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Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

IN THE CASE OF

SUBJECT:

David K. Rosenthal, M.D.,

Petitioner,

- v -

The Inspector General

DATE: December 08, 2003

Docket No.**C-03-534**
Decision No. **CR1119**

DECISION

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DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, David K. Rosenthal, M.D., from participating in Medicare, Medicaid, and other federal health care programs for a period of 10 years. 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 10-year exclusion imposed by the I.G. against Petitioner falls within a reasonable range.

I. Background

By letter dated April 30, 2003, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs (as defined in section 1128B(f) of the Act) for a period of 10 years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(2) of the Act as a result of his conviction in the Superior Court of California, County of Sacramento, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. The I.G. also noted that the Act mandates that Petitioner be excluded for a minimum period of five years, but he was excluded for 10 years because of three aggravating circumstances: 1) The action that resulted in Petitioner's conviction was premeditated, part of a continuing pattern of behavior, or consisted of non-consensual sexual acts, in that Petitioner was convicted of the crime of sexual battery; 2) The sentence imposed by the court included incarceration; and 3) Petitioner was the subject of an adverse action by a State board, based on the same set of circumstances that served as the basis for his exclusion. By letter dated June 26, 2003, Petitioner timely request a hearing and the case was assigned to me.

On August 4, 2003, I convened a prehearing telephone conference. During the conference, the parties agreed that the case could be heard and decided based on an exchange of written briefs and exhibits in lieu of an in-person hearing. Thereafter, the I.G. submitted *The Inspector General's Motion for Summary Disposition and Brief in Support of Exclusion* (I.G. Br.) and six proposed exhibits (I.G. Exs. 1-6). Petitioner submitted its *Opposition to Inspector General's Motion for Summary Disposition* (P. Br.) and two proposed exhibits (P. Exs. 1-2). On October 31, 2003, the I.G. submitted *The Inspector General's Reply Brief* (I.G. R. Br.). The record was closed on November 5, 2003. There being no objection, I have admitted all proposed exhibits into the record.

II. Issues

The issues in this care are:

1. Whether the I.G. had a basis to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and,

2. Whether the length of the exclusion imposed by the I.G. is unreasonable.

III. Applicable Law

Section 1128(a)(2) of the Act mandates exclusion from federal health care programs of an individual or entity convicted of "a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service." 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 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, § 1128(i)(1)-(4).

Section 1128(c)(3)(B) of the Act sets the minimum exclusion period at five years. The Secretary of Health and Human Services (Secretary) has given the I.G. the responsibility for excluding an individual convicted of patient abuse or neglect. 42 C.F.R. § 1001.101(b). The Secretary has also given the I.G. discretion to lengthen the period of exclusion if specific aggravating factors are present. 42 C.F.R. § 1001.102(b). Among those aggravating factors are: (1) in convictions involving patient abuse or neglect, the action that resulted in the conviction was premeditated, was part of a continuing pattern of behavior, or consisted of non-consensual sexual acts; (2) the sentence included incarceration; and (3) the individual was convicted of other offenses besides those which formed the basis for the exclusion, or has been the subject of any other adverse action by any federal,

State or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. 42 C.F.R. §§ 1001.102(b)(4), (b)(5), and (b)(9).

If the presence of one or more aggravating factors justifies an exclusion longer than five years, specific mitigating factors contained in the regulations at 42 C.F.R. § 1001.102(c) may be considered as a basis for reducing an exclusion to no less than five years. This includes the mitigating factor at 42 C.F.R. § 1001.102(c)(1), which states that it is a mitigating factor if an individual is convicted of an offense consisting of three or fewer misdemeanor offenses and the entire amount of the financial loss to Medicare, or any other federal, State, or local governmental health care program due to the acts resulting in the conviction, and similar acts, is less than $1,500. The aggravating and mitigating factors set forth in the regulations comprise the exclusive factors that may be considered in determining the length of an exclusion to be imposed pursuant to section 1128(a) of the Act. Evidence which does not relate to these factors is not relevant to determining the length of exclusion.

The regulations governing the length of exclusions do not prescribe the weight to be given to these factors. However, so long as the amount of time chosen for the exclusion imposed on a petitioner by the I.G. is within a reasonable range, based on demonstrated criteria, an administrative law judge has no authority to change the length of the exclusion. *JoAnn Fletcher Cash,* DAB No. 1725, at 18 - 19 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992); *see Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002); *see also Gary Alan Katz, R.Ph.,* DAB No. 1842 (2002).

IV. The Petitioner's Contentions

In this case, Petitioner, a physician who was licensed to practice psychiatry in the State of California, has admitted that the I.G. had a basis upon which to exclude him under section 1128(a)(2) of the Act. P. Br. at 1. Petitioner argues that, instead of the presence of three aggravating factors the I.G. has assessed against Petitioner, only two aggravating factors and one mitigating factor are applicable. Therefore, argues Petitioner, the exclusion period should be the minimum five-year mandated exclusion.

In particular, Petitioner disputes that his conviction involved acts consisting of non-consensual sexual acts, the basis for one of the I.G.'s asserted aggravating factors. Petitioner also contends that he was convicted of fewer than three misdemeanor offenses, and there was no loss to any federal, state or local health care program as a result of his actions, which according to Petitioner, is a mitigating factor the I.G. should have considered and did not.

V. Findings of Fact and Conclusions of Law

I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, as a separate finding.

1. Petitioner was licensed as a physician and surgeon in California during the time period relevant to this case. I.G. Ex. 2, at 1-2.

2. In August 2000, Petitioner resumed treating B.G., a 39-year old female patient after a break of several years, in part because the patient stated that she had been a victim of a sexual assault by her landlord.[(1)] I.G. Ex. 2, at 3.

3. Petitioner had sexual contact with this female patient through one act of sexual intercourse and one act of oral copulation on or about and between October 10, 2000 and November 6, 2000. I.G. Ex. 2, at 3.

4. On February 9, 2001, before the Sacramento County Superior Court, in Sacramento, California, Petitioner entered a plea of nolo contendere to both a violation of the Business and Professions Code section 729 (sexual exploitation), a misdemeanor, and Penal Code section 243.4 (sexual battery), also a misdemeanor. I.G. Ex. 1.

5. Petitioner was sentenced on March 13, 2001, to three years of probation, one hundred and eighty (180) days in jail, and was ordered not to treat females or minor children during the period of probation, or if the Medical Board of California acts in the interim and determines differently. I.G. Ex. 3; I.G. Ex. 2, at 3.

6. Petitioner was convicted under State law of a criminal offense related to the neglect or abuse of a patient in connection with the delivery of a health care item or service. Therefore, the I.G. had a basis upon which to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs.

7. The I.G. is required to exclude Petitioner for a period of at least five years.

8. The I.G. proved that the acts resulting in Petitioner's conviction were either premeditated, part of a continuing pattern of behavior, or consisted of non-consensual sexual acts, an aggravating factor.

9. The sentence imposed by the Court on Petitioner included incarceration, an aggravating factor.

10. Effective September 2, 2002, the Petitioner surrendered his Physician's & Surgeon's license as a result of an action before the Division of Medical Quality, the Medical Board of California, based on the same set of circumstances that formed the basis for the exclusion, another aggravating factor. I.G. Exs. 5, 6.

11. Petitioner was convicted of fewer than three misdemeanors and no governmental health care program suffered a financial loss, a mitigating

factor.

12. Given the presence of three aggravating factors, one mitigating factor, and the circumstances of each factor, I do not find a ten-year exclusion to be unreasonable.

VI. Discussion

A. The I.G. had a basis to exclude Petitioner under section 1128(a)(2) of the Act.

Section 1128(a)(2) of the Act requires the Secretary to exclude any individual who "has been 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." 42 U.S.C. § 1320a-7(a)(2); 42 C.F.R. § 1001.101(b). The Act defines "conviction" to include, among other things, acceptance of a guilty or nolo contendere plea by a federal, State or local court. Act, § 1128(i)(3).

The I.G. has shown, and Petitioner does not dispute, that he was convicted under state law of a criminal offense related to the neglect or abuse of a patient in connection with the delivery of a health care item or service. Petitioner pled nolo contendere to one count of sexual exploitation and one count of sexual battery relating to sexual activity with one of his patients. I.G. Ex. 1; I.G. Ex. 2. The Petitioner's plea of nolo contendere constitutes a conviction under section 1128(i) of the Act. 42 U.S.C. § 1320a-7(i)(3). His conviction was for a criminal offense of abuse in that he had sexual intercourse with a patient. To use the exact words of his conviction, he sexually exploited his patient. It is generally accepted that the doctor in a doctor-patient relationship must refrain from sexual activity with a patient because the patient's consent can be distorted by the doctor-patient relationship. There can be few medical professionals who would deny that a doctor, in a position of trust with a patient, has "abused" that patient by engaging in sexual activity with the patient, even if the patient has consented to the activity. *Bruce L. Lindberg, D.C.,* DAB No. 1280 (1991). Petitioner's conviction is "related to abuse" within the meaning of section 1128(a)(2) of the Act. Further, Petitioner's abuse of his patient was during a time period when he was to be treating her and was, thus, in connection with the delivery a health care item or service. Petitioner's abuse of his patient during the course of their doctor-patient relationship satisfies the common sense connection or nexus required between the abuse and the delivery of a health care item or service. *See Narendra M. Patel*, *M.D.*, DAB No. 1736 (2000).

The I.G. has shown the elements necessary for the I.G. to impose an exclusion against an individual under section 1128(a)(2) of the Act. The Petitioner must, therefore, be excluded for the mandatory minimum of five years.

B. The length of the exclusion imposed by the I.G. is within a reasonable range.

The purpose of an I.G. exclusion is to protect the federally-funded health care programs, as well as those served by the programs, from an individual who has demonstrated by his or her conduct that he or she is untrustworthy. The I.G. has been vested with the discretion to increase the minimum period of exclusion. A longer period of exclusion may be reasonable when it is necessary to accomplish this statutory purpose. The aggravating and mitigating factors listed in the regulations are the only factors the I.G. and an administrative law judge can consider when evaluating an individual's potential threat to the federal health care programs and the people they serve. *Narendra M. Patel, M.D.,* DAB No. 1736 (2000).

I find the I. G. has shown the presence of three aggravating factors.

1. The sentence imposed by the court after Petitioner's conviction included incarceration.

Petitioner was sentenced to serve 180 days in jail. While a work furlough program was suggested, Petitioner was, nonetheless, sentenced to incarceration. I.G. Ex. 3. Even home confinement constitutes "incarceration" within the plain meaning of the regulation. *Mark A. Maher*, DAB CR678 (2000). A sentence of incarceration constitutes an aggravating factor which can serve as the basis for the I.G. to increase the period of exclusion beyond the minimum mandatory period of five years. 42 C.F.R. § 1001.102(b)(5).

2. Petitioner was subject to other adverse action by the Medical Board of California, based on the same set of circumstances that led to his conviction in the State court.

On July 9, 2002, Petitioner submitted a stipulated surrender of his license for consideration by the Division of Medical Quality, Medical Board of California. I.G. Ex. 2. The Stipulated Surrender of License and Order was accepted and adopted as the Decision and Order of the Medical Board of California such that Petitioner surrendered his license to practice, effective September 2, 2002. I.G. Ex. 2, at 5 - 6; I.G. Ex. 6. The decision and order of the Medical Board of California was based upon Petitioner's conviction for sexual exploitation and sexual battery of a patient. The action of the Medical Board of California was based upon the same set of circumstances as his conviction. This constitutes an aggravating factor under 42 C.F.R. § 1001.102(b)(9), and can be used to support an exclusion longer than the minimum of five years.

3. Petitioner's conviction involving patient abuse or neglect consisted of non-consensual sexual acts.

Petitioner contests the application of this aggravating factor. He argues that a nolo contendere plea in the Sacramento County Superior Court cannot be used to prove "non-consensual sexual acts." P. Br. at 3. Petitioner quotes from the California Penal Code concerning the use of no contest pleas.

In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and actual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

California Penal Code § 1016(3).

Petitioner concedes that the doctrine of federal preemption applies to permit the use of a no contest plea for purposes of exclusion on the basis that a no contest plea fits the definition of "conviction" in the Act and regulations. However, Petitioner argues, federal preemption would not apply to authorize the use of a no contest plea to prove the elements necessary to establish an aggravating factor. According to Petitioner, there were no non-consensual sexual acts in this case, and the fact that Petitioner pled no contest to sexual battery or exploitation does not establish the element of non-consent necessary to prove it as an aggravating factor. P. Br. at 4.

The I.G. responds that the accepted definition of battery is an intentional wrongful physical contact with a person without his or her consent that entails some injury or offensive touching and the I.G. quotes *Black's Law Dictionary* 1032 (6th ed. 1990). The I.G. also points out that sexual battery under the California Penal Code section 243.4 requires that

"the touching is against the will of the person being touched." Thus, according to the I.G., the Petitioner's very conviction for sexual battery shows that the sexual act involved was non-consensual.

Petitioner seems to be saying that the I.G. must prove Petitioner used some physical force in completing the sexual acts with B.G., to which he admitted, in order to prove this aggravating factor. I do not agree. In its pertinent wording, the aggravating factor states:

> In convictions involving patient abuse or neglect, the action that resulted in the conviction . . . consisted of non-consensual sexual acts.

42 C.F.R. § 1001.102(b)(4).

An adult may have sexual intercourse with a minor with absolutely no physical force used to complete the act. The minor may have even seduced the adult. Nonetheless, because of the supposed maturity and responsibility of the adult versus that of the minor, the adult can be charged with statutory rape because the minor is assumed not to be able to knowingly consent. Similarly, in a doctor and patient relationship, the doctor must assume that a patient cannot knowingly consent to sexual acts with his or her physician. Such acts are within the doctor's control. What physician has not been advised that, if the physician wishes to have an outside relationship with the patient, the physician must first sever the doctor-patient relationship?

Moreover, I agree with the I.G. that a conviction for sexual battery requires that the touching involved has been against the will of the person being touched. The California Penal Code, section 1016(3), is not relevant in this case for purposes of establishing this aggravating factor. Petitioner's no contest plea is not inappropriately being used "against the defendant as an admission." It is the definition of the crime to which Petitioner offered the no contest plea that is being used to establish the aggravating factor.

> **4. Petitioner established one mitigating factor in that he was convicted of fewer than three misdemeanors and caused no loss to any governmental health program.**

Petitioner pointed out that he was convicted of two misdemeanors only. I.G. Ex. 3. The I.G. has not alleged that Petitioner has caused any financial loss to any federal, state or local health care program. Section 1001.102(c)(1) of 42 C.F.R. sets forth the following mitigating factor:

> The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less that $1,500.

One could argue that this mitigating factor applies only to situations where the fewer than 3 misdemeanor offenses were offenses of a financial nature against the program or its beneficiaries. *See, e.g., John Francis Hildebrand, M.D.,* DAB CR1001 (2003). The I.G., however, "does not dispute that this mitigating factor is available to Petitioner." I.G. R. Br. at 5. I conclude that the regulatory language of this mitigating factor is not a restriction to financially-related offenses but is a way to describe less serious offenses as a factor to be considered when establishing the length of exclusion.

I find the evidence in this case manifests the presence of three aggravating factors and one mitigating factor. 42 C.F.R. §§ 1001.102(b)(4), (5), (9); 42 C.F.R. § 1001.102 (c)(1). I agree with the I.G. that the circumstances of the three aggravating factors outweigh the mitigating factor and render the 10-year exclusion imposed against the Petitioner to be within a reasonable range. The State court judge who took Petitioner's plea and listened to B.G.'s statement had the opportunity to consider her demeanor and credibility. The judge then sentenced Petitioner to 180 days of incarceration, a relatively lengthy sentence for misdemeanors. P. Ex. 2. The State court judge accepted B.G.'s statement that she had sought help from Petitioner for a prior incident of sexual assault and castigated Petitioner for violating the trust she had placed in him, "whether the conduct here was with [B.G.'s] base consent or without [B.G.'s] consent." *Id.* at 8. Petitioner surrendered his license to the Medical Board of California, stipulating to the events that led to the action.

The circumstances surrounding the aggravating factors in this case persuade me that Petitioner is not a trustworthy individual. An individual who seeks treatment from a physician places himself or herself in a vulnerable position and must rely on the physician's judgment and good faith. Petitioner manifested an inability to respect the immense trust that a patient places in a physician. A 10-year exclusion will serve the purposes of the Act; that is, to protect federally-funded health care programs and the beneficiaries of those programs. *Joann Fletcher Cash,* DAB No. 1725 (2000).

VII. Conclusion

For the reasons set forth above, I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(a)(2) of the Act. Further, I find that Petitioner's 10-year exclusion is not unreasonable.

JUDGE ...TO TOP

Anne E. Blair

Administrative Law Judge

FOOTNOTES ...TO TOP

I am using the victim's initials to protect her privacy.

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