

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
Thomas M. Cook,)	DATE: October 27, 1989
Petitioner,)	
- v. -)	Docket No. C-106
The Inspector General.)	DECISION CR 51

DECISION OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On February 14, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and State health care programs.¹ The I.G. told Petitioner that he was being excluded as a result of his conviction in a Texas court 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 was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(2) of the Social Security Act. The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years.

Petitioner timely requested a hearing as to the exclusion, and the case was assigned to me for a hearing and a decision. The I.G. moved for summary disposition of the case, and Petitioner opposed the motion. I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

I conclude that the exclusions imposed and directed by the I.G. are mandated by section 1128(a)(2) of the Social Security Act. Therefore, I am deciding this case in favor of the I.G.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Social Security Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 8, 1988, Petitioner was charged under Texas law with committing a criminal offense of intentionally or recklessly engaging in conduct that caused injury to an elderly individual. I.G. Ex. 1.²
2. Petitioner was accused of causing injury to a nursing home patient. I.G. Ex. 1.
3. Petitioner was an administrator of the nursing home in which the allegedly injured party resided. I.G. Ex. 1; P.'s Brief at 2.

² The parties' exhibits and memoranda will be referred to as follows:

I.G.'s Exhibit	I.G. Exhibit (number)
Brief in Support of Motion for Summary Disposition	I.G.'s Brief at (page)
Response to Government's Motion for Summary Disposition	P.'s Brief at (page)
Reply Brief to Petitioner's Response to Government's Motion for Summary Disposition	I.G.'s Reply Brief at (page)
Petitioner's Supplemental Brief	P.'s Supplemental Brief at (page)
Supplemental Brief in Support of Motion for Summary Disposition	I.G.'s Supplemental Brief at (page)

4. The incident which led to criminal charges being filed against Petitioner occurred in the course of Petitioner's administrative duties and involved a nursing home patient. I.G. Ex. 1; P.'s Brief at 2-3.

5. On July 13, 1988, Petitioner pleaded guilty in a Texas court to the criminal offense of reckless conduct. I.G. Ex. 2.

6. Petitioner's guilty plea was made in lieu of a trial of the criminal charges against Petitioner. I.G. Ex. 2.

7. The Texas court found Petitioner guilty of reckless conduct and entered a final judgment against him. I.G. Ex. 2.

8. Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Findings 1-6.

9. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Social Security Act. Findings 1-7; Social Security Act, section 1128(a)(2).

10. Petitioner was convicted of a criminal offense as defined by section 1128(i) of the Social Security Act. Finding 7; Social Security Act, section 1128(i).

11. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

12. On February 14, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Social Security Act.

13. The exclusion imposed and directed against Petitioner by the I.G. was for five years, the minimum period required by law for exclusions imposed and directed pursuant to section 1128(a)(2) of the Social Security Act. Social Security Act, section 1128(c)(3)(B).

14. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Finding 7; Social Security Act, sections 1128(a)(2); 1128(c)(3)(B).

ANALYSIS

Petitioner pleaded guilty in a Texas court to the criminal offense of reckless conduct. The I.G. excluded Petitioner from participating in Medicare and directed that Petitioner be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Social Security Act. This section mandates the exclusion from participating in Medicare and Medicaid of individuals who are:

(C)onvicted, 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.

Neither party to this case disagrees that Petitioner was convicted of a criminal offense within the meaning of section 1128. The undisputed facts establish that Petitioner entered a guilty plea to a criminal offense, and the Court accepted Petitioner's plea and entered a judgment of guilty. The exclusion law defines the term "convicted of a criminal offense" to include those circumstances in which a judgment of conviction has been entered against an individual by a federal, state, or local court. Social Security Act, section 1128(i)(1).

The statute of which Petitioner was convicted does not specifically refer to neglect or abuse. Petitioner was convicted of the offense of reckless conduct. I conclude that Petitioner was convicted of an offense relating to "neglect" of another individual, as that term is used in section 1128(a)(2) of the Social Security Act.

The terms "neglect" and "abuse" are not defined in section 1128(a)(2). In the absence of a definition, they should be given their common and ordinary meaning.

"Neglect" is defined in Webster's Third New International Dictionary, 1976 Edition as "1: to give little or no attention or respect to:. . . 2: to carelessly omit doing (something that should be done) either altogether or almost altogether" "Abuse" is defined as "4: to use or treat so as to injure, hurt, or damage; MALTREAT" I conclude from these common definitions that Congress intended the statutory term "neglect" to include failure by a party to satisfy a duty of care to another

person. "Abuse" is intended to include those situations where a party willfully mistreats another person.

Petitioner was convicted of violating section 22.05 of the Texas Penal Code, which provides in relevant part that:

(a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

I conclude that reckless conduct that places another in imminent danger of serious bodily harm falls within the common definition of "neglect." Therefore, a conviction under section 22.05 of the Texas Penal Code is plainly a conviction related to "neglect" within the meaning of section 1128(a)(2).

Thus, Petitioner's guilty plea and the statute under which Petitioner was convicted establish that he was convicted of an offense relating to neglect of another. However, it is not clear from Petitioner's guilty plea or from the statute under which Petitioner was convicted whether the offense related to patient neglect or abuse in connection with the delivery of a health care item or service. That raises the issue of whether there is relevant evidence concerning the facts upon which Petitioner's conviction was predicated to determine if Petitioner was convicted of an offense related to patient neglect or abuse. I conclude that it is consistent with Congressional intent to admit limited evidence to establish whether the individual who was the subject of the offense for which Petitioner was convicted is a "patient," and to determine whether the incident which led to Petitioner's conviction was "in connection with the delivery of a health care item or service."

A primary purpose of the exclusion law is to provide a remedy to protect Medicare beneficiaries and Medicaid recipients from individuals who have demonstrated by their actions that they are not trustworthy to render services. The purpose is not to create additional penalties for state criminal convictions, but, rather, to protect federal programs and recipients and beneficiaries of those programs. Congress made a legislative determination that parties convicted of criminal offenses relating to neglect or abuse of patients in connection with the delivery of a health care item or service were untrustworthy, and it mandated the exclusion of such parties.

Congress could have conditioned imposition of the exclusion remedy on conviction of criminal offenses consisting of patient neglect or abuse. Had it used the term "of" instead of the term "relating to" in section 1128(a)(2), that intent would have been apparent. However, Congress plainly intended that the exclusion apply to a broader array of circumstances. It mandated that the Secretary exclude parties who are convicted of criminal offenses "relating to" patient neglect or abuse in connection with the delivery of a health care item or service.

It is consistent with Congressional intent to admit evidence which explains the circumstances of the offense of which a party is convicted.³ In this case, the only extrinsic evidence that is necessary to establish whether Petitioner was convicted of an offense within the meaning of section 1128(a)(2) is evidence establishing the identity of the person Petitioner was convicted of endangering and Petitioner's relationship to that individual.

The undisputed material facts of this case establish that Petitioner was a nursing home administrator, that the incident that resulted in Petitioner's guilty plea occurred in the course of Petitioner's administrative duties, and that the incident involved a nursing home patient. Findings 2-4. These undisputed facts therefore establish all that is necessary to conclude that Petitioner was convicted of a criminal offense relating to neglect of a patient in connection with the delivery of a health care item or service, satisfying the requirements of section 1128(a)(2). Therefore, I conclude that the I.G. was required to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(2) of the Social Security Act.

³ This is not to suggest that evidence should be admitted to establish whether Petitioner is guilty of the offense to which he pleaded. The event which triggers the Secretary's duty to impose and direct exclusions is an individual's conviction of an offense related to patient neglect or abuse. The term "conviction" is defined in section 1128(i) to include circumstances where parties enter guilty pleas, even if they do not admit guilt or the court makes no finding of guilt. See Carlos E. Zamora, M.D. v. The Inspector General, Civil Remedies Docket No. C-74 (1989), appeal docketed, DAB No. 89-100, Decision No. 1104 (1989).

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s exclusion was mandated by law. Therefore, I am entering a decision in favor of the I.G. in this case. The five-year exclusion imposed and directed against Petitioner is sustained.

/s/

Steven T. Kessel
Administrative Law Judge