

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

| | | |
|--------------------------|---|--------------------------|
| In the Case of: |) | |
| Bernard Friedman, R.Ph., |) | DATE: September 10, 1992 |
| Petitioner, |) | |
| - v. - |) | Docket No. C-92-099 |
| The Inspector General. |) | Decision No. CR230 |

DECISION

By letter dated January 15, 1992, Bernard Friedman, R.Ph., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services, that it had been decided to exclude him for a period of five years from participation in the Medicare and Medicaid programs ("Medicaid" here refers to the programs mentioned in section 1128(h) of the Social Security Act (the Act)). The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action.

The I.G. moved for summary disposition of the case. Petitioner did not respond to the I.G.'s evidence and argument and did not participate further in the case (after filing the initial request). In the absence of disputed material facts, and in light of the evidence of record, I enter summary judgment in favor of the I.G.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or

service under Medicare or Medicaid to be excluded from participation in such programs, for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. It is undisputed that, during the period relevant to this case, Petitioner was a registered pharmacist in the State of Ohio.
2. On August 7, 1990, Petitioner entered a plea of guilty in the Court of Common Pleas, Franklin County, Ohio, to the offense of Medicaid fraud, a felony. I.G. Ex. 2.
3. Petitioner was sentenced to incarceration for a period of one year. He was also required to pay investigatory expenses and to make restitution to the State of Ohio in the total amount of \$15,000. I.G. Ex. 3 and 4.
4. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).
5. A criminal conviction for Medicaid fraud is related to the delivery of an item or service under Medicare or Medicaid and justifies application of the mandatory exclusion provisions of section 1128(a)(1).

ARGUMENT

In his request for a hearing, Petitioner states that, although he is now retired, he wishes to be able to work as a pharmacist on a part-time basis to supplement the benefits he receives from Social Security. However, inasmuch as there are no pharmacies in the Columbus, Ohio, area which do not participate in the Medicare/Medicaid programs, exclusion would unreasonably preclude him from earning a living. Petitioner, therefore, maintains that the proposed penalty is too, severe, particularly since he has already paid for his crime.

¹ The I.G. filed a brief, attached to which were exhibits. I admitted the exhibits into evidence and refer to them as "I.G. Ex. 1," et seq.

DISCUSSION

The first statutory requirement for mandatory exclusion pursuant to section 1128(a) is that the individual or entity in question be convicted of a criminal offense under federal or State law. In the present case, it is undisputed that Petitioner pled guilty in a State court and that a conviction was entered, thus satisfying section 1128(i)'s definition of "convicted."

I also find that the requirement of section 1128(a)(1) that the criminal offense leading to the conviction be related to the delivery of an item or service under Medicare or Medicaid has been satisfied. Specifically, it is well-established in Departmental Appeals Board (DAB) precedent that Medicaid fraud constitutes a program-related offense which mandates exclusion. Jack W. Greene, DAB 1078 (1990), aff'd Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

As noted above, Petitioner contends that a five-year exclusion is too severe in his case, particularly since he has already paid for his crime. Unfortunately for this argument, it was the intent of Congress to require, through civil enforcement actions, the exclusion of all persons who had been convicted of certain crimes, in order to protect the Medicare and Medicaid programs. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682. The imposition of such civil remedies upon persons previously convicted of criminal offenses arising out of the same facts does not constitute unlawful double jeopardy. U.S. v. Halper, 490 U.S. 435 (1989). Lastly, an administrative law judge has no authority to modify the five-year minimum exclusionary period, once mandatory exclusion has been shown to be applicable. Greene, id..

CONCLUSION

Petitioner's conviction requires his exclusion for a period of at least five years, pursuant to section 1128(a)(1).

/s/

Joseph K. Riotto
Administrative Law Judge