Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Peter C. Loeser, M.D.,	)	Date: May 10, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-81
	)	Decision No. CR1596
The Inspector General.	)	
	)	

DECISION

Petitioner, Peter C. Loeser, M.D., appeals a determination by the Inspector General (I.G.) to exclude him from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(2) of the Social Security Act (Act), and that the regulations mandate a five-year exclusion.

I. Background

By letter dated September 29, 2006, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(2) of the Act because of his conviction in New Hampshire State Court of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. By letter dated November 8, 2006, Petitioner requested a hearing and the case was assigned to me.

On January 10, 2007, I held a prehearing conference by telephone. At that conference, Petitioner did not dispute that he had been convicted of a criminal offense. The parties also agreed that the case could move forward on written submissions. I directed the parties to submit, with their briefs, a written request for an in-person hearing if either determined that an in-person hearing would be necessary. Order (January 10, 2007).

Neither party has suggested that an in-person hearing is necessary.[1] The I. G. has filed four exhibits (I.G. Exs. 1 - 4) as part of his submission, and Petitioner has filed five exhibits. (P. Exs. 1 - 5).[2] In the absence of objection, I receive into evidence I.G. Exs. 1 - 4 and P. Exs. 1 - 5.

II. Issue

The sole issue before me is whether Petitioner was convicted of a criminal offense relating to the 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), thus providing a basis for excluding him from participation in the Medicare, Medicaid, and all federal health care programs. If so, the five-year exclusion is mandatory.

III. Discussion

> ***Petitioner was convicted of a criminal offense relating to the neglect or abuse of a patient in connection with the delivery of a health care item or service, and must be excluded from participation in federal health care programs for a minimum of five years.***[3]

Section 1128(a)(2) of the Act mandates that an individual or entity convicted of "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service" be excluded from participation in federal health care programs. Section 1128(i) of the Act defines the term "convicted" to include: (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

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[1] The I.G. characterizes its brief as in support of a "motion for summary affirmance." In fact, in responding to my order, neither party indicated that an in-person hearing was necessary. Thus, each party has effectively waived appearance at an oral hearing and agreed to submit only documentary evidence and written argument. 42 C.F.R. § 1005.4(a)(5); Order (Jaunary 10, 2007). The distinction may appear subtle, but is significant because in summary affirmance all disputed facts and inferences must be drawn in favor of the nonmoving party. Where the parties agree to resolve the case on the written record, the judge is free to weigh the evidence and draw whatever inferences are most reasonable.

[2] Petitioner marked his exhibits P. Exs. A - E. To conform with Civil Remedies Division procedures, we have numbered them P. Exs. 1 - 5.

[3] I make this one finding of fact/conclusion of law.

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. Act, section 1128(i)(1) - (4).

The relevant facts here are not in dispute. Petitioner is a physician licensed to practice in the State of New Hampshire. On November 3, 2005, he was charged with second degree assault, a felony, for "recklessly" engaging in sexual contact with one of his patients, causing her "severe psychological trauma," contrary to New Hampshire Revised Statutes Annotated (RSA) 631:2. I.G. Ex. 3 at 1; P. Ex. 3. On November 4, 2005, he pled guilty to the charge. I.G. Ex. 3, at 2; P. Ex. 4. Under RSA 631:2, a person commits second degree assault if he "knowingly or recklessly causes serious bodily injury to another."

The I.G. refers to an affidavit supporting the issuance of an arrest warrant. According to the affidavit, the victim alleged that she twice had unprotected consensual sex with Petitioner: once, on January 31, 2004, at Petitioner's home (January encounter) and once, on February 5, 2004, at his office (February encounter). I.G. Ex. 4, at 1. She said that she started seeing him professionally at the end of 2003, and that he was treating her for heart problems and anxiety related to her heart problems. I.G. Ex. 4, at 2. He prescribed for her, at different times, certain anti-anxiety drugs, including Ativan, Librium, Paxil, Prozac, and Klonopin, as well as the heart medication, Atenolol. *Id.* She then describes in greater detail the two incidents.

Although he admits that he was convicted of a criminal offense that involved a patient, Petitioner points out that all sexual contact was consensual, and attributes his indictment to New Hampshire's "unique criminal statute," which criminalizes even consensual sexual conduct between a physician and his patient, "even where there is no allegation of coercion." Petitioner's Brief (P. Br.) at 3, n.1 (*citing* RSA 632:2). Petitioner argues that his criminal conduct does not fall within the definition of section 1128(a)(2) because it was not related to patient abuse and was not "in connection of the delivery of a health care service." P. Br. at 4. He acknowledges that his patient charged him with two instances of sexual misconduct: the January encounter that occurred at his home and a February encounter that allegedly occurred at his office following his patient's medical appointment. However, he insists that his conviction related *only* to the January encounter, and argues that the I.G. improperly relied on extrinsic evidence – an uncorroborated affidavit – to establish the office contact. *See* P. Br. at 6.

First, Petitioner's conviction is not reviewable in this forum (42 C.F.R. § 1001.2007(d)),[4] so I must conclude that he feloniously assaulted this patient. Any conduct toward a patient that falls within the definition of assault must be considered abuse. *Gregory Vagshenian, M.D.*, DAB CR1457, at 3 (2006).

Second, with respect to whether Petitioner's criminal conduct was related to the delivery of a health care service, it is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances of the offense of which a party is convicted. *Narendra M. Patel*, DAB No. 1736 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991). However, the conviction must be for the same conduct or events to which the extrinsic evidence relates. *Narendra M. Patel* at 5. Here, Petitioner was not convicted of having sex with his patient in his office, and I agree that extrinsic evidence should not be allowed to create the presumption that he did so.

Nevertheless, I do not agree that the setting of the sexual encounter is the critical factor here. That a physician engages in sexual conduct in his office is evidence that may put his actions within the ambit of section 1128(a)(2), but not necessarily. For example, an encounter with someone wholly unrelated to Petitioner's medical practice would not be "in connection with" the delivery of a health care service because the physician delivers no such service to the sexual partner. On the other hand, abusive conduct need not necessarily occur in a clinical setting to be considered "in connection with" the delivery of a health care service. *Patel* at 8, n.2. In *Patel*, the Board explained the breadth of the "in connection with" language of the statute:

> Congress did *not* limit the I.G.'s authority and duty to exclude only to those individuals convicted *of the crime of abusing a patient while under medical care*. The plain language of the statute clearly covers a broader reach . . . . The circumstances that surrounded the actual offense need only show a relation to the neglect or abuse of a patient.

Patel at 8 (emphasis in original). As the *Patel* decision also notes, the regulations themselves emphasize that the statutory terms be interpreted broadly in order to carry out the remedial purpose of the statute. Offenses that will trigger sanction under section 1128(a)(2) include "any offense that the [I.G.] concludes entailed, or resulted in, neglect or abuse of patients." 42 C.F.R. § 1001.101(b); *Patel* at 8, n.2.

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[4] *See also, Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Ira Katz, Little Five Points Pharmacy*, DAB CR1044 (2003).

In this case, the victim was Petitioner's patient. He was treating her for emotional, as well as physical problems, and his criminal actions caused her "severe psychological trauma." I.G. Ex. 3, at 1. That on-going therapeutic relationship – not the location of the encounter – made his conduct a crime, and creates the relationship to abuse of a patient that subjects him to sanction under section 1128(a)(2).

An exclusion under section 1128(a)(2) must be for a minimum period of five years. Act, section 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

The I.G. has a basis for imposing an exclusion under section 1128(a)(2) because Petitioner was convicted of assaulting his patient and his action occurred in the context of a therapeutic relationship. I therefore sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge