

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Janet R. Constantino,
(OI File No. H-12-42047-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-721

Decision No. CR3949

Date: June 10, 2015

DECISION

Petitioner, Janet Constantino, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)) for a period of five years. I find that there is a legal basis for the I.G. to exclude Petitioner, and an exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background and Procedural History

On November 28, 2014, the I.G. notified Petitioner that she was being excluded, effective 20 days from the date of the I.G.'s letter, from Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Act for the minimum statutory period of five years. The I.G. based this exclusion on Petitioner's conviction in the Family Court of the First Circuit, State of Hawaii, of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. I.G. Ex. 1.

On December 17, 2014, Petitioner, who was represented by counsel, filed a timely request for a hearing, and the case was assigned to me. I ordered the parties to file briefs and their proposed exhibits including the written direct testimony of any proposed witnesses. Prehearing Order dated December 31, 2014 (PHO). I also directed the parties to answer the questions on the short form briefs I provided with the PHO and instructed the parties that they could also make additional arguments. PHO ¶ 3. A. The I.G. filed his short form brief together with additional arguments (I.G. Br.) and four exhibits identified as I.G. Exs. 1-4. Petitioner filed a brief, titled *Reply Brief* (P. Br.), but did not file the short form brief as I directed. Petitioner also did not file any exhibits. The I.G. submitted a reply. Petitioner did not object to the I.G.'s exhibits. I therefore admit the I.G.'s exhibits into the record. Neither party proposed any witnesses or submitted any direct written testimony. Thus, an in-person hearing is not necessary, and I decide this matter based upon the parties' written submissions.

II. Discussion

A. Issue

The sole issue in this case is whether there is a legal basis under section 1128(a)(2) of the Act for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs. If I find a legitimate basis for the exclusion, I am required to uphold the mandatory five-year exclusion.

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legal basis for excluding Petitioner under section 1128(a)(2) of the Act.

The essential elements necessary to support an individual's exclusion based on section 1128(a)(2) of the Act are: (1) the individual must have been convicted, under Federal or State law, 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. Act §1128(a)(2) (42 U.S.C. § 1320a-7(a)(2); *see also* 42 C.F.R. § 1001.101(b). An exclusion based on section 1128(a)(2) is mandatory, and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a).

a. Petitioner was convicted of a criminal offense.

After an investigation of an abuse complaint by the State of Hawaii Medicaid Fraud Control Unit, Petitioner was charged on April 23, 2012 with the criminal misdemeanor offense of *Endangering the Welfare of an Incompetent Person* in violation of Hawaii Revised Statutes (Haw. Rev. Stat.) § 709-905. I.G. Ex. 4; I.G. Ex. 2. The complaint stated:

On or about November 1, 2010 to and including February 3, 2011, in the City and County of Honolulu, State of Hawai'i, JANET CONSTANTINO, did knowingly act in a manner likely to be injurious to the physical or mental welfare of [F.H.], a person unable to care for himself, because of physical and/or mental disease, disorder or defect . . .

I.G. Ex. 2.

The incompetent person referenced in the complaint as F.H. was a Medicaid and Social Security recipient who lived in a community care family foster home. I.G. Ex. 4 at 1-2. Petitioner was a registered nurse and F.H.'s case manager assigned to provide care for F.H. I.G. Ex. 4 at 2. As such, Petitioner was obligated to visit and check on the person's care and condition monthly while F.H. resided in the family foster home. I. G. Ex. 4 at 18. Petitioner entered a plea of no contest, and on May 15, 2012, the Family Court of the First Circuit, State of Hawaii, deferred acceptance of Petitioner's plea for one year subject to Petitioner's compliance with the terms and conditions of the deferral and payment of a \$1000 fine and a \$30 contribution to the Crime Victim Compensation Fund. I.G. Ex. 3.

For purposes of exclusion from Federal health care programs, an individual is "convicted" when a plea of nolo contendere or no contest is accepted by a court or when a judgment of conviction is withheld under deferred adjudication. Act § 1128(i)(3)-(4) (42 U.S.C. § 1320a-7(i)(3)-(4)); 42 C.F.R. § 1001.2. Here, Petitioner entered a plea of no contest, and the court deferred its acceptance of Petitioner's plea. Both of these are situations specifically contemplated by the Act for exclusion purposes when determining whether there was a relevant conviction.

Petitioner argues that she was not aware of, or counseled about, the consequences of entering either a guilty plea or a nolo contendere plea "vis a vis the consequent action" taken by the I.G. because under the laws of the State of Hawaii she is not considered convicted. P. Br. at 1. Petitioner also contends that her plea of nolo contendere does not constitute an admission of guilt, and thus the I.G.'s exclusion action violates the fundamental concept of due process. P. Br. at 2.

While Petitioner may not be considered “convicted” under Hawaii law, here I am required to apply the federal definition of “convicted” under the Act. The Departmental Appeals Board (Board) expressly addressed this contention in a previous exclusion case:

If there were no definition of ‘convicted’ in the Act, then Petitioner’s arguments about whether a conviction exists . . . for state law purposes would be relevant. However, Congress has defined for the ALJ and this Board what ‘convicted’ means for purposes of section 1128 and that definition is binding on us.

Carolyn Westin, DAB No. 1381 at 6 (1993), *aff’d*, *Westin v. Shalala*, 845 F.Supp. 1446 (D. Kan. 1994); *see also Henry L. Gupton*, DAB No. 2058, at 7-8 (2007), *aff’d sub nom, Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008) (citing the legislative history of section 1128(i) of the Act, the Board explained that the goals that may support a state’s deferred adjudication program are distinct from the goal of Congress to protect federal health care programs from untrustworthy individuals through mandatory exclusions and explaining as “well established” the principle that a “conviction” includes “diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction”).

Thus, I find Petitioner’s plea and deferred adjudication constitutes a “conviction” within the meaning of sections 1128(a)(2) and 1128(i)(3) and (4) of the Act and 42 C.F.R. § 1001.2.

b. Petitioner’s conviction is related to patient neglect.

The second essential element of a section 1128(a)(2) exclusion requires that the underlying conviction be related to patient abuse or neglect. The relevant regulation defines a patient as:

any individual who is receiving health care items or services, including any item or service provided to meet his or her physical, mental or emotional needs or well-being (including a resident receiving care in a facility as described in part 483 of this chapter), whether or not reimbursed under Medicare, Medicaid and any other Federal health care program and regardless of the location in which such item or services is provided.

42 C.F.R. § 1001.2. The complaint against Petitioner, to which she pled no contest, charged her with *Endangering the Welfare of an Incompetent Person*, a violation of Haw. Rev. Stat. § 709-905. The Medicaid Fraud Unit’s Investigative Report on which the

complaint was precipitated explained that Petitioner, a registered nurse, was the case manager for F.H., a 92 year-old female patient residing in a community care foster home. Petitioner was responsible for visiting and checking on the care and condition of F.H. monthly while she resided in the family foster home. I.G. Ex. 4 at 18. During the time that F.H. was under Petitioner's care, she developed a late stage decubitus ulcer in the sacral area that was so severe it prompted a referring hospital's staff to contact the Hawaii Department of Human Services Adult Protective Services. I.G. Ex. 4 at 1, 3-4, 18-20. The Department of Human Services Adult Protective Services' investigation concluded that there was evidence of neglect to F.H. I.G. Ex. 4 at 3. As a result, the community care family foster home where F.H. resided and the case management company, Harvest Care Management, for whom Petitioner worked, both had their licenses revoked due to the finding of neglect. I.G. Ex. 4 at 18.

Petitioner acknowledges that the complaint "charges that an individual's care was violated." P. Br. at 1. Based on the offense to which Petitioner pled no contest, the conduct underlying her conviction as set forth in the investigative reports, and the nature of Petitioner's employment, especially her obligations with respect to F.H., I conclude that Petitioner's conviction is directly related to neglect of her patient.

c. Petitioner's offense was committed in connection with the delivery of a health care item or service.

The third essential element for a section 1128(a)(2) exclusion requires that the patient neglect or abuse occurs in connection with the delivery of a health care item or service. For an offense to be "in connection with the delivery of a healthcare item or service," there need only be a "common sense connection or nexus" between the offense and the delivery of the health care item or service. See *Kevin J. Bowers*, DAB No. 2143 (2008), *aff'd Bowers v. Inspector General of the Dep't of Health & Human Servs.*, No. 1:08-CV-159, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008). The Board has previously held that the "words 'in connection with' in section 1128(a)(2) require only a minimal nexus between the abuse and the delivery of a health care service." *Bruce Lindberg, D.C.*, DAB No. 1386, at 8 (1993).

Here, Petitioner was charged with her criminal offense because of her employment as a registered nurse and case manager responsible for checking monthly on the care and condition of F.H., a patient. It was her failure to provide the expected and proper care and services to F.H. that resulted in the findings of neglect and Petitioner's subsequent conviction of the criminal offense. I.G. Ex. 2, 4. Petitioner's employer, Harvest Care Management, also had its license revoked by the State of Hawaii Adult Protective Services due to findings of neglect found during their investigation of the care provided F.H. I.G. Ex. 4 at 3, 18. I find, therefore, the existence of the nurse/case manager-patient relationship with F.H. establishes the nexus that the neglect of F.H. was in connection with the delivery of a health care item or service.

I do not find merit to Petitioner's defense that her offense did not implicate Medicare, Medicaid, or any other Federal health care program and that the office of the I.G. inserted "itself in a case . . . in which no direct relationship has been made between the asserted act and a violation of statute or regulation with respect of any program funded by the Federal government." P. Br. at 1, 2. For purposes of exclusion under section 1128(a)(2), the existence of a connection between the offense and a Federal health care program is irrelevant. Pursuant to 42 C.F.R. § 1001.102 (b), which implements the mandatory exclusion provisions under 1128(a)(2) of the Act, a health care item or service "includes the provision of any item or service to an individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any Federal health care program." Thus, no reimbursement by a Federal health care program is required to uphold this type of mandatory exclusion.

d. I do not have authority to review Petitioner's constitutional objections to the exclusion process.

Petitioner's objections to the constitutionality of the exclusion process are beyond the scope of my review. My jurisdiction in an exclusion case is limited by statute and regulation, and in the case of a mandatory five-year exclusion, I am limited to determining only whether there is a legal basis for the I.G.'s exclusion action. 42 C.F.R. § 1001.2007(a)(2). I have found the I.G. has presented a legitimate and mandatory basis for exclusion, and I am unable to find invalid or refuse to follow Federal statutes or regulations. 42 C.F.R. § 1005.4(c)(1).

III. Conclusion

Based upon Petitioner's conviction relating to patient neglect, the I.G. had a legal basis to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs, and I sustain the five-year mandatory exclusion. The exclusion became effective 20 days after November 28, 2014, the date of Petitioner's notification letter. *See* 42 C.F.R. § 1001.2002(b).

/s/
Joseph Grow
Administrative Law Judge