the regulations pertaining to the confidentiality of alcohol and drug abuse patient records, as "any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program and includes any individual who, after arrest on a criminal charge, is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in a program." 42 C.F.R. § 2.11. However, this definition has no apparent application in this case.

complaint (I.G. Ex. 5); some documents which appear to meet the investigating officer's description (I.G. Ex. 3, at 4) of documents that Petitioner used when collecting blood (I.G. Ex. 6); Petitioner's plea agreement (I.G. Ex. 13); the Journal Entry from the District Court of Harvey County, Kansas reflecting Petitioner's guilty pleas and the court's acceptance of those pleas (I.G. Ex. 14); and the Journal Entry of the District Court reflecting Petitioner's sentencing (I.G. Ex. 15).

The documentary evidence shows that Petitioner was convicted pursuant to his pleas of counts 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 21, 25, and 30, each of which alleged battery. I.G. Ex. 14. The complaint provides little information in each count other than the approximate date of the battery and the name of the victim. I.G. Ex. 5. The investigating officers' reports, specifically I.G. Ex. 3, at 1; I.G. Ex. 9, at 1-5; I.G. Ex. 10, at 2-3; and I.G. Ex. 11, at 1-3, provide the only details related to Petitioner's contact with each of the victims named in the counts to which Petitioner pled guilty.[5] The evidence reflects that some of the victims recognized Petitioner as a pharmacist, some were co-workers at Dillon's, some had contact with Petitioner at Dillon's, but the evidence does not show that any received prescriptions or related counseling from Petitioner. Furthermore, contrary to the I.G.'s assertion in its Reply Brief at 5, there is no evidence that any of his victims were customers or patients of Dillon's Pharmacy.[6]

The I.G.'s primary argument, however, is that Petitioner's victims were his patients because he drew their blood, with or without some examination, and he used some supplies such as syringes, "blood containers," and rubbing alcohol that he obtained at Dillon's. I.G. Brief at 8-9; I.G. Reply at 5-6. However, applying either the common definition suggested by the I.G. or the definition adopted by the Secretary, it is clear that Petitioner's victims were not patients. Petitioner's victims were not seeking or receiving care or treatment from Petitioner, nor is there evidence that they ever did. The evidence

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[5] The I.G. has provided no transcript of any proceeding in which the judge discussed the providence of Petitioner's guilty pleas so I have no detailed admissions by Petitioner related to the counts to which he pled guilty. However, Petitioner did not object to my consideration of the investigator's reports or otherwise deny the content of those reports. Thus, I can match the names in those reports with the names in the counts to which Petitioner pled guilty to derive some information about Petitioner's conduct with the victims identified.

[6] The I.G. seems to assume that because Petitioner met some of his victims at the "Dillons" and drew blood there in the backroom or parking lot that the victims must have been customers of Dillon's Pharmacy. I.G. Reply at 5. However, if the assumption is based upon the victims' presence, it does not necessarily hold if the Dillon's stores where Petitioner worked were supermarkets with pharmacy operations.

does not show any relationship between him in his capacity as a pharmacist and any of the victims named in the charges of which he was convicted. The evidence shows that Petitioner sought out and solicited his victims but not that he used his position as a pharmacist to locate his victims or to convince them to permit him to draw blood. Furthermore, the evidence does not show that his victims were receiving needed care for the maintenance, improvement, or protection of their health or treatment for the prevention or lessening of an illness, disability, or pain. According to the victims' statements in the investigator's reports, they believed that blood was being drawn for research, not their care or treatment.

Accordingly, I conclude that Petitioner's victims were not his patients.

c. Petitioner's abuse of his victims did not occur in connection with the delivery of a health care item or service.

The I.G. must also prove for an exclusion pursuant to section 1128(a)(2) that the neglect or abuse occurred in connection with the delivery of a health care item or service. According to the Board's decision in *Bruce Lindberg*, DAB No. 1386 (1983) (*Lindberg II*), "[t]he words 'in connection with' in section 1128(a)(2) require only a minimal nexus between the abuse and the delivery of a health care service."

The I.G. argues that Petitioner evaluated his victims' blood pressure, heart and liver functions, and drew their blood. The I.G. argues that three of Petitioner's victims (K.S., S.S., and M.A.) were patients of Dillon's Pharmacy; however, review of the evidence (I.G. Ex. 3, at 1-2; I.G. Exs. 8 and 11) shows that Petitioner met these three victims at the Dillon's but does not show that they were patients of the Dillon's pharmacy. The mere fact that the victims met Petitioner at the Dillon's, particularly if it was a supermarket with a pharmacy operation, does not give rise to the inference that they were pharmacy customers. The I.G. further argues that Petitioner used supplies obtained from Dillon's Pharmacy. I.G. Reply at 6-8. However, Petitioner obtained the supplies for his purported research and not for delivery as a health care item or service. The I.G. asserts in its opening brief that Petitioner drew blood from three victims while "he was on duty as a pharmacist" (I.G. Brief at 11) but the evidence does not support that assertion.

Although Petitioner did draw blood in some cases at the Dillon's using supplies obtained at the Dillion's, the evidence does not show that he was either dispensing health care items or providing health care services. Petitioner's victims were tricked into believing that they were giving blood samples for a research study. The evidence does not show

that any of the victims believed or that Petitioner ever suggested that he was providing his victims either health care items or health care services. Thus, the nexus between Petitioner's abuse of his victims and the delivery of health care items or services simply does not exist.

3. There is no basis for Petitioner's exclusion pursuant to section 1128(a) of the Act and no period of exclusion is reasonable.

The I.G. has failed to prove that Petitioner's victims were his patients. The I.G. has also failed to prove that there is a nexus between Petitioner's abuse of his victims and the delivery of a health care item or service. Accordingly, I conclude that there is no basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act and no period of exclusion is reasonable.

III. Conclusion

For the foregoing reasons, Petitioner may not be excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(a)(2) of the Act based upon his March 21, 2002 conviction by the District Court of Harvey County Kansas.

/s/

Keith W. Sickendick
Administrative Law Judge