

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Ingolf K. Bartels, D.C.,)	DATE: October 28, 1994
Petitioner,)	
- v. -)	Docket No. C-94-335
The Inspector General.)	Decision No. CR339

DECISION

By letter dated April 15, 1994, Ingolf K. Bartels, D.C., Petitioner herein, was notified by the Inspector General (I.G.) of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner 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.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been 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.

Petitioner filed a timely request for review of the I.G.'s action, and the case was assigned to me for hearing and decision. During a June 1, 1994 prehearing conference, the parties agreed that, to the extent that there were no genuine issues of material fact, there was no need for an in-person hearing. Thus, I set up a schedule for the parties to file briefs supported by documentary evidence.

¹ In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

I have considered the parties' written submissions, exhibits, and the applicable statutes and regulations. I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts.

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 related to the 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 period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW²

1. During the period relevant to this case, Petitioner was a chiropractor practicing in Wisconsin. I.G. Ex. 1.

2. A female patient of Petitioner's reported to the police that, in May and June of 1990, Petitioner, who was treating her for a back and neck injury, had molested her. I.G. Ex. 1.

² The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s brief	I.G. Br. at (page)
Petitioner's brief	P. Br. at (page)
I.G.'s reply brief	I.G. R. Br. at (page)
My Findings of Fact and Conclusions of Law	FFCL

The I.G. submitted three exhibits with her initial brief, and two supplemental exhibits with her reply brief. I admit I.G. exhibits 1-5 into evidence. I cite the I.G.'s exhibits as "I.G. Ex. (number) at (page)." Petitioner submitted no exhibits.

3. On March 12, 1991, in Sheboygan Circuit Court, the State of Wisconsin filed a criminal complaint (Complaint) charging Petitioner with two counts of sexual contact with a person without the consent of that person (sexual assault), in violation of section 940.225 (3M) of the Wisconsin Statutes, arising out of the facts set forth supra. FFCL 1-2.

4. Specifically, the Complaint alleged that Petitioner fondled the female patient sexually without her consent when she came to his office for regular, scheduled appointments for chiropractic treatment. I.G. Ex. 1.

5. On December 5, 1991, a jury convicted Petitioner of two counts of sexual assault in violation of section 940.225 (3M) of the Wisconsin Statutes. I.G. Ex. 2; FFCL 3-4.

6. The court sentenced Petitioner to two concurrent prison terms of six months each and two years probation. Petitioner was also ordered to undergo psychosexual evaluation and to pay court costs, witness fees, and victim/witness surcharges. I.G. Ex. 2.

7. The two counts of sexual assault that Petitioner was found guilty of committing were identical to the two counts set forth in the Complaint which the State filed against him. FFCL 1-5.

8. The Wisconsin Chiropractic Examining Board (CEB) determined that Petitioner's criminal conduct warranted disciplinary action against his chiropractic license. I.G. Ex. 5.

9. The CEB concluded that Petitioner's conviction "substantially relate[d] to the practice of chiropractic" medicine and showed him to have been unprofessional in such regard. The CEB suspended Petitioner's license for one year and ruled that, to be reinstated, Petitioner had to undergo a psychosexual examination and pass courses in boundary training and ethics. Furthermore, the CEB ruled that it had the discretion to impose conditions relating to, among other things, monitoring and supervision. I.G. Ex. 5.

10. Petitioner stipulated to the findings of fact, conclusions of law, and conditions of the CEB's Final Decision and Order. I.G. Ex. 4; see I.G. Ex. 5.

11. In determining whether a particular conviction meets the criteria of section 1128(a)(2) of the Act, an administrative law judge is not bound by the title that a

State or other governmental body may have put on the law which was violated.

12. It is not erroneous to consider the Complaint pursuant to which Petitioner was charged in determining whether Petitioner's conviction meets the criteria of section 1128(a)(2) of the Act.

13. The individual whom Petitioner was convicted of sexually assaulting was a "patient" within the meaning of section 1128(a)(2) of the Act. FFCL 2, 4, 7.

14. Petitioner's conviction related to patient abuse, within the meaning of section 1128(a)(2) of the Act. FFCL 1-7.

15. The fact that the sexual assault for which Petitioner was convicted took place at Petitioner's office during the victim's scheduled appointments for chiropractic treatment with Petitioner establishes that Petitioner's criminal conviction was in connection with the delivery of a health care item or service. I.G. Ex. 1.

16. The CEB's actions are further evidence that Petitioner's criminal conviction was in connection with the delivery of a health care item or service.

17. The Secretary delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

18. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required by the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act. FFCL 1-17.

PETITIONER'S ARGUMENT

Petitioner acknowledges that he was convicted in a Wisconsin court of two counts of sexual assault in violation of section 940.225 (3M) of the Wisconsin Statutes. He argues, though, that, inasmuch as Wisconsin has statutes expressly addressing sexual exploitation by health care providers, his conviction under a general statute (section 940.225 (3M)) dealing only with sexual assault suggests that his criminal conduct did not constitute an offense involving patient abuse in connection with the delivery of a health care item or service.

Petitioner contends also that, when determining the exact nature of his misconduct, it is erroneous to consider the Complaint pursuant to which he was charged, inasmuch as it has not been shown that the prosecution proved, and the jury accepted, every allegation in the Complaint.

Lastly, Petitioner maintains that, if, after all, he must be excluded, it should be under the permissive exclusion provisions of section 1128(b) of the Act, rather than the mandatory exclusion provisions of section 1128(a).

DISCUSSION

The first requirement for excluding an individual or entity pursuant to section 1128(a)(2) of the Act is that such individual or entity must have been convicted of a criminal offense under federal or State law. In the case at hand, Petitioner concedes that he was convicted of two counts of sexual assault in violation of Wisconsin law. P. Br. at 1; see I.G. Ex. 2.

The second statutory requirement for invoking section 1128(a)(2) is that the criminal offense must relate to the neglect or abuse of patients, in connection with the delivery of a health care item or service. I find that this requirement also has been satisfied.

I am not persuaded by Petitioner's argument that he was convicted only under a general statute (section 940.225 (3M) of the Wisconsin Statutes) dealing with sexual assault, and that this suggests that his criminal conduct did not constitute an offense involving patient abuse in connection with the delivery of a health care item or service, inasmuch as Wisconsin has statutes expressly addressing sexual exploitation by health care providers. Petitioner's Request for Hearing, dated April 21, 1994; P. Br. at 1-2. It is well established that, in determining whether a particular conviction meets the criteria of section 1128(a)(2) of the Act, an administrative law judge is not bound by the title that a State or other governmental body may have put on the law which was violated. FFCL 11. An appellate panel of the Departmental Appeals Board has held that the question before an administrative law judge "is whether the criminal offense which formed the basis for the conviction related to neglect or abuse of patients, not whether the court convicted Petitioner of an offense called 'patient abuse' or 'patient neglect.'" Bruce Lindberg, D.C., DAB 1280, at 4 (1991). The appellate panel stated further that "even if there is nothing on the face of the counts of which Petitioner was convicted

or in related court documents which establishes that section 1128(a)(2) applies, other evidence is certainly admissible to establish this." Id. Accordingly, in assessing whether section 1128(a)(2) is applicable in this case, I am permitted to consider extrinsic evidence concerning the circumstances of Petitioner's conviction. Norman C. Barber, D.D.S., DAB CR123, at 10-11 (1991). My adjudication of this case includes an examination of "all relevant facts to determine if there is a relationship" between Petitioner's conviction and patient neglect or abuse in connection with the delivery of a health care item or service. Id. at 11. Thus, the fact that the State statute Petitioner violated did not mention patient abuse or health care workers is irrelevant. Id. at 10-11; Lindberg, at 4.

I also cannot agree with Petitioner's contention that, when determining the exact nature of his misconduct, it is erroneous to consider the Complaint pursuant to which he was charged, inasmuch as it has not been shown that the prosecution proved, and the jury accepted, every allegation in such document. Comparing the Complaint (I.G. Ex. 1) with another court document, the judgment of conviction (I.G. Ex. 2), one sees that the docket number(s) of the case(s) being referred to are identical and that the statute(s) violated are the same, as are the dates of the offenses. This data indicates that the two counts of sexual assault that Petitioner was found guilty of committing were identical to the two counts set forth in the Complaint which the State filed against him and that it is, therefore, not erroneous to consider the substance of the Complaint. FFCL 7, 12.

It is apparent from the Complaint that the individual victimized by Petitioner was one of his patients. I.G. Ex. 1. In the Complaint, which describes the incidents of Petitioner's alleged sexual misconduct, the female victim is reported as being a patient of Petitioner who was molested in the course of her receipt of chiropractic treatment from Petitioner for a back and neck injury. Id. FFCL 2, 4. Petitioner, moreover, has never denied that the female victim was one of his patients. In a letter dated February 24, 1994, which Petitioner enclosed with his Request for Hearing, Petitioner admitted that "[t]he complaining witness, . . . , was a patient" of his and that the "nature of the crime, generally, was an illegal touching by" Petitioner of the aforementioned witness.³ Thus, the individual whom Petitioner was

³ Although the victim's name was mentioned, it is omitted here out of respect for her privacy.

convicted of sexually assaulting was a "patient" within the meaning of section 1128(a)(2) of the Act. FFCL 13. Accordingly, Petitioner's conviction related to patient abuse, within the meaning of section 1128(a)(2) of the Act. FFCL 14.

I conclude further that the fact that the sexual assault for which Petitioner was convicted took place at Petitioner's office during the victim's scheduled appointments for chiropractic treatment with Petitioner establishes that Petitioner's criminal conviction was in connection with the delivery of a health care item or service. I.G. Ex. 1; FFCL 15.

The CEB concluded that Petitioner's conviction "substantially relate[d] to the practice of chiropractic" medicine and showed him to have been unprofessional in such regard. I.G. Ex. 5 at 2; FFCL 9. The CEB suspended Petitioner's license for one year and ruled that, to be reinstated, Petitioner had to undergo a psychosexual examination and pass courses in boundary training and ethics. *Id.* at 2-3. Furthermore, the CEB ruled that it had the discretion to impose conditions relating to, among other things, monitoring and supervision. *Id.* at 3; FFCL 9. Petitioner stipulated to the findings of fact, conclusions of law, and conditions of the CEB's Final Decision and Order. I.G. Ex. 4; see I.G. Ex. 5; FFCL 10. The CEB's actions are further evidence that Petitioner's criminal conviction was in connection with the delivery of a health care item or service. FFCL 16.

Proceeding to Petitioner's final point -- that, if he must be excluded, it should be under the permissive exclusion provisions of section 1128(b) of the Act, rather than the mandatory exclusion provisions of section 1128(a) -- I note, first, that Petitioner has offered no reason why this should be so. Second, this is not a matter in which the I.G. has unfettered discretion. The I.G. is required to exclude an individual whenever the I.G. has conclusive information that the individual has been convicted of a criminal offense meeting the factual predicate for mandatory exclusion under section 1128(a)(2) of the Act. 42 CFR § 1001.101(b); Ronald E. Jones, DAB CR257 (1993).

CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years because of his conviction of a criminal offense relating

to the neglect or abuse of patients, in connection with the delivery of a health care item or service. FFCL 18. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory exclusion. Jack W. Greene, DAB CR19, at 12 - 14, aff'd, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F.Supp. 835 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge