

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Ella Janice McGee,	)	DATE: August 7, 1992
Petitioner,	)	Docket No. C-92-083
- v. -	)	Decision No. CR221
The Inspector General.	)	

DECISION

By letter dated February 10, 1992, Ella Janice McGee, the Petitioner herein, was notified by the Inspector General (I.G.) of the Department of Health & Human Services (HHS) that it had been determined to exclude her for a period of five years from participation in the Medicare program and the state health care programs (referred to collectively in this decision as Medicaid) defined in section 1128(h) of the Social Security Act (the Act). This exclusion, the I.G. stated, was mandated by section 1128(a)(2) of the Act and arose out of Petitioner's conviction of a criminal offense involving the neglect or abuse of patients.

By undated letter received on March 10, 1992, Petitioner requested that the I.G.'s determination be reviewed by an administrative law judge.

The I.G. moved for summary disposition of the case. In a letter dated June 18, 1992, Petitioner requested an in-person hearing to show "...that the investigation report [I.G. Exhibit 3]... was altered and reconstructed after my trial;" that "I was not tried on this evidence;" and that "this statement is not the original statement made by Mrs. Lela Wright at my trial...." Petitioner's substantive arguments are set forth below.

I conclude that Petitioner's allegations, even if provable, are legally irrelevant; that, even without regard to I.G. Exhibit 3, undisputed evidence shows that the mandatory exclusion provisions of Section 1128(a)(2) control this case; that an in-person hearing is

unwarranted since there are no material factual disputes; and that summary disposition in favor of the I.G. is justified.

### Law

Section 1128(a)(2) of the Act makes it mandatory for the Secretary of HHS (or his designee) to exclude any person who has been convicted, under federal or State law, of a criminal offense relating to the neglect or abuse of patients, in connection with the delivery of health care, from participation in the Medicare and Medicaid programs.

Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for a offense of this nature is five years.

### Findings of Fact and Conclusions of Law 1/

1. It is undisputed that, during the period relevant to this case, Petitioner was employed as a nursing aide at the Valley View Care Center (the home).

2. On September 11, 1990, a complaint was filed in the Municipal Court of the City of Anson, Texas, charging Petitioner, with having slapped a (named) 74 year old Alzheimers'patient who was being cared for at the home.  
I.G. Ex. 1

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1/ The I.G. submitted five numbered documents as exhibits, plus an affidavit from William J. Hughes, which the I.G. appears to also regard as evidence. I admit exhibits 1, 2, 4, and 5. They are referred to herein as "I.G. Ex. 1, 2, 4, and 5." The Hughes affidavit, which is a first-hand explanation of the process whereby the I.G.'s office excluded Petitioner, is also admissible as evidence. Because the authenticity of I.G. Exhibit 3 -- the Texas Attorney General's "Criminal Investigative Report" -- is in question, I do not admit it.

In my Order of April 24, 1992, I afforded the parties the opportunity to submit evidence and argument. Petitioner offered no evidence. Both parties submitted extensive argument.

3. Petitioner appeared in Anson Municipal Court on December 5, 1990 and entered a plea of not guilty to the charge set forth in the complaint. She waived her right to a jury trial. I.G. Ex. 2

4. On December 5, 1990, the court found Petitioner "guilty of the offense as charged in the complaint" and imposed a fine. I.G. Ex. 2

5. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

6. Section 1128(a)(2) of the Act mandates the exclusion, for a minimum period of five years, of any person who 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.

7. Petitioner's conviction for assaulting a resident of the home who was being cared for by Petitioner and her coworkers constitutes a criminal conviction relating to patient abuse in connection with the delivery of a health care service within the meaning of section 1128(a)(2) of the Act.

8. Petitioner cannot use the HHS administrative appeal process to collaterally attack her prior criminal conviction and, thus, is not entitled to relief in this proceeding based on her contention that she was falsely accused and did not slap the patient, or her argument that her action actually was self-defense.

9. The Act requires persons who violate section 1128(a)(2) to be excluded for a minimum of five years, which period cannot be waived or lessened.

#### Argument

Petitioner contends that she was innocent and that another employee of the home, motivated by personal animus, had falsely accused her. Petitioner acknowledges raising her hand toward the patient in question, but explains that she did so to protect herself from the patient, who was often violent. Lastly, Petitioner insists that her trial was unfair because she was unrepresented and misled, and because the judge was biased against her.

### Discussion

Undisputed evidence shows that Petitioner was charged with unlawfully slapping an elderly patient while Petitioner was working as an aide in the nursing home where the patient in question resided, and that, following a bench trial, she was convicted of such offense.

Petitioner's conviction for doing physical violence to a patient in her care satisfies the statutory requirement of section 1128(a)(2) that there be a conviction "...of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."

Section 1128(a)(2) is controlling wherever it is shown that an appropriate criminal conviction has occurred. Dewayne Franzen, DAB 1165 (1990). HHS does not look beyond the fact of conviction and a Petitioner may not utilize its administrative proceedings to collaterally attack the criminal conviction by seeking to show that she did not do the act charged or that there was no criminal intent. Richard G. Phillips, D.P.M., DAB CR133 (1991). If Petitioner believes that her criminal conviction was improperly tainted by judicial bias, lack of counsel, or false evidence, her recourse may be within the State court system, but not here. Peter J. Edmonson, DAB 1330 (1992).

Once section 1128(a)(2) is determined to be applicable, the statute requires that the guilty individual be excluded for a minimum period of five years. There is no authority in law or regulation for an administrative law judge's waiving or reducing this minimum sanction.

### Conclusion

Petitioner's conviction of a criminal offense involving patient abuse mandates her exclusion from the Medicare and Medicaid programs for a period of five years.

/s/

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Joseph K. Riotto  
Administrative Law Judge