Department of Health and Human Services

Departmental Grant Appeals Board

Office of Hearings for Civil Money Penalties

In the Case of: The Inspector General - v. - Narenda Khurana, M.D., Respondent	DATE: MAY 27, 1986 Docket No. C-12 DECISION # CR7

CLARIFICATION
OF
DECISION OF ADMINISTRATIVE LAW JUDGE

By motion dated May 13, 1986, the Inspector General (I.G.) requested that my Decision of March 14, 1986 be clarified to specify that the requirements which I imposed as conditions for the Respondent's suspension being seven (7) years and one (1) day, (rather than the ten (10) years imposed by the Inspector General) are in addition to the requirements for reinstatement set out in the regulations at 42 C.F.R. §420.130. This Office made several attempts to set up a telephone conference with the parties, but counsel for the Respondent has not returned these calls. I understand a member of Mr. Taub's family is seriously ill. Accordingly, in order to avoid further undue delay, I am issuing this clarification subject to a request by Respondent (or counsel on his behalf) for additional proceedings. If I do not receive such a request by June 10, 1986, this clarification will be in effect as a part of my Decision of March 14, 1986.

In my March 14 decision, I conditioned the reduction of the Respondent's suspension on his submitting, by October 10, 1990, evidence satisfactory to the I.G. that 1) the Respondent is not, as of October 1, 1990, dependent on drugs or alcohol, and 2) that he has completed, within the year preceding, a seminar or program on Medicaid and Medicare billing requirements that is approved by New York State, the federal government, or the I.G. If the Respondent fails to submit this evidence by October 10, 1990, his suspension would no longer be reduced, but would be for the entire ten (10) year period originally imposed by the I.G. In a parenthetical statement, I said that if the Respondent did submit the required evidence and the I.G. did not reply by December 10, 1990, the Respondent would then be "automatically reinstated" as of December 10, 1990.

It was not my intent to imply that Respondent would be automatically reinstated as a provider if the I.G. did not reply. As I indicated in a footnote to my decision, the Respondent would have the right to seek reinstatement under 42 C.F.R. §420.130. What I meant was that, insofar as the conditions which I imposed in addition to those in §420.130 were concerned, the Respondent had done what was necessary to reduce his suspension to seven (7) years and one

(1) day and it was no longer necessary to await a reply by the I.G. for the reduction to be effective. I reiterate that my decision was not intended to and has no bearing on the rights of the Respondent or the prerogatives of the I.G. regarding reinstatement under 42 C.F.R. §420.130.

The decision is modified accordingly.

/s/

Charles E. Stratton
Administrative law Judge

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Grant Appeals Board

Office of Hearings for Civil Money Penalties

In the case of:

The Inspector General,

- v. -

Narendra Khurana, M.D.,

Respondent.

DATE: MAR 14, 1986

Docket No. C-12
(Appeal of ten (10) year suspension from Medicare and Medicaid Programs imposed pursuant to §1128(a) of the Social Security Act)

DECISION NO. CR7

DECISION OF ADMINISTRATIVE LAW JUDGE

This case is before an Administrative Law Judge (ALJ) pursuant to a request for a hearing filed on behalf of the Respondent, a physician, who disagrees with and appeals from a determination of the Inspector General (I.G.) of the Department of Health and Human Services (DHHS) suspending the Respondent from participation in Medicare and Medicaid programs for a period of ten (10) years pursuant to section 1128(a) of the Social Security Act (Act), as amended, and its implementing federal regulations (42 C.F.R. §§420.100 et. seq.) (Regulations). 1/ 2/ The suspension of the Respondent was effective on December 10, 1983 and was based upon the I.G.'s determination that (1) the Respondent had been convicted of a criminal offense, (2) the Respondent's conviction was related to his participation in a Medicaid program, and (3) a ten year suspension of the Respondent was reasonable.

1/ All references to the Act in this Decision are to the current sections, as amended, unless otherwise stated. Section 1128(a) of the Act is codified at Title 42 U.S.C. §1320a-7(a) and was enacted as a part of the Omnibus Budget Reconciliation Act of 1980 (Pub. L. No. 96-499, 94 Stat. 2599, section 913, effective December 5, 1980) and amended by §2105(b) of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. No. 97-35, enacted on August 13, 1981, 95 Stat. 791, 873).

2/ This case is before the undersigned ALJ as a result of the April 2, 1985 Delegation of Authority from L. Charles Leonard, Regional Chief Administrative Law Judge, Office of Hearings and Appeals (OHA), Region II, Social Security Administration (SSA),
(Footnote cont'd on page 2.)

THE LAWS AND REGULATIONS INVOLVED

Section 1128(a) of the Act requires the Secretary of DHHS to suspend physicians from DHHS programs as follows:

> Whenever the Secretary determines that a physician or other individual has been convicted (on or after October 25, 1977 . . .) of a criminal offense related to such individual's participation in the delivery of medical care or services under Titles XVIII [Medicare], XIX [Medicaid], or XX [Social Services Programs], the Secretary -
>
> (1) shall bar from participation in the [Medicare] program under title XVIII [Medicare], each such individual otherwise eligible to participate in such program;
>
> (2)(A) shall promptly notify each appropriate State agency administering or supervising the administration of a State [Medicaid] plan . . . of such determination, and . . . require each such agency to bar such individual from participation in such [Medicaid] program for such period as he shall specify . . . .
>
> * * *
>
> (3) shall promptly notify the appropriate State or local agency or authority having responsibility for the licensing or certification of such individual of the fact and circumstances of such determination, request that appropriate investigations be made and sanctions invoked in accordance with applicable State law and policy, and request that such State or local agency or authority keep the Secretary and the Inspector General of the Department of Health and Human Services fully and currently informed with respect to any actions taken in response to such request.

(Footnote 2/ cont'd)
DHHS; this case would normally be heard and decided by an ALJ from the SSA, OHA. This case was delegated because the undersigned ALJ already had a pending case (Docket No. C-11) involving different sections of the Act, but similar subject-matter, i.e., proposed civil money penalties and assessments totalling $150,000 (§1128A of the Act; 42 U.S.C. §1320a-7a(a) to (h)) and a ten (10) year suspension from participation in the Medicare and Medicaid Programs (§1128(c) of the Act; 42 U.S.C. §13207a-7(c)), the suspension to run concurrently with the ten year suspension which is the subject-matter of this case; the consolidation of these cases was for the convenience of the parties and for reasons of judicial economy. See, Regulations, §405.1532, which allow such delegation.

Section 1128(e) of the Act (42 U.S.C. §1320a-7(e)) provides:

> Any person or entity who is the subject of an adverse determination made by the Secretary under . . . [§1128(a)] shall be entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this Title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this Title. 3/

The legislative history of section 1128(a) of the Act (more specifically, its predecessor, i.e., section 1862(e) of the Act) provides: 4/

> [T]his provision [was included] in response to the concern that some program violators have been permitted continued participation, often without interruption, in Federal health care programs. The committee feels that the misuse of Federal and state funds is a very serious offense and that those convicted of crimes against the programs should not be permitted continued and uninterrupted receipt of Federal and state funds.

H.R. Rep. No. 393, 95th Cong., 1st Sess. 69 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 3039, 3072.

The current section 1862(e) of the Act (42 U.S.C. §1395y(e)) provides:

> No payment may be made under this subchapter with respect to any item or service furnished by a physician or other individual during the period when he is barred pursuant to . . . [§1128(a) of the Act] from participation in the [Medicare or Medicaid programs] . . . .

3/ Section 1128(e) was formerly §1128(d) and was redesignated as (e) by Pub. L. No. 98-369, Title III, §2333(a)(b), 98 Stat. 1089, effective July 18, 1984. The redesignation applies to "convictions of persons occurring after [July 18, 1984]" and technically should be referred to as (d) in this case because the Respondent's conviction was on February 24, 1983, before the July 18, 1984 effective date; however, since there are no substantive changes involved, for convenience and clarity, I have referred to the current subsection (e) in this case.

4/ The predecessor section to 1128(a) of the Act was §1862(e) of the Act, until 1980 when Pub. L. No. 96-499, §913(b), substituted the provisions of §1862(e) to §1128 and added the present day language to §1862(e).

The Regulations implementing section 1128 of the Act (42 C.F.R. §§420.1 et. seq.; 48 Fed. Reg. 3742; January 27, 1983) became effective in 1983. 5/ 6/

Section 420.128 of the Regulations provides for appeals to an ALJ subsequent to suspension and limits the appeal to three (3) issues as follows:

1) whether he was, in fact, convicted;
2) whether the conviction was related to his participation in the delivery of medical care or services under the Medicare, Medicaid or social services programs; and
3) whether the length of the suspension is reasonable.

Section 420.128 also provides that:

> (c) If any party to the hearing is dissatisfied with the hearing decision, the party is entitled to request Appeals Council review of the decision as specified in sections 405.1559 through 405.1595 [of 42 C.F.R.] . . . . A suspended party may also seek judicial review of the final administrative decision [in the United States District Court].

Section 420.125(b) of the Regulations provides that in setting a term of suspension, the I.G. will consider the following:

(1) The number and nature of the program violations and other related offenses;
(2) The nature and extent of any adverse impact the violations have had on beneficiaries;

5/ On April 3, 1983, the Secretary rescinded the previous delegation of authority for taking action under section 1128 of the Act, which had been vested in the Health Care Financing Administration (HCFA), and redelegated this authority to the I.G. 48 Fed. Reg. 21662 (May 13, 1983). Accordingly, where the Regulations read HCFA, the I.G. should be substituted.

6/ It should be noted, to avoid any possible confusion, that the current §1128(c) of the Act relates to a suspension pursuant to the civil money penalties law (42 U.S.C. §1320a-7a(a) to (h) and §1320a-7(c)) and the implementing regulations to these provisions of the Act are found at 45 C.F.R. §§101. et. seq.; these provisions do not relate to this case at all, only to Docket No. C-11.

(3) The amount of the damages incurred by the Medicare, Medicaid, and the social services programs;
(4) Whether there are any mitigating circumstances;
(5) The length of the sentence imposed by the court;
(6) Any other facts bearing on the nature and seriousness of the program violations; and
(7) The previous sanction record of the suspended party under the Medicare or Medicaid program.

In summary, the suspension of a physician convicted of a DHHS program related crime in a state or federal court is mandatory under section 1128(a) of the Act. The length of the suspension is within the Secretary's discretion. The Secretary has delegated to the I.G. the responsibility for implementing the mandatory requirements of section 1128 of the Act and for determining the length of time that a physician or an individual will be suspended within the framework of the Act and Regulations. The suspended physician has the right to a hearing before an ALJ to determine whether he was convicted of a program-related crime and whether the length of a suspension is reasonable, in light of the seven (7) considerations outlined in section 420.125(b) of the Regulations. Finally, the suspended physician has a right to Appeals Council review and judicial review of the final administrative decision.

JURISDICTIONAL AND PROCEDURAL BACKGROUND

In this case, by the letter of November 25, 1983, the Acting Assistant Inspector General for Health Care Financing Integrity (HCFI) notified the Respondent that the I.G. had determined that the Respondent had been convicted of a criminal offense related to his participation in the New York State Medicaid Program and, accordingly, he was, effective as of December 10, 1983, mandatorily suspended from participation in the Medicare and Medicaid programs for a period of ten (10) years pursuant to section 1128(a) of the Social Security Act, 42 U.S.C. §1320a-7(a), and its implementing federal regulations, 42 C.F.R. §§420.100 et. seq. The Respondent's timely request for a hearing in this case and the subsequent delegation by SSA and the consolidation of this case with Docket No. C-11 resulted in the Docketing of this case to be decided by the undersigned ALJ.

A prehearing conference was held in Washington, D.C., on June 18, 1985, at which time prehearing procedures were discussed and a schedule was set forth for preparation for the hearing.

For the convenience of the parties and for reasons of judicial economy, the June 14, 1985 Order and Summary of Prehearing

Proceedings stated that this case was consolidated with Docket No. C-11 for purposes of hearing both cases during the same week; the Order also stated that the hearing would be bifurcated and that two separate decisions would be issued. Therefore, in view of the differing factual and procedural considerations, the hearing was conducted from September 10 through September 13, 1985 in two distinct parts; the first part, on September 10, involved this case, the section 1128(a) suspension, and the second part, from September 11 through the 13th, involved Docket No. C-11, the civil money penalties, assessments, and §1128(c) suspension. However, evidence presented in each case may be used in the other.

The Respondent moved for an indefinite adjournment or continuance of the hearing in this case and in Docket No. C-11 (prior to the hearing and again at the hearing) on the grounds that the Respondent would seek (on the basis of new evidence) to overturn the conviction upon which the I.G. based its suspension in this case and upon which the I.G. cites as an aggravating circumstance in support of the I.G.'s proposed penalties, assessments and suspension in Docket No. C-11. The I.G. objected to the motion. I denied the Respondent's motion on August 19, 1985 verbally, and issued a confirmation of said verbal order on August 20, 1985. I denied the motion a second time, at the hearing, on September 11, 1985. My reasons for denying the Respondent's motion were: First, this case would be reopened if the Respondent was successful in overturning his guilty plea in State Court because the I.G. is required to "reinstate a suspended party whose conviction has been reversed or vacated." Regulations, §420.136(a). Next, the requested period of continuance and likelihood of success was too indefinite. Finally, the Respondent had not yet even begun to attempt to overturn his conviction in State Court. TR II/10 to 20. See, Michienzi v. Harris, 634 F 2d 345 (6th Cir. 1980).

ISSUE

The general issue to be determined is whether the length of the Respondent's suspension under section 1128(a) of the Act is reasonable. 7/

FINDINGS, CONCLUSIONS, AND DECISION

Having considered the entire record, the arguments and briefs

---

7/ The Respondent concedes that his guilty plea to one (1) count of Grand Larceny, Third Degree, and one (1) count of Offering a False Instrument for Filing, First Degree, amounts to a conviction of a program-related crime within the meaning of the Act and Regulations. TR I/86 to 87. See also, the "Revised Order, Notice of Hearing and Summary of Prehearing Proceedings" in this case, at par. 9, and TR II/8, 9.

of the parties, and being advised fully herein, I make the following Findings, Conclusions, and Decision: 8/ 9/ 10/

FINDINGS AND CONCLUSIONS

1. After an investigation, the Respondent was indicted by the People of the State of New York for one (1) count of Grand Larceny, Third Degree, and eighty-two (82) counts of Offering a False Instrument for Filing, First Degree. The indictment was based on claims presented by the Respondent to the New York Medicaid Program for reimbursement of medical services which were not provided as claimed. Stip. B.8; TR II/9.

2. On February 24, 1983, the Respondent withdrew his not guilty plea and pleaded guilty to one (1) count of Grand Larceny, Third Degree, and one (1) count of Offering a False Instrument for Filing, First Degree. I.G. Ex 1; Stip. B.8; TR II/9.

3. The Respondent was sentenced the same day, upon his guilty plea, to a conditional discharge on each of the two (2) counts and a fine of Five Thousand Dollars ($5,000) on each of the two counts. With respect to the conditional discharge, the Court set the following conditions:

1. Respondent pay Fifty-Five Thousand Dollars ($55,000) restitution, plus Ten Thousand Dollars ($10,000) interest within two (2) years.

8/ Any part of this Decision of Administrative Law Judge preceding the Findings, Conclusions, and Decision which is or may be deemed a finding of fact or a conclusion of law is hereby incorporated herein as a finding of fact or conclusion of law. I refer primarily to the Jurisdictional and Procedural Background section where the facts and conclusions are not contested and may not be repeated here.

9/ References to record Exhibits, Stipulations and the Transcript are as follows:

Respondent's Exhibit	=	R Ex/(page number)
I.G. Exhibit	=	I.G. Ex/(page number)
Joint Exhibit	=	J Ex/ (page number)
Transcript	=	TR (volume/page number)
Stipulations	=	Stip. (number)

10/ The Respondent filed a post-hearing brief. The I.G. filed both a post-hearing brief and a reply brief. "RB" references are to the Respondent's brief. "I.G.B" references are to the I.G.'s brief. "I.G.RB" references are to the I.G.'s reply brief.

2. Respondent pay a fine of Ten Thousand Dollars ($10,000) on or before December 15, 1983 (10 months).

Stip. B.9; TR II/9.

4. The Respondent met each of the conditions set by the State Court. Stip. B.9; TR II/9.

5. Upon learning of the Respondent's conviction, the New York Regional Office of the I.G. began to process the Respondent's suspension, pursuant to section 1128(a) of the Act. TR I/92.

6. The I.G. reviewed the case pursuant to its customary procedures and ultimately recommended that the Respondent be suspended from participation in the Medicare and Medicaid program for a ten year period. TR I/103.

7. Specifically, Sam Starks, Administrative Sanctions Coordinator of the Office of the I.G. for the N.Y. Region recommended that the Respondent be suspended from participation in the Medicare and Medicaid Programs for a ten (10) year period based upon his evaluation or review of the recommendation of a "program analyst" whom he supervised (Barry Jerson). TR I/88 et. seq.

8. The proposed ten year period was derived from the application of the seven (7) factors set forth in section 420.125(b) of the Regulations to the facts of the Respondent's case. TR I/91.

9. This recommendation was adopted by the Assistant I.G. for HCFI and a Notice of Suspension was sent to the Respondent on November 25, 1983. I.G. Ex 4; TR I/103.

10. The Respondent submitted a timely appeal from the I.G.'s determination and requested a hearing before an ALJ. TR II/9.

11. The ten (10) year period of suspension imposed upon the Respondent by the I.G. is not reasonable for the following reasons:

I found Sam Starks to be a very honest, forthright, and competent individual. He was a very credible witness and considered each one of the seven (7) factors set forth in section 420.125(b) of the Regulations to determine a reasonable term of suspension for the Respondent. TR I/91 to 104, 108, 112, 113, 116, 117, 122, 123, 126 to 128. He did his job carefully and competently in this case. Mr. Starks considered mitigating circumstances and found none to exist. TR I/ 100, 127. Mr. Starks stated that the I.G. considers pre-conviction circumstances that lessen the moral culpability of the individual to be mitigating. He stated, as

an example, that this would be when a:

> physician is under some kind of medical or psychological strain that was recognized by the sentencing judge . . . some kind of extreme economic duress . . . [or] assists the prosecution in stopping other wrongdoing by other health care providers . . . .

TR I/100/lines 3 to 10; see also, lines 11 to 14, 20 to 25 and TR I/101/lines 1 to 9.

The Appeals Council of SSA stated, In the Matter of Barnett and Belkin, Docket No. OA-580-2, April 30, 1981, p. 14:

> That mitigating circumstances basically entail those considerations or conditions which occur prior to a criminal investigation, such as a practitioner's mental health, or a catastrophic situation within his immediate family requiring great financial sacrifice.

Mr. Starks explained that, in his experience, mitigating factors which might have a bearing on the I.G.'s determination are set forth by the defendant in a plea elocution at sentencing. TR I/100-101. In recommending the ten year suspension of the Respondent, Mr. Starks reviewed Dr. Khurana's statement to the sentencing judge concerning the circumstances underlying his conviction. I.G. Ex 3. Based on that statement, Mr. Starks found no evidence of mitigating circumstances which would justify a reduction in the period of suspension. TR I/100, 127-28; I.G.B at pp. 11 to 12. I find that he was correct.

However, the preamble to the Regulations, as cited by the I.G., states clearly that the DHHS:

> May consider information contained in the indictment, investigative reports, presentencing reports, prior convictions, reports from fiscal agents regarding previous problems arising from the subject's practice and relating to Federal reimbursement or any other credible evidence which will assist [the Department] in determining degree of risk the subject poses to the integrity of the Medicare and Medicaid programs.

48 Fed. Reg. 3744 (January 27, 1983); I.G.B at pp. 6 to 7.

Thus, since this is a de novo hearing, I must consider "any other credible evidence which will assist" me at arriving at a fair decision (48 Fed. Reg. 3744). Ordinarily, I would not substitute my judgment for that of someone as competent as Mr.

Starks. However, for some reason (perhaps because it was not available, was not considered credible, or was not examined because of internal policy), Mr. Starks did not consider certain information that was admitted into evidence in Docket No. C-11. Since this evidence was not included in Mr. Stark's report, it was not available for review through the various layers of review in the I.G.'s Office before the Notice of Suspension was issued on November 25, 1983 (indicating that a ten (10) year suspension was reasonable after considering the seven (7) factors in section 420.425(b) of the Regulations).

The evidence I am referring to is the transcript and tape recording of a conversation between the Respondent's wife and a New York City radio talk-show host named Ms. Kurianski, who is a psychologist. TR III/135 to 148. 11/ At the request of the I.G. and over the objection of the Respondent, this tape was played and transcribed into the record in this case (TR III/142 to 148) during the testimony of Mr. Barry Jerson, an investigator (program-analyst) for the I.G. TR III/114 to 174. While the Respondent's counsel originally objected to the admission of the tape into evidence, and objected to having the tape transcribed by the court reporter in this case, and having the transcription be used as evidence, the Respondent admits that the voice on the tape was that of the Respondent's wife and urges that I consider and weigh the evidence to support the Respondent's argument that the I.G. failed to consider certain factors as mitigating factors. RB at p. 12. The Respondent now argues that Ms. Khurana's statements about the guilt of her husband be discounted, but that her statements about the Respondent's medical and psychological strain be given great weight as mitigating factors. The I.G. argues that I

11/ The wife of the Respondent, Dr. Rhoopa Khurana, gave her name as "Mary" when she called the radio talk-show and spoke to Mrs. Kurianski. The radio station policy required callers to give a phone number in case they are disconnected. New York State investigators traced the number given by "Mary" to the home of Drs. Narendra and Rhoopa Khurana. Ms. Khurana's identity is further confirmed by the fact that during the conversation, she gave a large amount of personal and family history which corresponded exactly to the personal history of Rhoopa and Narendra Khurana. Furthermore, counsel for the Respondent admits that the caller was Ms. Khurana. TR IV/84, 88; TR III/151.

should give great weight to the statements of the Respondent's guilt, but does not really address the other side of the coin. The evidence offered by the I.G. is a double-edged sword; it addresses not only the Respondent's intent to cheat Medicaid, but outlines problems which impaired the Respondent's ability to work. I give equal weight to all of Ms. Khurana's statements. The evidence reveals shocking statements concerning the Respondent's intent to cheat Medicaid, drug-addiction causing impairment of the Respondent, a nervous breakdown of the Respondent's wife, also a physician, a daughter with cerebral palsy and her operation, unhappiness, depression and the inability of the Respondent to work. TR III/142 to 148.

Therefore, I must consider the evidence in the record of Ms. Khurana's conversation if it is credible and weigh it against the rest of the evidence in the record. I find that the words of the Respondent's wife illustrate a clear concern for the well-being of herself, her family and her husband's problems. She is also a physician and I find her statements concerning her husband to be credible. I find that the problems Ms. Khurana cited are evidence of the Respondent's mental condition, (i.e., that the Respondent was under great mental strain, that the Respondent's daughter was suffering from cerebral palsy, that the child's condition and his wife's nervous breakdown affected the Respondent, that the Respondent was suffering from dependency on drugs, and that the dependency and mental strain affected his ability to work).

It should be noted that although he now admits that his wife's description of his mental state and drug dependency is correct, the Respondent was remiss in not coming forward to establish a more concrete nexus between these problems and the program-related crime which is the subject-matter of this case. At the very least, the Respondent should have explained how his drug dependency and family problem lessened his moral culpability. Instead, the Respondent sat back, let the I.G. provide the evidence in the case that the Respondent later seized upon as evidence of migitating factors, and then still took no affirmative action. Nonetheless, even by taking no affirmative action, the Respondent argues that he has benefitted because the I.G. must show, that all seven (7) criteria listed in section 420.125(b) were considered and that:

> The length of the suspension determined on the basis of these criteria was not extreme or excessive.

(48 Fed. Reg. 3744.)

The I.G. has the burden of showing that the seven-point criteria has been complied with and that the I.G.'s decision to suspend for the ten (10) year period is reasonable. Regulations §420.128(a). If the I.G. meets his burden of proof, the burden then shifts to the Respondent to establish the I.G.'s determination is unreasonable. See, In the Matter of Barnett and Belkin, supra, at p. 11. Absent the evidence supplied by the Respondent's wife's conversation, which was introduced into evidence by the I.G., I find that the I.G. has met his burden of proof and that the Respondent failed to rebut. I find, but for this evidence, there is no factual or legal basis for setting aside or modifying the period of suspension imposed by the I.G. However, I find that these problems suffered by the Respondent are mitigating factors and that the I.G. did not consider these factors. I find that the I.G. and, specifically, Mr. Starks did consider the six (6) other factors thoroughly and correctly and that the ten (10) year suspension is warranted, but for the fact that the I.G. did not consider the pre-conviction problems of the Respondent as mitigating factors.

There may be several choices for the present disposition of this case under the Regulations, considering the entire record and the facts of the Respondent's mental condition prior to his program-related crime. First, I could remand this case to the I.G. pursuant to section 405.1542(c) of the Regulations. See also, §405.1560. Second, I could re-open the record for further testimony to (1) determine the extent of the Respondent's drug problem, mental health, and family problems (and how these factors affected his medical practice and program-related crime), and (2) examine how Mr. Stark's determination would be affected if he had considered the factors cited by Ms. Khurana. 12/ Third, I could decide this case on the basis of the present record and allow the parties 60 days to file a Motion for Reconsideration. See also, Regulations, §405.1570. In the interests of justice and to effect a speedy decision, I have chosen to make a decision and leave open to the parties the opportunity to file a timely Motion for Reconsideration.

12/ For example, if Mr. Starks had testified that he considered these factors or problems suffered by the Respondent prior to and during his program-related crime and still decided that a ten (10) year suspension was reasonable under the circumstances, I would have decided that a ten (10) year suspension is reasonable. However, that is not the situation here.

To reach a decision in this case, several steps were taken. The first was to determine whether Ms. Khurana's statements about her husband were credible. 13/ I found Ms. Khurana's statements to be credible and, by examining the record, I found that the I.G. had not considered these statements in making his determination to suspend the Respondent for ten (10) years. The next step required an inference. To find that the Respondent's problems affected his program-related crime, I had to make an inference that the Respondent's problems, as stated by Ms. Khurana, would have motivated the Respondent (or at least contributed to his situation in great part) to commit or exacerbate his program-related crime. While this is the weakest link in the decision-making chain, I feel that justice and common sense requires the assumption that the shocking set of problems facing the Respondent at the time of his program-related crime had to have clouded his judgment and thus diminished his culpability. The final step was to determine how the evidence of the mitigating factors presented in this case, which was not considered by the I.G., should affect the term of suspension in this case. Assuming that the problems stated by the Respondent's wife are the type of problems that the I.G. would consider as mitigating circumstances (i.e., circumstances that would require a reduction in the term of suspension of the Respondent), the major consideration in determining the length of suspension is to assess the "degree of risk the subject poses to the integrity of the Medicare and Medicaid programs" (48 Fed. Reg. 3744). While the program, and thus the medically needy persons served by it, suffered because of the Respondent's intent to cheat Medicaid, the Respondent's patients did not seem to suffer as directly and as severely as they could have. For example, nowhere in the record in this case or in Docket No. C-11 is there enough credible evidence that the Respondent rendered improper medical treatment to his patients or refused to see them when they sought

---

13/ At the hearing, the Respondent's wife appeared by counsel and opposed the I.G.'s motion for an order to enforce appearance as a witness against her husband. I ruled at the hearing that the Respondent's wife did not have to testify in this case or in Docket No. C-11 on the grounds that (1) the principles of the common law as interpreted by the courts of the United States govern the law of privilege because federal law supplied the rule of decision in this case (see, Rule 501 of the Federal Rules of Evidence), and (2) the case of Trammel v. United States, 445 U.S. 40 (1979), stands for the proposition that a wife cannot be compelled to testify against her husband in a federal forum (on the basis of the marital privilege). Here, however, the Respondent's wife waived the marital privilege with regard to the taped conversation with the radio talk-show host, which is in evidence in his case, because she volunteered information about her husband to thousands of people over the radio. TR I/80 to 85.

treatment. On the other hand, the Respondent should have been more cooperative with the I.G. in directly supplying evidence of his problems and how these problems affected his program-related crime so that the I.G. could have taken them into consideration prior to the issuance of the suspension notice of November 25, 1983. Moreover, the Respondent should have been more candid and cooperative during the course of the prehearing process and at the hearing itself by directly supplying evidence of the mitigating factors and evidence of how these factors affected his program-related crime (especially since the Respondent's pre-sentencing statements do not refer to these mitigating factors at all).

Accordingly, taking all the above factors into consideration, I decided to reduce the ten (10) year period of suspension imposed on the Respondent to seven (7) years and to impose conditions to reduce any future risk to the Medicare and Medicaid programs. 14/

DECISION

It is my decision that the Respondent's ten (10) year suspension from Medicare and Medicaid participation pursuant to section 1128(a) be reduced to seven years and one (1) day (*i.e.*, from December 10, 1983 to December 10, 1990) (because of mitigating factors not considered by the I.G.) on the condition that, by October 10, 1990, the Respondent submit evidence satisfactory to the I.G. (1) that he is not, as of October 1, 1990, dependent on drugs or alcohol and (2) submit evidence that he has completed a seminar or program within that year on Medicaid and Medicare billing requirements that is approved or sponsored by New York State, the Federal Government or by the I.G. (In the event the Respondent submits this evidence to the I.G. and the I.G. does not respond to the Respondent by December 10, 1990, the Respondent is then automatically reinstated as of December 10, 1990.) If this evidence is not submitted by the Respondent by October 10, 1990, the Respondent's suspension from Medicare and Medicaid programs will then be for the entire ten (10) year period imposed by the I.G.

/s/

Charles E. Stratton
Administrative law Judge

14/ This decision in no way alters the rights of the Respondent to seek reinstatement at any time pursuant to provisions in the Regulations, such as section 420.130.