**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Myrna Baptista,

Petitioner,

v.

The Inspector General.

Docket No. C-11-380

Decision No. CR2410

Date: August 8, 2011

# DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Myrna Baptista from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination are based on section 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(2), and arise from Petitioner's state court conviction of an offense relating to patient neglect or abuse. As I shall explain below, the undisputed facts in this case require the imposition of the five-year exclusion. For that reason, I grant the I.G.'s Motion for Summary Disposition.

## I. Procedural Background

In June 2009, Petitioner Myrna Baptista was the owner and operator of a facility known in Hawaii as an Adult Residential Care Home (ARCH). On June 25, 2009, she left two of her patient-residents alone and unsupervised in a closed automobile. One of the men was 76 years old and developmentally disabled and the other was 50 years of age and schizophrenic. Both were Medicaid beneficiaries whose care at Petitioner's facility was funded by that program.

Passersby observed the situation and reported it to authorities, who conducted an investigation. I.G. Exs. 3, 4.

On April 14, 2010, Petitioner appeared with counsel in the Family Court, Circuit Court of the Third Circuit, Hawaii. She appeared there to plead guilty to two misdemeanor charges of Endangering the Welfare of an Incompetent Person, in violation of HAW. REV. STAT. § 709-905, set out in a Complaint filed in the Family Court on October 1, 2009. I.G. Ex. 5; P. Exs. 1, 3. The charges were based on the incident of June 25, 2009, and her plea was the result of an agreement negotiated with prosecuting authorities. As part of that agreement, Petitioner moved for the deferred acceptance of her plea, a procedure available to some defendants under Hawaii state law. P. Ex. 2. There are no citations in any of the Family Court records before me to the specific Hawaii statute establishing this procedure, but Petitioner's briefing identifies that statute as HAW. REV. STAT. § 853.

Petitioner's motion was granted, and all further proceedings in her case were deferred for one year from April 14, 2010. During the period of deferral, Petitioner was placed under the supervision of the Family Court's Adult Probation Division. The Order Granting Motion for Deferred Acceptance of Guilty Plea included the special conditions that Petitioner pay $110.00 to the crime victim compensation fund, and pay a fine in the amount of $500.00. I.G. Ex. 2; P. Ex. 3.

Section 1128(a)(2) of the Act dictates the mandatory exclusion, for a term of not less than five years, of "[a]ny 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 I.G. notified Petitioner of her exclusion for the mandatory minimum period of five years on February 28, 2011.

Acting through counsel, Petitioner timely sought review of the I.G.'s action on March 30, 2011. I convened a telephonic prehearing conference on April 27, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and the procedures best suited for addressing them. The parties agreed that the case likely could be decided on written submissions, and I established a schedule for the submission of documents and briefs. The details of the conference and the schedule established in it are set out in my Order of April 28, 2011. All briefing is now complete, and for purposes of 42 C.F.R. § 1005.20(c) the record closed August 4, 2011.

There are eight exhibits in this case. The I.G. has proffered I.G.'s Exhibits (I.G. Exs.) 1-5; Petitioner has not objected to these exhibits, and they are admitted. Petitioner has proffered Petitioner's Exhibits (P. Exs.) 1-3, to which no objection

has been made by the I.G. They, too, are admitted.

## II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Section 1128(a)(2) of the Act mandates Petitioner's exclusion since her predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore reasonable as a matter of law.

## III. Controlling Statutes and Regulations

Section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of 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 terms of section 1128(a)(2) are restated in regulatory language at 42 C.F.R. § 1001.101(b). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of whether . . . the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act; "when a plea of guilty . . . by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

In pertinent part, HAW. REV. STAT. § 853 provides:

Deferred acceptance of guilty plea or nolo contendere plea; discharge and dismissal, expungement of records.

(a) Upon proper motion as provided by this chapter:

(1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;

(2) It appears to the court that the defendant is not likely again to engage in a criminal course of conduct; and

(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

(b) The proceedings may be deferred upon any of the conditions specified by section 706-624. As a further condition, the court shall impose a compensation fee pursuant to section 351-62.6 upon every defendant who has entered a plea of guilty or nolo contendere to a petty misdemeanor, misdemeanor, or felony; provided that the court shall waive the imposition of a compensation fee, if it finds that the defendant is unable to pay the compensation fee. The court may defer the proceedings for a period of time as the court shall direct but in no case to exceed the maximum sentence allowable; provided that, if the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, the court may defer the proceedings for a period not to exceed one year. The defendant may be subject to bail or recognizance at the court's discretion during the period during which the proceedings are deferred.

(c) Upon the defendant's completion of the period designated by the court and in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against the defendant.

(d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction.

> (e) Upon discharge of the defendant and dismissal of the charge against the defendant under this section, the defendant may apply for expungement not less than one year following discharge, pursuant to section 831-3.2.

An exclusion based on section 1128(a)(2) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

## IV. Findings and Conclusions

I find and conclude as follows:

1. On April 14, 2010 in the Family Court, Circuit Court of the Third Circuit, Hawaii, Petitioner pleaded guilty to two counts of the misdemeanor criminal offense of Endangering the Welfare of an Incompetent Person, in violation of HAW. REV. STAT. § 709-905. I.G. Exs. 2, 5; P. Exs. 1, 2, 3.

2. The pleas described above in Finding 1 constitute a "conviction" within the meanings of sections 1128(a)(2) and 1128(i)(3) and (4) of the Act, and 42 C.F.R. § 1001.2.

3. There is a nexus and a common-sense relationship between the criminal offenses of which Petitioner was convicted, as noted above in Finding 1, and the neglect or abuse of a patient in connection with the delivery of a health care item or service. I.G. Exs. 3, 4, 5; P. Ex. 1.

4. Petitioner's conviction of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2).

5. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

6. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

## V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal

offense; (2) the conviction must have been related to the neglect or abuse of patients; and, (3) the patient neglect or abuse to which an excluded individual's conviction related must have occurred in connection with the delivery of a health care item or service. *Bruce Lindberg, D.C.*, DAB No. 1280 (1991); *Neitra Maddox*, DAB CR1218 (2004); *Maureen T. Kehoe*, DAB CR673 (2000); *Gabriel S. Orzame, M.D.*, DAB CR587 (1999); *Ann M. MacDonald*, DAB CR519 (1998); *Anthony A. Tommasiello*, DAB CR282 (1993).[1]

The parties' pleadings do not debate the second and third elements. Petitioner does not explicitly contest that the two crimes to which she pleaded guilty were related to the abuse or neglect of the two impaired men she left unattended in her vehicle, or that the incident occurred while they were in her care as Medicaid patients. I note, however, that both these elements are established by the investigation that led to the charges filed on October 1, 2009, and by the language of the charges themselves. I.G. Exs. 3, 4, 5; P. Ex.1.

The parties' arguments in this case focus on the first element. Petitioner asserts that the specific provisions of the Hawaii statute under which she tendered her guilty pleas — and the Hawaii courts' construction of that statute — do not support the I.G.'s determination to treat them as predicate "convictions" under the federal exclusionary statute.[2] The I.G. relies on a body of precedent in this forum to argue that Petitioner has been convicted for purposes of this federal litigation, and that the deferred acceptance of her guilty pleas cannot operate to invalidate them as predicate "convictions" under federal law.

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[1] The Departmental Appeals Board (Board) has from time to time characterized the first essential element as having two discrete parts: the first part requiring a "conviction," and the second part requiring that the "conviction" have been "of a criminal offense." *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Janet Wallace, L.P.N.*, DAB No. 1326 (1992).

[2] There is an evidentiary gap in Petitioner's position, however. In all her pleadings, she invites the assumption that her year-long probationary period was successfully completed on or about April 14, 2011, and that the Family Court eventually entered the order contemplated by HAW. REV. STAT. § 853(c): "the court shall discharge the defendant and dismiss the charge against the defendant." No order of discharge and dismissal appears in the evidence before me, neither side having proffered it or explained its absence. When the dates of the I.G.'s February 28, 2011 notice-of-exclusion letter and Petitioner's March 30, 2011 hearing request are juxtaposed with the date that her probation presumably ended, the gap is particularly difficult to understand. But for purposes of this decision, I assume *arguendo* that such an order of discharge and dismissal was actually entered, and that it entitled Petitioner to all the forms of relief set out at HAW. REV. STAT. § 853(d) and (e).

Petitioner's argument emphasizes that the Family Court deferred the *acceptance* of her guilty pleas, and asserts that the deferral of the *acceptance* of the pleas had the fundamental effect of rendering their tender on April 14, 2010, and the plea agreement by which they were tendered, of no legal effect whatsoever. Petitioner correctly notes that no judgment of conviction was ever entered against her, and just as correctly points out that no finding of guilt was ever made by the Family Court. Those valid arguments place her situation beyond the reach of the definitions of "conviction" set out at sections 1128(i)(1) and 1128(i)(2) of the Act. But Petitioner goes on to assert that because the Hawaii statute has been interpreted by Hawaii courts to mean that she has neither been convicted nor been the subject of a deferred adjudication, she cannot be treated as "convicted" within the terms of sections 1128(i)(3) or 1128(i)(4).

This issue has been debated in this forum and before the Board for nearly two decades, and the resolution of the issue has never varied.[3] The Administrative Law Judges (ALJs) of this forum and appellate panels of the Board have frequently addressed petitioners' arguments that they should not be regarded here as "convicted" because they are not considered "convicted" under state law. The Board panels and ALJs of this forum have consistently rejected those arguments for the reason that federal law — specifically section 1128(i) of the Act — and not state laws, govern the meaning of "convicted" in applying the terms of the Social Security Act. *Henry L. Gupton*, DAB No. 2058, at 5-6 (2007); *see also Henry L. Gupton*, DAB Ruling No. 2007-1 (2007). Indeed, the matter seems settled beyond the need for further discussion, given "how well established the principle is that the term 'conviction' under the Act extends to diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction . . . The plain language [of section 1128(i)] provides that a person is 'convicted' for purposes of an exclusion whenever [that person] has . . . entered into any program deferring or withholding judgment." *Henry L. Gupton*, DAB 2058, at 8, 9-10.

While the Board's views and analyses have been consistent and definitive over time and with reference to a variety of state laws, the Board has not had occasion to address HAW. REV. STAT. § 853 specifically. That is not the case with the ALJs of this forum: in four decisions spanning a dozen years they have applied the Board's teachings on the matter and held that Hawaii's procedure for the deferred acceptance of a guilty or *nolo contendere* plea constituted a "conviction" as defined at sections 1128(i)(3), 1128(i)(4),

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[3] The *Gupton* panel measured this protracted discussion from *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994). This is what the *Westin* panel wrote: "Congress has defined for the ALJ and this Board what 'convicted' means for purposes of section 1128 and that definition is binding on us. Moreover, it is clear from the legislative history of this provision that Congress adopted such broad definitions to ensure that exclusions from federally funded health programs would not hinge on state criminal justice policies." *Westin*, at 6.

or both. *Khristiane Nicholas Lagua Caraang a.k.a. Khristianeni Lagua Caraang a.k.a. Khristian Caraang*, DAB CR1898 (2009); *Estelita M. Cardoza*, DAB CR1256 (2004); *Steven Caplan, R.Ph.*, DAB CR1112 (2003); and *Donald J. Purcell, II, M.D.*, DAB CR572 (1999). Neither the facts of this case nor Petitioner's arguments give me cause to differ with the reasoning of — or the results reached by — the ALJs in those cases. I adopt the reasoning of the ALJs in those cases, and having done so, find and conclude that Petitioner has been "convicted" within the meaning of sections 1128(i)(3) and 1128(i)(4) of the Act. The first essential element in this section 1128(a)(2) exclusion is present.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(2), her exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096 (2007). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

## VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition is GRANTED. The I.G.'s exclusion of Petitioner Myrna Baptista from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), is thereby sustained.

/s/
Richard J. Smith
Administrative Law Judge