

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Jean Reeder,	)	DATE: May 12, 1995
Petitioner,	)	
- v. -	)	Docket No. C-95-002
The Inspector General	)	Decision No. CR376

DECISION

By letter dated September 20, 1994, Jean Reeder, the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid." The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner filed a request for review of the I.G.'s action by an administrative law judge of the Departmental Appeals Board.

The I.G. moved for summary disposition. For the reasons discussed below, I conclude that the I.G. has failed to prove that Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Therefore, the I.G. was without authority to exclude Petitioner.

## APPLICABLE LAW

Section 1128(a)(2) requires the Secretary of HHS to exclude from participation in the Medicare and Medicaid programs any individual or entity that has been 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.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period of time relevant to the case, Petitioner was administrator of the Guest House of Nashville, a nursing facility. I.G. Ex. 1.
2. On or about September 23, 1992, Kay Aist, an investigator for the Arkansas Office of Attorney General, Medicaid Fraud Control Unit, executed an affidavit for a warrant for Petitioner's arrest. I.G. Ex. 1.
3. In the affidavit, Ms. Aist stated that she had reason to believe Petitioner had committed the offense of failing to report abuse -- in that Petitioner allegedly had slapped an 84-year-old resident of the Guesthouse of Nashville, Arkansas, during a disaster drill at the facility on May 26, 1992 -- but that Petitioner had not immediately reported this incident to the Office of Long Term Care, instead reporting the incident on June 2, 1992, after other employees of the facility had reported the incident. I.G. Ex. 1.
4. Based on the affidavit, a warrant was issued for Petitioner's arrest. I.G. Ex. 2.
5. On or about October 19, 1992, Petitioner was arrested and given a citation which directed her to appear in Howard County Municipal Court (Municipal Court) on October 22, 1992. I.G. Ex. 8 at 5.
6. Petitioner posted a cash bond of \$92.25 to guarantee her appearance, but did not appear to stand trial. I.G. Ex. 8 at 5.
7. On October 22, 1992, the Municipal Court forfeited the cash bond. I.G. Ex. 3.
8. On January 8, 1993, Petitioner filed a petition asking the Municipal Court to set aside her bond forfeiture and to grant her a trial on the merits. I.G. Ex. 4.

9. On February 8, 1993, the Municipal Court entered an order holding "the conviction and/or bond forfeiture . . . is hereby set aside, canceled, nullified, and expunged and shall forever hereafter have no force and effect whatsoever at law or in equity." I.G. Ex. 5.

10. The Municipal Court also returned Petitioner's case to the docket to be set for a trial at a later date. I.G. Ex. 5.

11. In a response filed February 19, 1993, the State requested that the Municipal Court vacate its order granting Petitioner a new trial. I.G. Ex. 6.

12. On or about March 4, 1993, the Municipal Court denied the State's request on the grounds that the State's response was filed out of time. I.G. Ex. 7.

13. On or about May 5, 1993, the State filed with the Arkansas Supreme Court a motion and brief requesting a writ of prohibition to the Municipal Court. I.G. Ex. 8 at 3.

14. In its motion, the State requested that the Arkansas Supreme Court overturn the Municipal Court's order vacating Petitioner's bond forfeiture and prohibit the Municipal Court from convening a new trial in Petitioner's case. I.G. Ex. 8 at 2.

15. On May 24, 1993, the Arkansas Supreme Court granted the State's motion for a writ of prohibition in a one-sentence order. I.G. Ex. 10.

16. The I.G. has the burden of proving that there is a basis for Petitioner's exclusion.

17. The I.G. failed to prove by a preponderance of the evidence that the Municipal Court entered a judgment of conviction against Petitioner.

18. The I.G. failed to prove by a preponderance of the evidence that a State or local court made a finding of guilt against Petitioner.

19. The I.G. failed to prove by a preponderance of the evidence that Petitioner entered a plea of guilty or nolo contendere to the charge of failing to report abuse or that the Municipal Court accepted such a plea.

20. The I.G. failed to prove by a preponderance of the evidence that Petitioner entered into participation in a

first offender, deferred adjudication, or other arrangement where judgment of conviction was withheld.

21. The I.G. failed to prove that Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

22. The I.G. is without authority to impose and direct an exclusion against Petitioner. Findings 16-21.

#### THE I.G.'s POSITION

The I.G. contends that the Municipal Court treated Petitioner's failure to appear as a plea of guilty and that the court "accepted" such plea. I.G. Br. at 6. The I.G. suggests also that Petitioner herself regarded her nonappearance as a guilty plea inasmuch as she declared that it was cheaper than defending herself in court. I.G.'s Resp. at 2.

The I.G. further maintains that issuance of a writ of prohibition necessarily means that the Municipal Court wholly lacked jurisdiction to set aside the conviction or forfeiture or to set a new trial. I.G. Br. at 9.

#### PETITIONER'S POSITION

Petitioner insists that her case was never heard or tried and that she never pled guilty in any court. She argues that a bond forfeiture is not a guilty plea and not a conviction. She states that she disregarded her court date (even though this allowed the bond to be forfeited) because she thought that it would be cheaper and easier that way.

Lastly, Petitioner notes that the Arkansas Supreme Court has never decided the question of whether a bond forfeiture constitutes a conviction.

#### DISCUSSION

The I.G. argues that she was authorized to exclude Petitioner from the Medicare program and to direct Petitioner's exclusion from the Medicaid program pursuant to section 1128(a)(2) of the Act. To establish a basis for Petitioner's exclusion, the I.G. must prove that Petitioner was (1) convicted of a criminal offense and (2) that the criminal offense was related to the neglect or abuse of patients in connection with the delivery of a

health care item or service. I conclude that the I.G. has failed to prove that Petitioner was convicted of a criminal offense. Therefore, I do not need to reach the question of whether the offense with which Petitioner was charged was related to patient neglect or abuse within the meaning of the statute.

The parties have devoted a great deal of their argument to the question of whether the writ of prohibition issued by the Arkansas Supreme Court served to reinstate Petitioner's bond forfeiture or only to prevent a new trial from taking place. I do not need decide which interpretation is correct, however. This is because I have determined that, even if Petitioner's bond forfeiture had been reinstated by the Arkansas Supreme Court, the bond forfeiture would not represent a conviction within the meaning of section 1128(i) of the Act.

Whether or not an individual is subject to exclusion from federally funded health care programs because he or she has been "convicted" is a question of federal law. "What constitutes a 'conviction' under the Medicaid Act . . . is determined by federal law, not state law." Travers v. Shalala, 20 F.3d 993, 996 (9th Cir. 1994). Federal law defines the term in section 1128(i) of the Act. That section provides that an individual will be deemed to have been "convicted" if any of the following circumstances are applicable to his or her case:

- (1) 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; or
- (2) there has been a finding of guilt against the individual or entity by a federal, State, or local court; or
- (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) 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.

As this language demonstrates, Congress intended the term "conviction" to apply to a broad range of dispositions. Yet, the language of section 1128(i) is also quite specific: nowhere does it provide that bond forfeitures are to be treated as convictions.

Each of the definitions of conviction found in section 1128(i) involve some determination of guilt on the record before a State or federal court. The statutory definition of conviction strikes a balance between the due process rights of excluded individuals and HHS' interest in expeditiously ceasing its relationship with individuals who are untrustworthy. In enacting section 1128, Congress made the determination that a formal finding of guilt against an individual conclusively demonstrates that the individual is not trustworthy to participate in the Medicare and Medicaid programs. The Act imposes a mandatory five-year period of exclusion on individuals who have been convicted of offenses related to the delivery of services under Medicare or Medicaid or related to neglect or abuse of patients. Such exclusions have significant consequences for excluded individuals' reputations and livelihoods. The Act's definition protects excluded individuals by ensuring that the individuals are not deemed to have been convicted unless they have appeared before a court for a determination on the merits regarding the offenses with which they have been charged.

In the present case, the I.G. does not dispute that Petitioner never appeared before the Municipal Court for a determination on the merits of the charge of failure to report abuse. Therefore, the I.G. has failed to prove that Petitioner was convicted within the meaning of any of the alternative definitions of section 21128(i) of the Act.

The I.G. has not offered in evidence any document purporting to be a judgment of conviction against Petitioner. At most, the I.G. has pointed out that Petitioner's motion for a new trial and the Municipal Court's order granting Petitioner's motion refer to Petitioner's "conviction and/or bond forfeiture." However, there is nothing in the record that explains which of these words applied to Petitioner. Moreover, the I.G. acknowledges that the Municipal Court apparently "did not enter a specific judgment of conviction or make a specific finding of guilt against petitioner." I.G. Resp. to ALJ's Inquiry at 1. Thus, the documentary evidence is insufficient to prove, by a preponderance of the evidence, that the Municipal Court entered a judgment of conviction against Petitioner.

Nor has the I.G. pointed to any provision of Arkansas law that would operate to transform a bond forfeiture into a conviction. By contrast, Petitioner cites Almond v. Countryside Casualty Co., 329 F. Supp. 137 (W.D. Ark. 1971), aff'd, 455 F.2d 503 (8th Cir. 1972), which holds that a bond forfeiture is not a conviction under Arkansas law.<sup>1</sup> Therefore, I conclude that the I.G. has failed to prove that a judgment of conviction has been entered against Petitioner, within the meaning of section 1128(i)(1).

There is no evidence that the Municipal Court, or any other court, made any finding of guilt against Petitioner. Thus, the definition of "convicted" found at section 1128(i)(2) is inapplicable to Petitioner's case.

The I.G. argues that Petitioner's failure to appear for trial and her willingness to surrender her bond are the equivalent of a guilty plea. Accordingly, the I.G. argues that she was convicted within the meaning of section 1128(i)(3). However, the I.G. has failed to offer any evidence that this position reflects settled State law. Petitioner avers that she did not enter a plea of guilty or nolo contendere--and there is nothing in the record to contradict her. I therefore conclude that the I.G. failed to prove that Petitioner was convicted within the meaning of section 1128(i)(3).

As to section 1128(i)(4), there is no evidence to suggest that Petitioner's case was treated as part of any deferred adjudication program. As discussed above, it does not appear that Petitioner ever entered a plea, nor that the Municipal Court ever held any proceedings on the merits of her case. Thus, there is no basis to conclude that any judgment of conviction was withheld, nor was there any record of conviction to be expunged. Accordingly, I conclude that Petitioner was not convicted within the meaning of section 1128(i)(4).

Based on the above facts and reasoning, I conclude that the I.G. has failed to show that Petitioner was convicted as that term is defined in the Act. Because federal law is controlling, as noted above, the numerous State law

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<sup>1</sup> The I.G. points out that the Arkansas Supreme Court has not ruled explicitly on the question of whether a bond forfeiture is the equivalent of a guilty plea. I.G. Resp. to Petitioner's Brief at 2. This merely reinforces my conclusion that the evidence is insufficient to establish that Petitioner's bond forfeiture amounts to a conviction.

issues discussed by the parties herein are not determinative of the outcome.

CONCLUSION

Inasmuch as it was not proven that 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, her exclusion from the Medicare and Medicaid programs under the authority of section 1128(a)(2) is not justified.

/s/

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Joseph K. Riotto  
Administrative Law Judge