

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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|------------------------|---|---------------------|
| _____                  | ) |                     |
| In the Case of:        | ) |                     |
|                        | ) |                     |
| Jim Su Pak,            | ) | Date: March 9, 1998 |
|                        | ) |                     |
| Petitioner,            | ) |                     |
|                        | ) |                     |
| - v. -                 | ) | Docket No. C-97-560 |
|                        | ) | Decision No. CR521  |
| The Inspector General. | ) |                     |
| _____                  | ) |                     |

DECISION

By letter dated July 11, 1997, Petitioner, Jim Su Pak, was notified by the Inspector General (I.G.), U.S. Department of Health and Human Services (HHS), that it had been decided to exclude him for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs.<sup>1</sup> The I.G. explained that the five-year exclusion was authorized under section 1128(a)(1) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The I.G. also stated that an exclusion of five years is the minimum mandatory period of exclusion under the Act. Section 1128(c)(3)(B) of the Act.

Petitioner filed a request for hearing. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have granted the I.G.'s motion and decide the case on the basis of the parties' written submissions in lieu of an in-person hearing.

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<sup>1</sup> In this decision, I use the term "Medicaid" to refer to these State health care programs.

Both parties submitted briefs<sup>2</sup> in this matter. The I.G. submitted six proposed exhibits (I.G. Ex. 1-6). Petitioner did not object to these exhibits. Petitioner submitted four "letters" which I have designated Petitioner's exhibits one through four (P. Ex. 1-4). The I.G. did not object to these exhibits. I receive into evidence I.G. Ex. 1-6 and P. Ex. 1-4.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

#### 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 a health care 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. During the period relevant to this case, Petitioner was a pharmacist licensed to practice in the State of Maryland. I.G. Ex. 4.
2. During the period relevant to this case, Petitioner owned Hickory Plaza Pharmacy in Columbia, Maryland, where he worked as a pharmacist. I.G. Ex. 4.
3. On August 7, 1996, a criminal indictment was filed in the District Court of Maryland for Baltimore City, Case No. 4B00128881, charging Petitioner with one count of Medicaid fraud. The indictment alleged that Petitioner knowingly and wilfully made and caused to be made a false statement and a material misrepresentation of fact in an application for payment, in the amount of \$361.76 under a State plan established under Title XIX of the Social Security Act of 1939. I.G. Ex. 5.
4. On September 18, 1996, Petitioner was convicted of one count of Medicaid fraud. I.G. Ex. 2.
5. On September 18, 1996, as a result of his conviction for Medicaid fraud, Petitioner was sentenced to serve 12 months of unsupervised probation before judgment, to pay a fine of \$500, and to make restitution in the amount of \$361.76. I.G. Ex. 2.
6. Petitioner's criminal conviction constitutes a conviction within the meaning of section 1128(i) of the Act.

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<sup>2</sup> I refer to Petitioner's brief as P. Br. and to the I.G.'s brief as I.G. Br.

7. Petitioner's conviction for Medicaid fraud is related to the delivery of a health care item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

8. Once an individual has been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, a five-year exclusion is mandatory under section 1128(c)(3)(B) of the Act.

9. The I.G. properly excluded Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of five years, as required by the minimum mandatory exclusion provision of section 1128(c)(3)(B) of the Act.

### DISCUSSION

The first statutory requirement for the imposition of a mandatory exclusion pursuant to section 1128(a)(1) of the Act, is that the individual or entity in question be convicted of a criminal offense under federal or State law. Petitioner does not challenge that he has been convicted, and I so find. P. Br. at 1. The record reflects that Petitioner was found guilty of the offense of Medicaid fraud on September 18, 1996, by the District Court of Maryland for Baltimore City. I.G. Ex. 2 and 6. Petitioner was thus convicted within the meaning of section 1128(i) of the Act.

Next, it is required under section 1128(a)(1) of the Act that the crime at issue be related to the delivery of a health care item or service under the Medicare or Medicaid programs. The record reflects that Petitioner, in August and September of 1994, filled eight prescriptions for an elderly woman, Shirley Kramer. In response to Petitioner's prescription bill, Ms. Kramer's family informed Petitioner that Ms. Kramer was indigent and that the bill would not be paid. Ms. Kramer became a Medicaid recipient, effective October 1, 1994. In March and April of 1995, Petitioner submitted claims to Medicaid for a total of nine prescriptions allegedly filled for Ms. Kramer on March 22, 1995, April 11, 1995, and April 20, 1995. Seven of these prescriptions were for the generic equivalents of drugs previously prescribed to Ms. Kramer in August and September 1994. The Medicaid program reimbursed Petitioner for these claims in March and April 1995. Petitioner admits that he never actually filled any prescriptions for Ms. Kramer in 1995. I.G. Ex. 4 and 6. A one count indictment was subsequently filed against Petitioner in the District Court of Maryland for Baltimore City. I.G. Ex. 5. The indictment charged Petitioner with knowingly and willfully making and causing to be made a false statement and a material representation of fact in an application for payment, in the amount of \$361.76 under a State plan established by Title XIX of the Social Security Act of 1939. I.G. Ex. 5.

Petitioner was convicted of one count of Medicaid fraud on September 18, 1996. I.G. Ex. 2. Petitioner was sentenced to serve 12 months of unsupervised probation before judgement, to pay a fine of \$500, and to make restitution in the amount of \$361.76. I.G. Ex. 2.

To determine if an offense is program-related, an administrative law judge (ALJ) must analyze the facts and circumstances underlying a conviction to determine whether a nexus or common sense connection links the offense for which a petitioner has been convicted and the delivery of a health care item or service under a covered program. Berton Siegel, D.O., DAB No. 1467 (1994). In Petitioner's case, a necessary nexus links the facts underlying his crime with the delivery of health care items or services under Medicaid, because the falsified claims leading to Petitioner's conviction resulted in his receipt of fraudulent Medicaid reimbursement. In Rosalyn Saba Khalil, M.D., DAB CR353 (1995), the ALJ found that a criminal offense stemming from the fraudulent receipt of reimbursement checks from Medicaid provided a sufficient nexus between the offense and the delivery of health care items or services under Medicaid. Additionally, the ALJ in Khalil held that a nexus may exist "despite the fact that Petitioner may not have provided items or services to Medicaid recipients personally or made reimbursement claims for those items or services." Khalil, DAB CR353, at 8. In the present case, the nexus between Petitioner's offenses and the delivery of health care items or services is firmly established by his conviction for the charge of "Medicaid fraud."

Further, the filing of fraudulent Medicare and Medicaid claims consistently has been held to constitute a clear program-related offense invoking mandatory exclusion. Alan J. Chernick, D.D.S., DAB CR434 (1996) (I.G.'s five-year mandatory exclusion of dentist who was convicted in State court of filing false claims upheld); see also Barbara Johnson, D.D.S., DAB CR78 (1990) (I.G.'s five-year mandatory exclusion of dentist convicted of filing false claims upheld).

In his defense, Petitioner contends that he should not be subject to an exclusion under section 1128(a)(1) of the Act because he was in fact entitled to reimbursement from Medicaid. Petitioner argues that he was told that Medicaid would reimburse him for any prescription he filled within a nine month period prior to October 1, 1994, the date on which Ms. Kramer became a Medicaid recipient. Petitioner argues also that the criminal conduct for which he was convicted was unintentional, in that he merely resubmitted claims for which he was entitled to payment under Medicaid. P. Br. at 1-2. By these arguments, Petitioner apparently seeks to challenge the propriety of his criminal conviction, claiming that he was in fact not guilty of the offense for which he has been convicted. Petitioner's argument amounts to a collateral attack on his conviction, which the

Departmental Appeals Board has previously held to be an ineffectual argument in the context of an exclusion appeal, as the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter J. Edmonson, DAB No. 1330 (1992).

Petitioner also claims that he provides a valuable service to elderly Medicaid patients by donating vitamins, and providing free consultation and free delivery of prescriptions to this population. Petitioner has submitted letters from individuals attesting to these services and to Petitioner's good character. Under section 1128 of the Act, however, such arguments are irrelevant. Petitioner must be excluded for a minimum five-year term. Mitigating circumstances may only be considered as a basis for reducing a section 1128(a)(1) exclusion when that exclusion is for a period in excess of five years. 42 C.F.R. § 1001.102(c).

#### CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from the Medicare and Medicaid programs for a period of at least five years, because he has been convicted of a criminal offense related to the delivery of a health care item or service under the Medicaid program. The five-year exclusion is therefore sustained.

/s/

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**Joseph K. Riotto**  
**Administrative Law Judge**