

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Lee G. Balos,	)	DATE: June 2, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-025
	)	Decision No. CR378
The Inspector General.	)	
	)	

DECISION

By letter dated September 20, 1994, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Lee Balos (Petitioner), that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years.<sup>1</sup> The I.G. advised Petitioner that he was being excluded as a result of his conviction 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. advised Petitioner that the exclusion of individuals convicted of such offenses is mandated by section 1128(a)(2) of the Social Security Act (Act). The I.G. further advised Petitioner that for exclusions imposed pursuant to section 1128(a)(2) of the Act, section 1128(c)(3)(B) requires a five-year minimum period of exclusion.

Petitioner filed a request for review of the I.G.'s action. This case was initially assigned to Judge Joseph K. Riotto for hearing and decision, and then it was reassigned to me. During a prehearing conference held by Judge Riotto on November 23, 1994, the parties agreed to proceed by written submissions. Accordingly, Judge

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

Riotto established a schedule for the parties to file briefs and documentary evidence.

Thereafter, the I.G. filed a brief, including a statement enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s brief was accompanied by seven exhibits which I identify as I.G. Ex. 1 through 7. Petitioner responded with a brief, including a response to the I.G.'s proposed findings of fact and conclusions of law and an additional statement enumerating material facts and conclusions of law Petitioner considered to be uncontested. Petitioner's responsive brief was accompanied by 13 exhibits which I identify as P. Ex. 1 through 13. The I.G. filed a reply and Petitioner filed a sur-reply.

Petitioner has not contested the admissibility of the seven exhibits submitted by the I.G. I admit into evidence I.G. Ex. 1 through 7. The I.G. has not contested the admissibility of the 13 exhibits submitted by Petitioner. I admit into evidence P. Ex. 1 through 13.

I have considered the parties' arguments, supporting exhibits, and the applicable law. I conclude that there are no material factual issues in dispute (i.e., the only matter to be decided is the legal significance of the undisputed facts). I conclude also that Petitioner is subject to the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act, and I affirm the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid for a period of five years.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. During the period relevant to this case, Petitioner was employed as a certified registered nurse anesthetist (CRNA) by Waterville Osteopathic Hospital (WOH) in Waterville, Maine. I.G.'s Proposed FFCLs, paragraph 1; Petitioner's Response to I.G.'s Proposed FFCLs, paragraph 1.
2. On July 23, 1991, a nurse in a operating room at WOH reported that Petitioner was acting inappropriately in the operating room. The nurse observed Petitioner to be "dopey or high." I.G. Ex. 3, p. 1; Petitioner's Proposed FFCLs, paragraph 1.
3. Upon learning this, Petitioner's supervisor went into the operating room and observed that Petitioner had heavy eyelids and slurred speech. Petitioner's supervisor

observed also that Petitioner had filled out incorrect times on the operating room anesthetic record completed by him. I.G. Ex. 3, p. 1; P. Ex. 10, p. 1.

4. Petitioner's supervisor suspected that Petitioner was performing his CRNA duties while under the influence of drugs, and he requested Petitioner to submit a urine sample for drug testing. I.G. Ex. 3, pp. 1 - 2.

5. The results of the drug test were positive. P. Ex. 10, p. 2.

6. When confronted with the results of the drug test, Petitioner admitted that he had a problem with drug dependency. P. Ex. 10, p. 2.

7. When confronted with the results of the drug test, Petitioner took affirmative steps to notify hospital authorities that he had removed ampules of drugs from WOH's anesthesia department and replaced the drugs with ampules filled with a sterile saline solution. I.G. Ex. 4, 5.

8. Petitioner informed hospital authorities that the drug cupboard contained ampules of saline solution in an effort to ensure that no patient would be harmed. FFCL 7; I.G. Ex. 4, 5.

9. On April 8, 1992, the State of Maine filed a three count criminal information against Petitioner in the Superior Court for Kennebec County (the court). I.G. Ex. 1.

10. Count 1 of the information charged Petitioner with the offense of endangering the welfare of an incompetent person. The information alleged that Petitioner knowingly endangered the health, safety or mental welfare of a person who is unable to care for himself by performing CRNA functions such as administering anesthesia while impaired by the scheduled drugs sufentanil and morphine. I.G. Ex. 1.

11. Count 2 of the information charged Petitioner with the offense of stealing drugs. The information alleged that Petitioner committed the theft of the scheduled drugs sufentanil and morphine from WOH. I.G. Ex. 1.

12. Count 3 of the information charged Petitioner with the offense of reckless conduct. The information alleged that Petitioner recklessly created a substantial risk of serious bodily injury to patients at WOH by tampering with the scheduled drugs sufentanil and morphine which

were used by WOH personnel to provide patients relief from pain during surgery. I.G. Ex. 1.

13. On April 9, 1992, Petitioner entered a plea of guilty to all three counts of the information. I.G. Ex. 2, p. 1.

14. The court accepted Petitioner's guilty plea and found him guilty of the offenses of endangering the welfare of an incompetent person, stealing drugs, and reckless conduct as charged. I.G. Ex. 2, p. 1.

15. Based on its acceptance of Petitioner's guilty plea, the court sentenced Petitioner to 364 days of imprisonment on each count, sentence suspended, placed him on probation for one year, and fined him \$1650. As a special condition of probation, the court ordered Petitioner to abstain from the possession and use of alcohol and drugs, except upon the prescription of a licensed physician, and to participate in an alcohol and substance abuse treatment program. I.G. Ex. 2, p. 1.

16. The Secretary of DHHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

17. Petitioner's guilty plea, and the court's acceptance of that plea, constitute a conviction of a criminal offense within the meaning of sections 1128(a)(2) and 1128(i) of the Act. FFCLs 9 - 15; I.G.'s Proposed FFCLs, paragraph 20; Petitioner's Response to I.G.'s Proposed FFCLs, paragraph 20.

18. Petitioner's conviction for the offense of endangering the welfare of an incompetent person constitutes a conviction of a criminal offense relating to neglect 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. FFCLs 1 - 6, 9 - 10, 13 - 15, 17.

19. Petitioner's conviction for the offense of reckless conduct constitutes a conviction of a criminal offense relating to neglect 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. FFCLs 1, 7 - 9, 12 - 15, 17.

20. Pursuant to section 1128(a)(2) of the Act, the I.G. is required to exclude Petitioner from participating in Medicare and Medicaid.

21. The minimum mandatory period of exclusion pursuant to section 1128(a)(2) is five years. Act, section 1128(c)(3)(B).

22. The I.G. properly excluded Petitioner from participation in Medicare and Medicaid for a period of five years pursuant to sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

23. The determination of the I.G. to impose and direct a five-year exclusion in this case does not violate Petitioner's right to equal protection of the law under the United States Constitution.

24. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

#### DISCUSSION

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 Act. This section mandates the exclusion of individuals who are:

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.'s authority to impose and direct an exclusion under section 1128(a)(2) is based on the fulfillment of the following statutory criteria: (1) conviction of a criminal offense, (2) relating to neglect or abuse, (3) of patients, and (4) in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that Petitioner must be convicted of a criminal offense. Petitioner does not dispute that he was convicted of a criminal offense within the meaning of the Act. The undisputed facts establish that Petitioner entered a guilty plea to the offenses of endangering the welfare of an incompetent person, stealing drugs, and reckless conduct in the Superior Court for Kennebec County, Maine, and that the court accepted Petitioner's guilty plea. FFCLs 9 - 15. The Act defines the term "convicted of a criminal offense" to include those circumstances in which a plea

of guilty by an individual has been accepted by a federal, State, or local court. Act, section 1128(i)(3). Therefore, I conclude that Petitioner was convicted of a criminal offense within the meaning of sections 1128(a)(2) and 1128(i) of the Act.

The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that criminal offense must relate to neglect or abuse of another individual. The undisputed facts that Petitioner was convicted of three criminal offenses: (1) endangering the welfare of an incompetent person, (2) stealing drugs, and (3) reckless conduct. The I.G. contends that the offenses endangering the welfare of an incompetent person and reckless conduct which formed the basis of Petitioner's conviction are related to neglect of another individual. Petitioner contends, however, that these offenses are not related to neglect, within the meaning of section 1128(a)(2) of the Act.<sup>2</sup>

The information to which Petitioner pled guilty does not specifically refer to neglect. Petitioner was convicted of the offenses of endangering the welfare of an incompetent person and reckless conduct. I conclude that these offenses relate to "neglect" of another individual, as that term is used in section 1128(a)(2) of the Act.

Congress could have conditioned imposition of the exclusion remedy on conviction of criminal offenses consisting of patient neglect. 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 intended that the exclusion authority under section 1128(a)(2) apply to a broader array of circumstances. It mandated that the Secretary exclude providers who are convicted of criminal offenses "relating to" patient neglect in connection with the delivery of a health care item or service. The question before me is whether the criminal offense which formed the basis of the conviction

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<sup>2</sup> Since the I.G. does not argue that the offense of stealing drugs is related to neglect or abuse, I do not address that issue in this decision. In addition, while the I.G. tracks the language of section 1128(a)(2) of the Act in her statement of proposed FFCLs by using the term abuse together with the term of neglect, she does not argue that Petitioner's criminal offenses relate to abuse. Accordingly, I do not address the issue of whether Petitioner's offenses relate to abuse in this decision.

relates to neglect, not whether the court convicted Petitioner of an offense called "patient neglect."

The term neglect is not defined in section 1128(a)(2). In the absence of a definition, the term must be defined according to its common and ordinary meaning. Case law precedent has consistently held that based on the common definition of neglect, Congress intended the statutory term neglect to include failure by a party to satisfy a duty of care to another person. Thomas M. Cook, DAB CR51 (1989); Rosette Elliott, DAB CR84 (1990). Moreover, neglect can be unintentional, as there is nothing in the definition suggesting that there must be a purposeful or malicious failure to act. Janet Wallace, L.P.N., DAB 1326 (1992).

Petitioner was convicted of endangering the welfare of an incompetent person in violation of Title 17-A, section 555 of the statutes of the State of Maine. In Olian Small, DAB CR136 (1991), the petitioner was convicted of the same offense under the same Maine statute. The petitioner in Small was a nurse's aide/medication technician who committed the offense endangering the welfare of an incompetent person by failing to administer medications to nursing home patients and falsifying the patients' records in an attempt to conceal that fact. The administrative law judge in Small found that the petitioner's offense was related to neglect, within the meaning of section 1128(a)(2).

In reaching this conclusion, the administrative law judge in Small pointed out that the Maine statute under which the petitioner was convicted defines endangering in terms which are almost identical to the common definition of neglect:

As used in this section, 'endangers' includes a failure to act only when the defendant had a legal duty to protect the health, safety or mental welfare of the incompetent person.

Me. Rev. Stat. Ann. tit. 17-A, § 555; see I.G.'s Brief, footnote 1: The administrative law judge in Small reasoned that the petitioner's duties as a nurse's aide/medication technician includes the duty to administer medications. His failure to do so constituted an act of "neglect" within the meaning of section 1128(a)(2).

Although the facts in the present case are not on all fours with the facts of Small, the rationale used by the administrative law judge in deciding that case can be

applied here. In this case, count 1 of the criminal information establishes that Petitioner committed the offense of endangering the welfare of an incompetent person by "perform[ing] C.R.N.A. functions such as administering anesthesia while impaired by scheduled drugs." The statutory elements of Petitioner's offense establish that by administering anesthesia while impaired by scheduled drugs, Petitioner failed to satisfy a legal duty of care he owed to an incompetent person.

The common material element in both Small and this case is that, in both cases, the criminal offense involved a failure to satisfy a duty of care owed to another individual. In both cases, the petitioners were convicted of the offense of endangering the welfare of an incompetent person. The legal definition of that offense, under Maine State law, encompasses the same conduct that constitutes "neglect" under federal law. Therefore, Petitioner's offense was related to neglect, within the meaning of section 1128(a)(2) of the Act.

Petitioner's offense of reckless conduct in violation of section 211 of Title 17-A of the Maine statutes also relates to neglect, within the meaning of section 1128(a)(2) of the Act. Count 3 of the criminal information to which Petitioner pled guilty establishes that Petitioner committed this offense by "tampering with scheduled drugs, to wit, sufentanil and morphine, which were utilized by Waterville Osteopathic Hospital personnel for purposes of alleviating pain during surgery." The information establishes that through such acts, Petitioner "recklessly create[d] a substantial risk of serious bodily injury to patients" at the hospital.

As a CRNA at WOH, Petitioner owed the patients at WOH a duty to care for them in a manner that would not create a substantial risk of serious bodily injury. By tampering with WOH's supply of drugs intended for patients at WOH, Petitioner neglected this duty of care. I conclude that reckless conduct that creates a substantial risk of bodily injury falls within the common definition of "neglect." Therefore, Petitioner's conviction for the offense reckless conduct is plainly a conviction for an offense related to "neglect," within the meaning of section 1128(a)(2). See Rossette Elliott, DAB CR84 (1990).

Petitioner appears to argue that no neglect has occurred since the I.G. has not shown that any individual suffered ill effects as a result of Petitioner's care. I disagree. The Petitioner in Small made a similar argument. Nevertheless, the administrative law judge in



Small upheld the exclusion imposed under section 1128(a)(2) in the absence of any proof of actual harm to patients. In rejecting the petitioner's argument in Small, the administrative law judge referred to the common and ordinary meaning of neglect, failure by a party to satisfy a duty of care owed to another, and found that it does not make any reference to harm caused by such failure. Small, DAB CR136 at 7.

What remains to be determined is whether the neglect of which Petitioner was convicted was neglect of a patient and whether it occurred in connection with the delivery of a health care item or service. Petitioner does not dispute that his criminal offenses involved patients and occurred in connection with the delivery of a health care item or service. Indeed, the relevant counts to which Petitioner pled guilty establish that the offenses involved patients in connection with the delivery of a health care item or service.

The information establishes that Petitioner committed the offense of endangering the welfare of an incompetent person in the course performing his CRNA functions. Specifically, Petitioner committed this offense while he was administering anesthesia to a patient. The information establishes also that Petitioner committed the offense of reckless conduct when he tampered with drugs which were intended for the use of patients at a hospital for the purpose of alleviating pain during surgery. I conclude that the language of the information on its face establishes that the neglect of which Petitioner was convicted involved patients and occurred in connection with the delivery of a health care item or service.

Petitioner seeks to invalidate his exclusion by contending that the I.G. treated him differently than other similarly-situated health care practitioners. Petitioner argues that the I.G. has in several other cases imposed "permissive exclusions" under section 1128(b) of the Act against health-care providers who, like himself, have been "convicted of drug-related crimes and who have endangered or jeopardized their patients' safety due to their addictions." Petitioner's Brief, p. 12. Petitioner argues that based on the I.G.'s action in these other cases, he should receive only a permissive exclusion. Petitioner argues also that in treating him differently by excluding him under the mandatory provision, the I.G. is violating Petitioner's constitutional right to equal protection under the law.

I am not persuaded by Petitioner's argument. None of the providers in the cases cited by Petitioner was convicted of the specific criminal offenses which formed the basis for Petitioner's exclusion. For example, in several of the cases cited by Petitioner, the excluded providers were convicted of criminal offenses involving theft or unlawful distribution of a controlled substance. These offenses do not necessarily by themselves provide a basis for an exclusion under section 1128(a)(2), given that a provider may steal or unlawfully distribute controlled substances without neglecting any duties owed to a patient. I assume that the I.G. determined that under the facts of the cases cited by Petitioner the relevant offenses did not fall within the parameters of the mandatory exclusion provisions of section 1128(a)(2). Once that determination was made, the I.G. was free to determine whether the offenses merited a permissive exclusion.<sup>3</sup>

Since the parties in the cases cited by Petitioner did not raise the issue of whether the I.G. should have treated the provider's conviction as the basis for a mandatory exclusion action, the I.G.'s choice to proceed under the permissive exclusion authority was not subjected to the scrutiny of the administrative law judges reviewing those cases. Moreover, even if the I.G. misapplied the law in other cases involving similarly situated providers, that does not invalidate the exclusion in this case. Nicholas J. Penna, D.M.D., DAB CR338 (1994).

In this case, the I.G. made the determination that Petitioner's offenses were governed by section 1128(a)(2) of the Act. Once that determination was made, she had no discretion to impose anything other than a mandatory exclusion. Petitioner challenged this determination and asked that it be reviewed by an administrative law judge. I have carefully reviewed the record in this case, and conclude that the I.G. properly classified Petitioner's offenses as falling under the mandatory exclusion authority of section 1128(a)(2) of the Act. The law

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<sup>3</sup> It is noteworthy that the Petitioner in this case was convicted of the offense of stealing drugs, but the I.G. did not base its authority to exclude under section 1128(a)(2) on that offense. In her reply brief, the I.G. stated that had stealing drugs been the only offense of which Petitioner was convicted, the I.G. would not have excluded him under section 1128(a)(2) of the Act.

requires that Petitioner be excluded for at least five years. Act, section 1128(c)(3)(B).

The determination of the I.G. to impose and direct an exclusion in this case does not violate Petitioner's right to equal protection of the law under the United States Constitution. The I.G. is merely carrying out the specific directive of section 1128 of the Act that a criminal conviction of an offense related to the delivery of an item or service mandates an exclusion of at least five years. I see nothing unreasonable or inequitable in the I.G.'s exclusion of Petitioner.

#### CONCLUSION

Based on the law and the undisputed material facts in this case, I conclude that the I.G. properly excluded Petitioner from Medicare and Medicaid pursuant to section 1128(a)(2) of the Act. I further conclude that the five-year minimum period of exclusion imposed and directed against Petitioner is mandated by section 1128(c)(3)(B) of the Act.

/s/

Jill S. Clifton  
Administrative Law Judge