

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Alicia Pinto,)	DATE: April 13, 1995
Petitioner,)	
- v. -)	Docket No. C-94-331
The Inspector General.)	Decision No. CR369

DECISION

By letter dated February 9, 1994, Alicia Pinto, the Petitioner herein, was notified by the Inspector General (I.G.), of the United States 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 relating to 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. The I.G. moved for summary disposition.

Because 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 have decided the case on the basis of the parties' written submissions. I grant the I.G.'s motion for summary disposition.

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

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 relating to 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 LAW (FFCL)²

1. During the period relevant to this case, Petitioner was employed as a certified nursing assistant (C.N.A.) at the Sarah R. Neuman Nursing Home (Home), located in Mamaroneck, New York. I.G. Exs. 1, 5, 9.
2. On July 30, 1991, Petitioner was charged, by information, with having committed the offense of "wilful violation of the health laws" under New York State Public Health Law, section 12-b(2), by violating Public Health Law, section 2803-d, subdivision 7. I.G. Ex. 1.
3. Specifically, the information alleged that, on February 21, 1991, Petitioner had slapped a female resident of the Home. I.G. Ex. 1.³
4. Petitioner's case was tried before a jury in the Rye Town Justice Court in Westchester County. I.G. Ex. 2.

² The I.G. submitted a brief in support of her motion for summary disposition. Petitioner submitted a letter dated January 5, 1995, which I construed to be her response brief. The I.G. submitted a reply.

The I.G. submitted nine exhibits with her initial brief. I cite the I.G.'s exhibits as "I.G. Ex. (number)." I admit into evidence I.G. Exs. 1 - 9. Petitioner did not submit any exhibits.

³ I do not disclose the name of this individual, so as to respect her privacy.

5. On July 15, 1992, the jury found Petitioner guilty of one count of wilful violation of the public health laws, a misdemeanor. I.G. Ex. 2.

6. On October 28, 1992, judgment was formally entered against Petitioner, and she was sentenced to six months probation, one year conditional discharge, and twenty hours of community service in a local hospital. I.G. Ex. 3.

7. The record contains an affidavit of the assistant nursing care coordinator at the Home, in which she states that the person whom Petitioner was convicted of abusing was a patient at the Home on February 21, 1991. I.G. Ex. 9.

8. The affidavit evidence and other record evidence, which show the nursing assistance required by the individual whom Petitioner was convicted of abusing, establish that the individual was a "patient" of the Home. I.G. Exs. 5 - 9.

9. The record contains this patient's admission record to the Home. I.G. Ex. 6.

10. The patient at issue suffered from at least two serious diseases and required continuous nursing support in her activities of daily living. I.G. Exs. 6 - 9.

11. According to the affidavit of the assistant nursing care coordinator, a C.N.A. performs patient care duties, which include handling, transferring, feeding, and bathing of patients, and using equipment such as wheelchairs and other devices. I.G. Ex. 9.

12. Petitioner regularly aided the patient at issue by performing patient care duties for her. I.G. Ex. 9.

13. The incident which led to Petitioner's conviction occurred while Petitioner was placing the patient in her wheelchair. I.G. Ex. 5.

14. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(1) of the Act. FFCL 6.

15. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(2) of the Act. FFCL 5.

16. The criminal offense of which Petitioner was convicted relates 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 Act. FFCL 1 - 13.

17. The Secretary of HHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

18. The five-year exclusion imposed and directed against Petitioner by the I.G. is for the minimum period required by the Act. Act, sections 1128(a)(2), 1128(c)(3)(B).

19. Under section 1128(a)(2) of the Act, a conviction within the meaning of section 1128(i) mandates exclusion. The administrative law judge is not authorized to look behind the conviction to determine its validity.

20. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required by sections 1128(a)(2) and 1128(c)(3)(B) of the Act. FFCL 1 - 20.

PETITIONER'S ARGUMENT

Petitioner contends that, notwithstanding the jury verdict against her, she was not guilty of striking the elderly woman who was in her care at the Home. She believes that her lack of mastery of the English language, plus poor legal representation, caused her to be wrongfully convicted. Petitioner's Brief at 1 - 6.

DISCUSSION

The law relied upon by the I.G. to exclude Petitioner requires, initially, that the excluded individual has been convicted of a criminal offense. Petitioner, a C.N.A., was charged with wilful violation of the health laws, which charge was based on Petitioner's alleged intentional and unlawful striking of a female resident at the Home who was in Petitioner's care at the time. FFCL 1 - 3. A jury found Petitioner guilty of the charge. FFCL 4, 5. The court thereupon sentenced Petitioner. FFCL 6.

Section 1128(i) of the Act provides that an individual will be deemed "convicted" of a criminal offense under any of the following circumstances:

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
- (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

In the case at hand, sections 1128(i)(1) and (2) are clearly applicable. FFCL 14, 15. Petitioner was found guilty by a jury, and the court entered a judgment of conviction against Petitioner. FFCL 5, 6. Thus, Petitioner must be regarded as having been "convicted" for purposes of the mandatory exclusion law.

Next, the statute requires that the criminal offense must have been related to the neglect or abuse of patients in connection with the delivery of a health care item or service (although not necessarily related to the Medicare or Medicaid programs).

In this regard, the undisputed evidence establishes that the abused person was a 95-year-old patient at the Home, and that Petitioner, in her capacity as a health care worker there, was performing a patient care duty for this patient -- i.e., placing her in a wheelchair -- at the time Petitioner struck her.⁴ I.G. Ex. 6; FFCL 7, 8, 13. Petitioner's wilful use of unjustified and harmful physical force under these circumstances reasonably constitutes patient abuse in connection with the delivery

⁴ Petitioner herself does not deny that this person is a nursing home patient. Petitioner's Brief at 2 - 3.

of health care services, within the meaning of section 1128(a)(2) of the Act. Petitioner was convicted under N.Y. Pub. Health L. § 2803-d(7), which pertains to patient abuse, and states that "any person who commits an act of physical abuse, neglect or mistreatment, . . . shall be deemed to have violated this section and shall be liable for a penalty pursuant to section twelve of this chapter. . . ." I.G. Ex. 4. Thus, Petitioner's conviction for her act of physical violence to a patient of the Home, satisfies the requirement of section 1128(a)(2) that there be a conviction " . . . 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); FFCL 16.

Lastly, Petitioner maintains that she did not, in fact, strike the patient at issue. Petitioner's Brief at 1 - 3, 5. However, under section 1128(a)(2), proof that a relevant criminal conviction has occurred ends the inquiry as to whether mandatory exclusion is justified. See DeWayne Franzen, DAB 1165 (1990). The administrative law judge is not authorized to look behind the conviction to determine its validity (FFCL 19), or entertain claims of innocence, or consider evidence intended to mitigate the minimum mandatory exclusionary period. Peter J. Edmonson, DAB CR163 (1991), aff'd, DAB 1330 (1992); Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991); Janet Wallace, L.P.N., DAB CR155 (1991), aff'd, DAB 1326 (1992). An appellate panel of the Departmental Appeals Board has held that the intent of the individual in committing the criminal offense is not relevant under section 1128(a)(2) of the Act. Summit Health Limited, DAB 1173 (1990). Consequently, Petitioner's explanations are not relevant or material to the outcome of this case.

CONCLUSION

Petitioner's exclusion from the Medicare and Medicaid programs, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act because of her conviction of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. FFCL 21. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion. FFCL 20. Jack W. Greene, DAB CR19, aff'd, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotta
Administrative Law Judge