

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Olufunke R. Anifowose,
(OI File No. H-12-43048-9)

Petitioner,

v.

The Inspector General.

Docket No. C-14-142

Decision No. CR3103

Date: February 4, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Olufunke R. Anifowose, from participating in Medicare and all other federally funded health care programs for a minimum period of five years.

I. Background

On August 30, 2013, the I.G. sent notice to Petitioner, advising her that she was being excluded from Medicare and all federally funded health care programs for a minimum period of five years. The I.G. advised Petitioner that her exclusion was mandated by section 1128(a)(2) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense relating to patient neglect or abuse in connection with the delivery of a health care item or service. The length of the exclusion, five years, was for the minimum period prescribed by law for exclusions imposed pursuant to section 1128(a)(2).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I directed the parties to file briefs and proposed exhibits. The I.G. filed a brief and seven proposed exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 7. I

receive these exhibits into the record. Petitioner filed a brief without supporting exhibits. The I.G. did not file a reply brief.¹ Neither party offered proposed testimony nor did either party request that I convene an in-person hearing.

II. Issues, Findings of Fact and Conclusions of law

A. Issue

The issue in this case is whether the I.G. was authorized to exclude Petitioner for a minimum of five years.

B. Findings of Fact and Conclusions of Law

I find that Petitioner's exclusion is mandated by section 1128(a)(2) of the Act and that the exclusion period of five years is the minimum period that is required by law.

Petitioner admits that she was convicted of a criminal offense and that her conviction is of an offense that falls within the reach of section 1128(a)(2) of the Act. As I discuss above, section 1128(a)(2) mandates the exclusion of any individual who is convicted of a criminal offense relating to neglect or abuse committed in connection with the delivery of a health care item or service. It is undisputed that Petitioner was convicted under Maryland law of abuse by causing physical injury to a vulnerable adult who at the time of the crime was under Petitioner's care. I.G. Ex. 3 at 3. More specifically, Petitioner worked as a caregiver at an adult care home. She entered a plea resulting in her conviction of the crime of abusing a resident of that home on February 6, 2011. I.G. Exs. 2, 5, 6.

There is no doubt that Petitioner's conviction satisfies all of the elements of a section 1128(a)(2) offense and that the law mandates her exclusion. She was convicted of a criminal offense. The crime – on its face – was related to Petitioner's abuse of an elderly and ill individual. That individual was under Petitioner's care at the time of the incident and so Petitioner committed her crime in connection with the delivery of a health care item or service.

¹ The I.G. also filed a motion to dismiss Petitioner's hearing request, arguing that Petitioner did not present an argument or raise an issue that I had authority to hear and decide. I deny that motion because I conclude that, although Petitioner's arguments may not be justiciable, they are certainly arguments that she had the right to raise and that I have the duty to address even if only to conclude that I lack authority to hear and decide them.

Petitioner argues that she is not actually guilty of the offense of which she was convicted. She avers without elaboration that she did not commit the “alleged crime.” Petitioner’s Informal Brief at IV. That assertion is, as a matter of law, irrelevant. The requirement that Petitioner be excluded derives directly from her *conviction* and not from the underlying issue of her guilt or innocence. That issue was resolved when Petitioner entered a plea to the charges filed against her and Petitioner may not litigate it before me.

Petitioner argues also that the length of her exclusion is unreasonable. I may not make findings as to reasonableness because Petitioner’s exclusion is for the minimum period that is mandated by the Act for exclusions imposed pursuant to section 1128(a)(2). Act, section 1128(c)(3)(B).

/s/
Steven T. Kessel
Administrative Law Judge