Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Robert C. Hartnett
Docket No. A-16-110
Decision No. 2740
October 3, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Robert C. Hartnett (Petitioner) appeals the June 8, 2016 decision of an Administrative Law Judge (ALJ). *Robert C. Hartnett*, DAB CR4628 (2016) (ALJ Decision). The ALJ sustained the determination of the Inspector General (I.G.) of the Department of Health and Human Services (HHS) to exclude Petitioner from Medicare, Medicaid, and all federal health care programs under section 1128(a)(2) of the Social Security Act (Act)[1] for a mandatory minimum period of five years based on his conviction 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 disputes that the criminal offense of which he was convicted is related to neglect or abuse of a patient and that it was committed in connection with the delivery of a health care item or service. For the reasons set out below, the Board affirms the ALJ Decision.

Legal background

Section 1128(a)(2) of the Act requires the Secretary of HHS to exclude an individual from participation in all federal health care programs if the individual "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." The implementing regulation states, similarly, that the HHS I.G. will exclude "any individual or entity that - . . . [h]as been convicted, under Federal or State law, of a criminal offense related to the neglect or abuse of a patient, in connection with the delivery of a health

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

care item or service, including any offense that the [I.G.] concludes entailed, or resulted in, neglect or abuse of patients[.]" 42 C.F.R. § 1001.101(b). An exclusion imposed under section 1128(a)(2) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

For purposes of exclusion under section 1128(a), as applicable here, an individual is considered to have been "convicted" of a criminal offense "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court." Act § 1128(i)(3); *see also* 42 C.F.R. § 1001.2 (defining "convicted"). The "delivery of a health care item or service" includes providing "any item or service to an individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed by Medicare, Medicaid, or any Federal health care program." 42 C.F.R. § 1001.101(b). The term "patient" means "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 . . ., whether or not reimbursed under Medicare, Medicaid and any other Federal health care program and regardless of the location in which such item or service is provided." *Id.* § 1001.2.

An individual who is excluded under section 1128, as Petitioner in this case, may request a hearing before an ALJ to challenge the exclusion. 42 C.F.R. § 1001.2007(a). Where, as here, the exclusion is mandatory and is imposed for the legal minimum five-year period, the excluded individual may request a hearing only on the issue of whether there is a basis for imposing the exclusion. 42 C.F.R. § 1001.2007(a); *Janet R. Constantino*, DAB No. 2666, at 2 (2015). *See also Henry L. Gupton*, DAB No. 2058, at 13 (2007) (holding that the ALJ "was required to uphold the mandatory minimum exclusion [under section 1128(a)(1)] once he found that [the HHS I.G.] had a basis to impose the exclusion under the Act"), *aff'd*, *Henry L. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Ill. 2008); *Mark K. Mileski*, DAB No. 1945, at 8 (2004) (where the statutory basis for exclusion is section 1128(a), the mandatory minimum five-year duration of the exclusion is reasonable as a matter of law), *aff'd, Mileski v. Leavitt*, Civ. No. 04-00403 RAS-DDB (E.D. Tex. Jun. 3, 2005).

Case background[2]

This case arises from a November 30, 2015 I.G. notice, which informed Petitioner, a licensed practical nurse (LPN) in the State of New York, 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 the legal minimum period of five years, under section 1128(a)(2) of the Act. I.G. Ex. 1, at 1. The I.G. stated:

[2] The case background is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal. It is not intended to replace, modify, or supplement the ALJ's findings of fact.

> This exclusion is due to your conviction as defined in section 1128(i) [of the Act] . . . , in the Utica City Court, Oneida County, of the State of New York, of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health care item or service, including any offense that the [I.G.] concludes entailed, or resulted in, neglect or abuse of patients (the delivery of 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).

Id.

On Petitioner's appeal, the ALJ determined that the I.G. lawfully excluded Petitioner for a mandatory minimum period of five years under section 1128(a)(2) of the Act.[3] The ALJ found that, on January 27, 2015, Petitioner was charged with two misdemeanor counts (endangering the welfare of an incompetent or physically disabled person in violation of N.Y. Penal Law § 260.24 and willful violation of N.Y. Public Health Law (PHL) § 12-b(2)), for alleged failure to call a doctor or a registered nurse (RN) supervisor on or about March 10, 2014 after receiving laboratory results indicating a "panic-high" level of potassium for a resident of the health care facility at which Petitioner was employed. ALJ Decision at 2; I.G. Ex. 3 (Misdemeanor Information), at 1. The ALJ also found that, on July 10, 2015, Petitioner pled guilty in state court to willfully violating health laws (PHL § 12-b(2)) and was sentenced to a one-year conditional discharge.[4] *Id.*, citing I.G. Exs. 4 and 5. Thus, the ALJ concluded, Petitioner was convicted of a criminal offense, by guilty plea, under New York law. *Id.* at 2; *id.* at 3 ("Petitioner concedes that he was convicted of a criminal offense . . . .").

The ALJ also found a nexus between the underlying act or omission that resulted in the conviction and the delivery of a health care item or service in a manner constituting neglect. She specifically stated that the conviction was "related to the neglect or abuse of a patient in connection with the delivery of a health care item or service." *Id.* at 2. The ALJ noted it was immaterial that Petitioner pled guilty to only one of the two counts charged (PHL § 12-b(2)), because both stemmed from the same undisputed facts that "relate to patient abuse and neglect," i.e., that Petitioner "did not notify a doctor or RN supervisor when he received lab results showing a facility resident's 'panic-high'

[3] The ALJ issued her decision based on the written record, noting that the "parties agree that an in-person hearing is not necessary." ALJ Decision at 2, citing I.G. Br. at 8-9 and P. Br. at 11.

[4] The ALJ noted that the court dismissed the remaining count, i.e., endangering the welfare of an incompetent or physically disabled person in the second degree, a Class "A" misdemeanor, in violation of N.Y. Penal Law § 260.24. ALJ Decision at 2, citing I.G. Exs. 4 and 5; I.G. Ex. 3, at 1; I.G. Ex. 4, at 1.

potassium levels." *Id.* at 3. Petitioner, the ALJ said, "acted 'recklessly . . . in a manner likely to be injurious to the physical, mental or moral welfare' of a seriously disabled person . . . Such a failure to act constitutes neglect." *Id.*, quoting I.G. Ex. 3, at 1. The ALJ noted, moreover, that 42 C.F.R. § 1001.2007(d) prohibits collateral attack on the underlying conviction. *Id.*

The ALJ therefore determined:

> Petitioner's conviction thus falls squarely within the ambit of section 1128(a)(2). While charged with delivering health care services to a vulnerable patient, Petitioner neglected to report a potentially life-threatening lab result. He is therefore subject to exclusion. An exclusion brought under section 1128(a)(2) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ [1001.]102(a), 1001.2007(a)(2).

Id. at 3.

Standard of review

The standard of review on a disputed issue of law is whether the ALJ's decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ's decision is supported by substantial evidence on the whole record. *Id.*; *see also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (*Guidelines*). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html.

Analysis

Exclusion under section 1128(a)(2) requires that three criteria be met. They are:

1) the individual sought to be excluded was convicted of a criminal offense under state or federal law;
2) the offense is related to neglect or abuse of patients; and
3) the offense was committed in connection with the delivery of a health care item or service.

Petitioner did not dispute below, and does not now dispute, that he was convicted, by guilty plea, of a criminal offense under New York law. ALJ Decision at 3, citing P. Br. at 2; P. Br. at 1; Petitioner's brief to the Board (P. Br. to Board) at 5 (acknowledging a plea of guilty to a violation of PHL § 12-b, an unspecified misdemeanor) and 10 (stating

he does not "dispute[ ] the fact of his conviction"); I.G. Exs. 4 and 5 (court accepted the guilty plea and entered a judgment of conviction). He raises no dispute as to whether he was "convicted" within the meaning of the term in section 1128(i) of the Act and 42 C.F.R. § 1001.2. Thus, the first criterion is met.

Petitioner disputed below, and disputes before the Board, the existence of the second and third criteria, i.e., the offense with which he was convicted is related to neglect or abuse of a patient and that it was committed in connection with the delivery of a health care item or service. Therefore, Petitioner argues, not every element of section 1128(a)(2) is met and, hence, there is no lawful basis to exclude him under section 1128(a)(2). As we explain below, we agree with the ALJ that the second and third criteria are also met.

1. *The ALJ's conclusion that the offense of which Petitioner was convicted is related to the neglect or abuse of a patient is supported by substantial evidence and is free of legal error.*

Petitioner's chief argument is that the ALJ erred in concluding that the offense of which Petitioner was convicted is related to neglect or abuse of a patient because the record includes nothing indicating specific admission of any facts to substantiate the charge that he abused or neglected a patient. P. Br. to Board at 3-5. According to Petitioner, a nexus between the criminal offense that results in a conviction and the second element (neglect or abuse of a patient) is established when the individual specifically admits to the facts substantiating the charge of abuse or neglect within his plea colloquy or plea agreement, or, the individual was proven guilty of the offense. *Id.* at 4, 9. Because he pled guilty only to a violation of PHL § 12-b, an unspecified misdemeanor, he says, no specific finding that he in fact failed to report an elevated potassium level for the resident was ever made, and accordingly neither his plea colloquy nor the "certificate of disposition" includes any admission to such wrongdoing. *Id.* at 5, citing I.G. Exs. 4 and 5; 8-9. On the contrary, he says, he "has always maintained that he did not fail to report a panic-high potassium laboratory result as alleged in the criminal complaint against him, and this fact is evidenced by his own voluntary statement and corroborated by other witness statements." *Id.*, citing P. Exs. 1-4. In the absence of any admission or finding of wrongdoing, he argues, the requisite nexus between his conviction and patient neglect or abuse has not been established and the ALJ erred in concluding, based only on "unproven allegations in the criminal complaint," that he "conceded" that the offense of which he was convicted is indeed related to patient neglect or abuse. *Id.* at 8-9.

Petitioner takes issue with certain language in the ALJ Decision, which he believes "mischaracteriz[es]" his position. *Id.* at 8. The ALJ stated:

> That [Petitioner] pled guilty to just one of the two counts [in the criminal complaint] is irrelevant because both counts stemmed from the same underlying facts, which as Petitioner conceded (P. Br. at 10), relate to

> patient abuse and neglect. Petitioner thus conceded that he did not notify a doctor or RN supervisor when he received lab results showing a facility resident's "panic-high" potassium levels.

Id., quoting ALJ Decision at 3. Petitioner denies that he ever "conceded" or admitted that he should have but failed to notify a doctor or RN supervisor that he had received "panic-high" potassium level laboratory results for a resident before the ALJ. *Id.*

On page 10 of his brief to the ALJ, Petitioner wrote, "Petitioner concedes that the State included allegations related to abuse and neglect in its Misdemeanor Information." The point the ALJ appears to have made is that, by conceding that the information to which he pled set out allegations related to abuse or neglect that formed the basis of both charges, Petitioner had acknowledged that he was charged with acts that constituted abuse or neglect. Petitioner seems to have understood the ALJ in the quoted statement to have gone further and concluded that Petitioner explicitly "conceded" the nexus between his offense and section 1128(a)(2)'s second criterion. We find such a reading of the ALJ's analysis inaccurate.

On our review of the ALJ's analysis in its entirety, we find that the ALJ without question appreciated that Petitioner was disputing, as he is now, that all elements of a section 1128(a)(2) exclusion were met. Before the passage quoted above, the ALJ wrote:

> Petitioner concedes that he was convicted of a criminal offense but denies that his conviction was related to the neglect or abuse of patients and that any alleged patient neglect or abuse occurred in connection with the delivery of a healthcare item or service. P. Br. at 2. He simply denies the facts underlying his conviction, claiming that they were never proven.
>
> But criminal convictions don't occur in a vacuum, and the facts underlying Petitioner's conviction are spelled out in the [criminal] information [referring to Misdemeanor Information, I.G. Ex. 3].

ALJ Decision at 3. The ALJ clearly stated Petitioner's position that the second and third criteria of section 1128(a)(2) were not met. The ALJ simply rejected Petitioner's position, finding that the information to which Petitioner pled did (as conceded) describe neglect in the course of health care delivery, that those facts underlay both charges and were therefore admitted by Petitioner in pleading guilty, and the facts were not subject to collateral attack in the exclusion proceeding. Thus, the ALJ concluded:

> [Petitioner] thereby acted "recklessly . . . in a manner likely to be injurious to the physical, mental or moral welfare" of a seriously disabled person. IG Ex. 3 at 1. Such a failure to act constitutes neglect.

Id. The ALJ therefore found that the offense of which Petitioner was convicted was "related" to "neglect"[5] of the resident based specifically on the allegations in the Misdemeanor Information, which Petitioner refers to as the "criminal complaint" (P. Br. at 8). We agree with the ALJ's determination.

Once the first criterion – conviction – is met, as here, the basic question in a section 1128(a)(2) exclusion case is simply whether there is a **common sense nexus** between the underlying offense and potential or actual harm to the health and well-being of a patient in the course of health care delivery. In essence this is the question the second and third criteria of section 1128(a)(2) seek to answer. It is no different in the context of a section 1128(a)(1) exclusion[6] in which the Board said that, in determining whether the requisite nexus exists, the "labeling of the offense under the state statute" is not determinative. *Berton Siegel, D.O.*, DAB No. 1467, at 7 (1994) (emphasis in original). We consider, as appropriate, "evidence as to the nature of an offense," such as the "facts upon which a conviction was predicated." DAB No. 1467, at 6-7. Thus, how an offense is labeled or classified under state law may very well be a relevant consideration, but it does not, alone, inform the Board's determination of whether or not the requisite nexus exists. The Board also looks to the factual allegations underpinning the offense with which a petitioner was charged and which form the basis for the requisite conviction. It would follow, then, that the fact that Petitioner pled guilty only to PHL § 12-b(2), an unclassified misdemeanor, does not mean that we may not or do not examine the record of the criminal proceeding below, of which the Misdemeanor Information is a part, to determine whether there is indeed a nexus between the offense and patient neglect or abuse.

In this case, in the Misdemeanor Information, a Special Investigator of the Office of New York State Attorney General stated that he was accusing Petitioner of two crimes:

[5] As discussed earlier, the statute requires a showing of "neglect" or "abuse." The ALJ found neglect. She neither made a finding as to whether the underlying offense constitutes abuse, nor opined as to whether it could constitute abuse, for purposes of exclusion under section 1128(a)(2).

[6] A mandatory exclusion under section 1128(a)(1) of the Act is based on "conviction of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." The Board has held that, based on the plain meaning of the word "related," an offense is "related to" the delivery of an item or service under a covered program if there is a common sense connection or nexus between the offense and the delivery of an item or service under the program. *See, e.g., Scott D. Augustine*, DAB No. 2043, at 5-6 (2006). Thus, in essence, the Board has required a minimal showing of a connection between the underlying offense and its potential impact on patient health and well-being in the context of section 1128(a)(1), and, as discussed here, it has likewise required a minimal showing in the context of section 1128(a)(2).

1. **Endangering the Welfare of an Incompetent or Physically Disabled Person in the Second Degree**, a Class "A" Misdemeanor, in violation of Penal Law § 260.24; and

2. **Willful Violation of Health Laws**, in violation of [PHL] § 12-b(2), an unclassified misdemeanor.

I.G. Ex. 3, at 1. The Misdemeanor Information also stated:

> [O]n or about March 10, 2014, the defendant [Petitioner] . . . failed to call the doctor or the RN Supervisor after receiving laboratory results containing a panic-high potassium laboratory result for [the] resident . . . thereby recklessly acting in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself because of physical disability, mental disease or defect, and willfully violated § 2803-d(7) of the Public Health Law and Title 10 of the New York Code of Rules and Regulations § 81.1(c), by failing to provide timely, consistent, safe, adequate and appropriate services, treatment, and care to [the resident] . . . .
>
> I base the above accusations upon information and belief, the source of which is my investigation; my review of the resident's medical records; the interview and attached statements of [seven named individuals]; and the defendant's admission on May 16, 2012, that he made an error by not reading the lab results; that if he had seen the 7.8 potassium level, he would have immediately called the doctor or the RN Supervisor; and that he knows a potassium level as high as [the resident's] could cause cardiac arrhythmia or cardiac arrest.

Id. at 1-2.

Thus, notwithstanding the fact that Petitioner pled guilty only to one crime or count, i.e., a violation of PHL § 12-b(2), an unclassified misdemeanor, the Misdemeanor Information set out the specific factual allegations on which the two crimes or counts

were based. Those allegations plainly make a case, at a minimum, for patient neglect[7] by omission, as they explicitly accused Petitioner of failure to review the resident's "panic-high" laboratory test result. Those allegations also expressly stated that Petitioner admitted that the test result was such that a doctor or RN supervisor should have been notified of it immediately in light of the potentially life-threatening consequences a "panic-high" potassium level posed for the resident. By pleading guilty to one of the two counts that were based on the specific factual allegations spelled out in the Misdemeanor Information, Petitioner admitted to those facts as set out in the Misdemeanor Information. We note, moreover, that the specific allegations of wrongdoing as set out in the Misdemeanor Information do not stand alone. The record also includes Petitioner's signed voluntary statement (April 11, 2014) , in which he acknowledged that a potassium level as high as the resident's was on March 10, 2014 "could [have] cause[d] cardiac arrhythmias or cardiac arrest."[8] P. Ex. 1, at 1.

2. *The ALJ's conclusion that the offense of which Petitioner was convicted was in connection with the delivery of a health care item or service is supported by substantial evidence and is free of legal error.*

Petitioner's assertion that the offense of which he was convicted was not "in connection with the delivery of a health care item or service" is related to his chief assertion, discussed above, that there is no factual basis supporting a nexus between the offense and patient neglect. Citing several exclusion decisions, Petitioner asserts that his case is distinguishable since the cited cases involved express concession by a petitioner, in the plea colloquy and/or plea agreement or some other statement, of the specific wrongdoing, whereas he has never specifically admitted to failing to report a panic-high potassium

[7] Neither section 1128(a)(2) of the Act, nor 42 C.F.R. Part 1001, defines the meaning of the word "neglect." The Board has stated, however, that it is not bound under section 1128(a)(2) to define "neglect" (or "abuse") by reference to state law. *Summit Health Limited, dba Marina Convalescent Hospital,* DAB No. 1173, at 8 (1990). "Rather, they should be defined consistent with the purposes and intent of the law with which they are a part." *Id.*, citing *Michael L. Burditt*, DAB No. 1167, at 44-45 (1990). The Board said, "The exclusion law is a federal law designed to protect the integrity of the Medicare and Medicaid programs. Giving these unambiguous terms their common and ordinary meaning reasonably fulfills that purpose." *Id.* The common and ordinary meaning of the word "neglect" is "to give little attention or respect to" or "to leave undone or unattended to especially through carelessness." *See* http://www.merriam-webster.com/dictionary/neglect. There is no question that Petitioner's failure or omission in this case amounted to "neglect" in the common and ordinary sense of this word.

[8] Petitioner has stated that acknowledging that an elevated potassium level could be dangerous (which he did) is different from knowing about the elevated potassium level but ignoring the risk the potassium level poses to the resident (which he denies). *See* P. Br. at 9. But neither the express language of section 1128(a)(2) nor of section 1001.101(b) includes an element of knowledge of the nature of one's act or omission, or requires a showing of any deliberate intent to cause harm.

level in a patient whose medical status was such that the failure to report could endanger that patient. Lacking an express admission, he asserts, there can be no basis for finding that the offense was "in connection with the delivery of a health care item or service." P. Br. to Board at 8-9, citing, inter alia, *Scott D. Augustine*, DAB No. 2043 (2006); *Paul R. Scollo; D.P.M.*, DAB No. 1498 (1994); and *Berton Siegel, D.O.*, DAB No. 1467 (1994).[9]

Petitioner assumes that because petitioners in certain exclusion cases specifically admitted to the facts of their criminal wrongdoing in a plea agreement and/or plea colloquy that means that evidence of such an admission is *required* to support a section 1128(a)(2) exclusion. That some petitioners made express admissions of facts in court documents presented in the later exclusion proceedings does not mean, however, that the *only* way of establishing the elements of a section 1128(a)(2) exclusion is through such evidence. Petitioner has cited no authority that requires such evidence, and the Board has held to the contrary as it said:

> We . . . see nothing in section 1128(a)(2) that requires that the necessary elements 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. We see no reason to assume that Congress intended to narrowly proscribe the I.G.'s exclusion authority by dependence on the vagaries of state criminal law definitions or record development. On the contrary, the statutory language says nothing about what evidence of the nature of and circumstances surrounding the offense itself may be considered to determine if the individual's criminal conduct included the elements necessary for a mandatory exclusion.

Narendra Patel, DAB No. 1736, at 10 (2000), *aff'd*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 539 U.S. 959 (2003). The Board also stated, "The words 'in connection with' in section 1128(a)(2) require only a minimal nexus between the [offense] and the delivery of a health care [item or] service." *Bruce Lindberg, D.C.*, DAB No. 1386, at 8 (1993).

At the time of the alleged act or omission as set out in the Misdemeanor Information, Petitioner was an LPN at a residential facility. I.G. Ex. 3, at 1. As noted, the offense of which Petitioner was convicted, by guilty plea, arose from alleged failure to notify a physician or RN supervisor about a high potassium level for a patient in the facility. *Id.*

[9] These three decisions involved mandatory exclusion under section 1128(a)(1) of the Act.

at 1-2. We find it self-evident that this offense not only relates to neglect, but occurred in connection with the delivery of a health care service. Act § 1128(a)(2); 42 C.F.R. § 1001.101(b). The failure to report such a laboratory result could have adversely affected the patient's well-being.[10]

3. The ALJ did not err in determining that Petitioner was precluded from collateral attacking the factual basis of his conviction.

Petitioner also argued that the ALJ wrongly determined that Petitioner was collaterally attacking his underlying conviction. P. Br. to Board at 10-12. Petitioner asserts that the ALJ erred in determining he was collaterally attacking the conviction because the ALJ's determination was based on "unsubstantiated finding of fact" that he "'conceded' to the charge of patient abuse or neglect." *Id.* at 10, 12. He was, he says, not questioning the fact of the underlying conviction or the "fairness" of the criminal proceedings, or taking a position concerning the criminal proceedings contrary to any prior admission or finding made earlier, or raising any issue concerning the evidence relevant to the conviction. *Id.* at 10-11. Rather, he maintains, he is pointing out "actual" facts concerning the offense charged against him – that he never admitted to failing to report the resident's potassium level and that the issue of whether he failed to do so was never adjudicated – which he says are distinguishable from allegations in the criminal complaint and are relevant to determining whether there is indeed a nexus between his conviction and patient abuse or neglect. *Id.*

As we have already explained, by pleading guilty to a charge arising from a specific set of alleged facts, Petitioner effectively conceded those facts. The statute does not permit Petitioner to admit his guilt to the charge as alleged in his criminal proceeding and then attempt to relitigate the facts of the charge in the exclusion proceeding. Thus, the ALJ correctly found that such arguments are precluded as collateral attacks on the merits of the underlying conviction, regardless of whether Petitioner complained of the fairness of the criminal proceeding. The ALJ therefore did not err in looking to the facts set out in the information to which Petitioner pled in order to determine whether the three criteria for a mandatory exclusion under section 1128(a)(2) were met. If they are met, as the ALJ found they were in this case, there is a lawful basis for excluding Petitioner for a mandatory minimum five-year period, and the ALJ was required to uphold the exclusion. *See Gupton*, DAB No. 2058, at 13. We agree with the ALJ that the requirements were met and uphold the ALJ Decision on that basis.

[10] We also note that Petitioner has not raised any specific contention about the meaning of the words "in connection with" or the word "delivery" in the third criterion of the exclusion law. He has not disputed that the "delivery" requirement would be met based on the charged facts, had he expressly conceded or admitted to the wrongdoing. The Board "will not consider any issue not raised in the parties' briefs nor any issue in the briefs that could have been raised before the ALJ but was not." 42 C.F.R. § 1005.21(e).

Conclusion

We affirm the ALJ's decision to sustain Petitioner's exclusion from Medicare, Medicaid, and all federal health care programs for a mandatory minimum five-year period.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member