

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Katrina Michelle Wisley,
(OI File No. H-16-42530-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-455

Decision No. CR4876

Date: June 26, 2017

DECISION

Petitioner, Katrina Michelle Wisley, was a registered nurse in the State of Florida, working for a home health agency. She was charged with felony counts of grand theft of a controlled substance and possession of a controlled substance and pled *nolo contendere* to the drug possession charge. Based on this conviction, the Inspector General (IG) has excluded her from participating in the Medicare, Medicaid, and all federal health care programs for a period of five years, pursuant to section 1128(a)(3) of the Social Security Act (Act).

For the reasons discussed below, I find that the IG is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated February 28, 2017, the IG advised Petitioner Wisley that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of

a healthcare item or service, the IG was excluding her from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. IG Ex. 1. Petitioner requested review.

The parties have submitted their written arguments. (IG Br.; P. Br.). The IG submitted six exhibits (IG Exs. 1-6) and a reply. Petitioner attaches one document to her brief, but does not ask that it be admitted into evidence. P. Br. at 6.

Petitioner objects to my admitting IG Ex. 3, which is her arrest report. Petitioner argues that the document is hearsay and irrelevant. P. Br. at 2. I am not bound by the Federal Rules of Evidence and may admit evidence that would not ordinarily be admitted under them. 42 C.F.R. § 1005.17(b). With limited exceptions, I admit all evidence that is relevant and material. *See* 42 C.F.R. § 1005.17(c), (d), (e), and (f). By regulation, evidence of crimes, wrongs or acts other than those at issue in the case before me are admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme. 42 C.F.R. § 1005.17(g). *See Hussein Awada, M.D.*, DAB No. 2788 at 9 n.6 (2017) (affirming that the ALJ may rely on the entire criminal record to determine the criminal misconduct). The arrest report is therefore admissible.

I admit into evidence IG Exs. 1-6.

The parties agree that this case does not require an in-person hearing. IG Br. at 5; P. Br. at 6.

Discussion

Petitioner must be excluded from program participation for a minimum of five years because she was convicted of a felony relating to fraud or theft in connection with the delivery of a healthcare item or service.*

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participating in federal health care programs for a minimum of five years. *See* 42 C.F.R. 1001.101(c).

Petitioner was a registered nurse, licensed in the State of Florida. IG Ex. 2 at 1. She was employed by a home health agency and providing care to an elderly patient in the patient's home. IG Ex. 3 at 1. According to her arrest report, the patient's son noticed

* I make this one finding of fact/conclusion of law.

that his mother's hydrocodone pills were disappearing. He suspected the home health nurse, arranged a hidden camera to record the nurse's activities, and called the sheriff's office to report his evidence of theft. IG Ex. 3 at 1. Officer Andrew Magdalany responded and viewed the tape. He reported that Petitioner Wrisley appeared to open the patient's bottle of pills and "dump" some of them into her hand, then put them into the side pocket of her bag. The officer found some hydrocodone pills in Petitioner's bag; he saw her drop other pills on the floor and retrieved them as well. All of these pills matched the patient's prescription. The number of pills retrieved matched the number missing from the patient's bottle. Finally, although Petitioner Wrisley had a bottle of hydrocodone in her car, that prescription differed from the patient's. Officer Magdalany arrested Petitioner and charged her with theft of medication, possession of a controlled substance without a prescription, and abuse of the elderly. IG Ex. 3 at 2.

In an indictment dated December 14, 2015, Petitioner was charged with one felony count of possessing a controlled substance, hydrocodone, and one felony count of theft of a controlled substance, hydrocodone. IG Ex. 4. She pled *nolo contendere* to the possession charge. On January 19, 2016, the Florida circuit court withheld adjudication but sentenced her to 36 months probation. IG Ex. 5 at 1, 6. The court ordered her to pay restitution *to her patient*, whom the court identified as the "victim." The court also ordered, as a condition of her probation, that Petitioner have no contact with the patient/victim. IG Ex. 5 at 10.

Petitioner concedes that she was convicted of a criminal offense but argues that she is not subject to exclusion because her crime was not related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. P. Br. at 3. In Petitioner's view, I must ignore all extraneous evidence and focus exclusively on the elements of the crime of possession, which would not satisfy the relatedness requirement.

The Departmental Appeals Board has long rejected efforts to limit section 1128 review to the bare elements of the criminal offense. *See Narendra M. Patel, M.D.*, DAB No. 1736 at 7 (2000) ("We thus see nothing in section 1128(a)(2) that requires that the necessary element of the criminal offense must mirror the elements of the exclusion authority, nor that all statutory elements required for an exclusion must be contained in the findings or record of the state criminal court."), *aff'd, Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003); *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Scott D. Augustine*, DAB No. 2043 (2006); *Lyle Kai, R. Ph.*, DAB No. 1979 at 5 (2005), *aff'd, Kai v. Leavitt*, No. 05-00514 BMK (D. Haw. July 17, 2006) (holding that an offense is "related to" the delivery of a healthcare item or service, if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of a healthcare item or service); *Berton Siegel, D.O.*, DAB No 1467 at 5 (1994); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994).

I also note that, by regulation, “evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible. . . .” 42 C.F.R. § 1005.17(g). If I were limited to considering the generic elements of the criminal offense to which Petitioner pled guilty, this regulation would serve no purpose.

Petitioner Wrisley stole drugs from her patient, a crime that falls squarely within the parameters of section 1128(a)(3). Even if I disregard the arrest report and limit my inquiry to the court’s judgment, Petitioner’s crime meets the relatedness requirement. In that judgment, the court identified her patient as the victim of her crime and ordered her to pay restitution. IG Ex. 5 at 10. I find this sufficient to establish that Petitioner’s crime involved stealing drugs from her patient.

Finally, I agree with the Florida Department of Health, which observed that, as a licensed professional providing direct patient care in the home of an aged and infirm patient, Petitioner Wrisley had access to the patient’s prescription medication. By unlawfully possessing a controlled substance, she violated the trust and confidence granted her with the nursing license. IG Ex. 2 at 2-3. That she did so without her patient’s knowledge effectively defrauded the patient, who likely would not have allowed her into her home, with access to her medications, had she known that the home health nurse possessed illegal narcotics.

An exclusion brought under section 1128(a)(3) must be for a minimum period of five years. Act § 1129(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the IG properly excluded Petitioner from participating in Medicare, Medicaid, and all federal health care programs, and I sustain the five-year exclusion.

_____/s/_____
Carolyn Cozad Hughes
Administrative Law Judge