

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael Dale Garritson
(OI File No. H-15-41661-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-241

Decision No. CR4624

Date: June 3, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Michael Dale Garritson, for 5 years from participating in Medicare, Medicaid, and all other federal health care programs. The IG based his exclusion on Petitioner's conviction of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). Petitioner requested a hearing to dispute the exclusion, arguing that he had not abused his patient. Because a jury found Petitioner guilty of one felony count and four misdemeanor counts of physically harming a severely autistic young man under Petitioner's care, I affirm Petitioner's five-year exclusion.

I. Procedural History

In an October 30, 2015 letter, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(2), for a period of 5 years. The IG advised Petitioner that the exclusion was based on his conviction, in the Superior Court of California, County of San Diego, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. IG Exhibit (Ex.) 1.

Petitioner timely requested a hearing to dispute the exclusion. On February 3, 2016, I convened a telephonic prehearing conference, the substance of which is summarized in my February 4, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). In compliance with the Order, the IG submitted a brief (IG Br.) and 5 proposed exhibits. Petitioner then submitted a brief (P. Br.). The IG filed a reply brief.

II. Decision on the Record

Petitioner did not object to the IG's proposed exhibits; therefore, I admit IG Exs. 1-5 into the record. Order ¶¶ 6, 9; Civil Remedies Division Procedures § 14(e).

The IG and Petitioner indicated that a hearing to take witness testimony was not necessary. IG Br. at 6; P. Br. at 2. Therefore, I decide this case based on the written record.

III. Issues

Whether the IG had a basis to exclude Petitioner for five years under 42 U.S.C. § 1320a-7(a)(2). 42 C.F.R. § 1001.2007(a)(1).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007, 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis¹

A. A jury found Petitioner guilty of two felony counts and four misdemeanor counts of harming a dependent adult under California Penal Code section 368(b)(1) and (c), and the California Court of Appeal upheld Petitioner's conviction with the exception of one of the felony counts.

In 1983, Petitioner received a license to practice in California as a registered nurse. IG Ex. 4 at 1. In 2015, the California Board of Registered Nursing revoked Petitioner's nursing license. IG Ex. 4 at 5.

From approximately 2010 to 2012, Petitioner provided in-home care for a severely autistic patient. The patient, who in 2012 was 23 years old, was an epileptic, unable to speak, had a mental age of an 8-month-old, and a physical age of a five to six-year-old. The patient required constant supervision to ensure he received basic nutrition and

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

hydration, to monitor seizures, and to prevent him from injuring himself. In July 2012, the patient's mother found bruising on the patient and placed a hidden camera in the patient's bedroom. From July 28, 2012, to August 22, 2012, while the patient's mother was out of the country, the hidden camera recorded 64 acts of Petitioner physically harming the patient, including: twisting the patient's arm; poking the patient's eyes; crushing the patient's arms and chest under Petitioner's knee; pulling the patient's hair; yanking the patient's arms; and pushing the patient. The patient would moan or cry in response to Petitioner's actions. IG Ex. 2 at 2-3; IG Ex. 3 at 2-3; IG Ex. 4 at 11.

On September 19, 2012, a criminal complaint was filed against Petitioner alleging six counts of willful cruelty to a dependent adult under circumstances likely to produce great bodily harm or death, in violation of California Penal Code § 368(b)(1). IG Ex. 4 at 11. On April 18, 2013, the District Attorney filed an Amended Information charging Petitioner with seven counts of violating section 368(b)(1). IG Ex. 2 at 2. Count 1 was a general allegation encompassing all of Petitioner's conduct from July 28, 2012, through August 22, 2012. Counts 2 through 7 charged specific acts Petitioner perpetrated on July 31, August 7, August 8, and August 14, 2012. IG Ex. 2 at 2-3.

The jury found Petitioner guilty of felony dependent adult abuse on Counts 1 and 4, and guilty of a lesser included misdemeanor offense (California Penal Code § 368(c)) of adult dependent abuse for Counts 2, 3, 5, and 6. The jury found Petitioner not guilty of Count 7. IG Ex. 3 at 5; IG Ex. 4 at 10. On May 20, 2013, the Superior Court of California, San Diego County, sentenced Petitioner to 365 days in local jail, three years of probation, and various fines and assessments, but the court also suspended the sentence related to incarceration. IG Ex. 3 at 5; IG Ex. 4 at 10; IG Ex. 5. On appeal, the California Court of Appeal, Fourth Appellate District, reversed the Petitioner's conviction under Count 1, but allowed the convictions under Counts 2 through 6 to stand, resulting in a reduction in certain assessments ordered by the Superior Court. IG Ex. 3 at 25.

B. Petitioner was convicted of a state law offense related to abuse of patients in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2); 42 C.F.R. § 1001.101(b).

The IG must exclude an individual from participation in all federal health care programs if the individual has been convicted of a criminal offense related to the abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). For purposes of 42 U.S.C. § 1320a-7(a)(2), the health care item or service need not be one that is paid for by Medicare, Medicaid, or a federal health program. 42 C.F.R. § 1001.101(b). Further, a patient is “any individual who is receiving health care items or services provided to meet his or her physical, mental, or emotional needs or well-being . . . whether or not reimbursed under Medicare, Medicaid and any other Federal health care program and regardless of the location in which such item or service is provided.” 42 C.F.R. § 1001.2 (definition of *Patient*).

In the present case, the record is clear that a jury found Petitioner guilty of multiple criminal offenses, i.e., one felony and four misdemeanors. IG Ex. 3 at 5, 25; IG Ex. 4 at 10; IG Ex. 5. For exclusion purposes, an individual is “convicted” of a criminal offense “when there has been a finding of guilt against the individual . . . by a Federal, State, or local court . . .” 42 U.S.C. § 1320a-7(i)(2). Petitioner admits that he was convicted of a criminal offense.² P. Br. at 1. Accordingly, for purposes of exclusion, Petitioner was “convicted” of criminal offenses.³

Petitioner disputes that his conviction was related to abuse. Petitioner argues that “there was no evidence of bodily harm caused by [Petitioner’s] supposed excessive or improper mistreatment . . . [t]he only evidence of this supposed mistreatment was of the testimony given by [the victim’s] mother, based upon her own description of what was occurring on the videos.” P. Br. at 2.

The question as to whether a conviction is related to abuse “is a legal determination to be made by the Secretary [for Health and Human Services] based on the facts underlying the conviction. Further, the offense that is the basis for the exclusion need not be couched in terms of patient abuse or neglect Since a determination as to whether an offense related to patient abuse or neglect is fact-intensive, we feel it is most appropriate for the [I]G to exercise its authority to make such determinations on a case-by-case basis.” 57 Fed. Reg. 3298, 3303 (Jan. 29, 1992); *see also Westin v. Shalala*, 845 F. Supp. 1,446, 1,451 (D. Kan. 1994). Therefore, I must look to the factual basis of Petitioner’s criminal conduct to determine if it relates to abuse of a patient.

The specific conduct for which Petitioner was found guilty involved: Count 2, “finger on eye”; Count 3, “finger on eye”; Count 4, “pulls victim to the ground by grabbing hair on back of head”; Count 5, “pulls victim’s arm over headboard and bends it down”; and Count 6, “grabs victim’s arm and twists it around once.” IG Ex. 2 at 2-3; IG Ex. 3 at 3. An expert witness who reviewed the video recordings of Petitioner’s actions testified that poking the patient’s eyes would result in pain, yanking the patient by the hair could cause

² Although Petitioner admits that he was convicted of a criminal offense, Petitioner asserts that there was insufficient evidence to prove the offenses with which he was charged. P. Br. at 2. The California Court of Appeal thought otherwise. IG Ex. 3 at 6-9. In any event, I am without authority to review the basis for Petitioner’s conviction and Petitioner may not collaterally attack his conviction in these proceedings. 42 C.F.R. § 1001.2007(d).

³ Petitioner asserts that exclusion will not be necessary because his felony conviction will be reduced to a misdemeanor offense in May 2016. Hearing Request. Even if Petitioner’s assertion is true, it is not availing because 42 U.S.C. § 1320a-7(a)(2) mandates exclusion for any criminal offense involving abuse of a patient and not just a felony offense.

neck trauma, and twisting of the patient's arm and bending the patient's arm over the headboard were painful. IG Ex. 3 at 4. Another expert medical witness testified that none of Petitioner's actions were proper efforts to redirect the patient's behavior and that, based on the video recordings, there was concern that the victim was at risk for bodily injury. Specifically, poking of the eyes may scratch the cornea or cause inflation of the eye or the skin around the eye; pulling one's hair to force the person to the ground can strain or fracture the neck; and twisting and bending a person's wrist can sprain the wrist or elbow, or dislocate a shoulder. IG Ex. 3 at 4. Contrary to Petitioner's assertions above, the jury saw the video recordings of Petitioner's physical encounters with the patient and convicted Petitioner of a felony and four misdemeanors for inflicting harm and pain on the patient under California Penal Code § 368(b)(1), (c). IG Ex. 3 at 8. The record provides more than enough evidence for me to conclude that Petitioner's conviction was related to the abuse of a patient.

It is useful to note that the statute under which Petitioner was convicted states that it was enacted because dependent adults "are deserving of special consideration and protection . . . because . . . dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore, **less able to protect themselves**, to understand or report criminal conduct, or to testify in court proceedings on their own behalf." California Penal Code § 368(a) (emphasis added). Petitioner maliciously abused the patient who was entrusted to his care, and who could not report Petitioner's crimes or defend himself.

C. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(2), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Petitioner asserts that he had been precluded from practicing as a nurse for three years before the IG imposed this exclusion. Petitioner argues that five additional years is an unreasonable length of exclusion. Hearing Request. However, the exclusion became effective 20 days after the date on the notice of exclusion and will run from that date. 42 C.F.R. 1001.2002(b); see also 42 U.S.C. § 1320a-7(c). I have no authority to alter that regulatory requirement. 42 C.F.R. § 1005.4(c)(1), (4).

Since Petitioner objects to the length of the exclusion as excessive, it is worth mentioning that the IG's exclusion notice failed to identify several aggravating factors that exist in this case that would have permitted the IG to exclude Petitioner for more than five years. Petitioner was sentenced to incarceration. 42 C.F.R. § 1001.102(b)(5). Petitioner was convicted of offenses involving patient abuse that "was part of a continuing pattern of behavior." 42 C.F.R. § 1001.102(b)(4). And Petitioner's acts that resulted in his

conviction “had a significant adverse physical . . . impact on one or more . . . individuals.” 42 C.F.R. § 1001.102(b)(3); IG Ex. 2 (conviction of Count 4 for actions that Petitioner “knew and reasonably should have known were . . . likely to produce great bodily harm or death . . . and did inflict thereon unjustifiable physical pain and mental suffering.”). Without any mitigating factors present, Petitioner’s exclusion could have been longer than five years.

VI. Conclusion

For the foregoing reasons, I affirm the IG’s determination to exclude Petitioner for 5 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(2).

/s/
Scott Anderson
Administrative Law Judge