

Medicare Overpayment Audits Update

The Centers for Medicare and Medicaid Services (CMS) is stepping up its efforts to recover alleged overpayments charged by providers for care rendered to Medicare patients. CMS contracts with private firms to conduct compliance audits of Medicare providers. The private auditors have a financial incentive because they are paid a percentage of the overpayments recovered from providers.

Two initiatives are of primary concern to physicians. First, Zone Program Integrity Contractors (ZPICs) are conducting compliance audits of physicians targeted by CMS. The ZPIC audit firm for Tennessee is AdvanceMed Corporation. Second, the Recovery Audit Contractor (RAC) program was initiated in Tennessee in August 2009. The RAC auditor for Region C, which includes Tennessee, is Connolly Healthcare.

Audits initiated by ZPICs or RACs will generally cover an approximately 18-month audit period. The audit contractor will not review every claim for payment submitted by the physician during the audit period; rather, the audit contractor will select a random sample of the payment claims submitted during the audit period for review of particular dates of services. For example, in recent audits handled by our firm, the audit contractor selected samples of 30 claims from over 4,000 payment claims in one 18-month audit period and from over 6,000 payment claims in another. On the basis of its detailed review of the medical records and billing claims submitted for the dates of service selected, the auditors use statistical sampling and extrapolation techniques to calculate an estimated overpayment for all payment claims submitted during the audit period. The overpayments sought to be recovered often run into the hundreds of thousands of dollars.

The first step in the process will be receipt by the physician of a request for records from the ZPIC or RAC relating to the audit sample dates of service identified. The provider will generally have 30 or 45 days to submit the requested records, depending on whether the request is made by a ZPIC or a RAC. The audit contractors will **not** request additional records when conducting their audit and making determinations to allow, deny or downcode payments, so the provider should submit all necessary records to support the medical necessity of the services delivered on the dates of service in question – which may require more than the progress note for the date of service. The audit contractor will conduct its audit of the sample claims selected, and issue a notice of determination letter to the provider and Medicare Fiscal Intermediary (in Tennessee, Cahaba Government Benefits Administrators). The next step is for Cahaba, on behalf of CMS, to issue an overpayment demand letter to the physician, demanding repayment of the alleged overcharges.

At this point, the physician has two choices and a critical deadline of which to be mindful. The physician can remit payment of the alleged overpayment, or appeal the audit contractor's overpayment determination administratively. The critical deadline that must be met *to stop automatic recoupment* by Cahaba of the alleged overpayment is to file the first level of administrative appeal within 35 days of the date of the CMS overpayment demand letter. While a provider has 120 days to file its initial appeal, automatic recoupment of the alleged overpayment (by offset against the physician's recently filed claims being processed) will start on the 41st day after issuance of the overpayment demand letter. There are four possible levels of administrative review: **level 1** – request for redetermination by the FI; **level 2** – reconsideration by a Qualified Independent Contractor; **level 3**- review by an Administrative Law Judge; and **level 4** – appeal to the Medicare Appeals Council. Thereafter, the provider may seek judicial review in federal court.

Tips for Responding to a ZPIC or RAC Audit

Physicians should consider the following steps in responding to audit initiated by ZPICs or RACs:

- Assure your initial response to the contract auditor's records request for the 30 or 40 audit sample dates of service is as complete as possible; consider engaging a coding consultant at

this point to review your records; keep in mind the contract auditors will *not* request additional records to justify the service.

- Take action to segregate and compile the patient files for the entire audit period for the patients/dates of service selected for review in the audit sample; keep a record and copies of all documentation sent to the auditor.
- If you receive a ZPIC or RAC determination letter of audit findings, *do not ignore* it; the CMS overpayment demand letter will follow shortly. Consider engaging experienced counsel to immediately commence preparation of the initial appeal – the request for redetermination. It may be necessary to engage a coding expert at this juncture. Remember, once the CMS overpayment demand letter is issued, you have only 35 days in which to file the initial appeal – work “ahead of the curve.”
- The ZPIC and RAC auditors do *not* engage in a sophisticated medical review of the records and payment claims for the sample dates of service selected; their review can be characterized as “biased” and perfunctory given their financial incentive to find overpayments. Appeals can be successful on a number of grounds: justification of the medical necessity of the service by reference to records other than the note for the date of service in question; appropriateness of billing at a lower level of E/M service, rather than denial of payment in full; “late-entry” clarification or supplementation of the record in appropriate circumstances; and challenges to the validity of the statistical sample and extrapolation on various grounds.

The frequency of some services provided to Medicare patients, as well as particular types of services/claim targeted by OIG, and issues/codes posted on the ZPIC or RAC websites, are some of the reasons giving rise to initiation of audits against certain physicians. Regardless of the reason for initiation of an audit, physicians need not “blindly” accept the audit findings of the ZPIC or RAC auditors as correct.

If you have any questions, please feel free to contact [Chris Was](mailto:cwas@millermartin.com) (cwas@millermartin.com | 615.744.8527), [Ken Bryant](mailto:kbryant@millermartin.com) (kbryant@millermartin.com | 615.744.8508) or any other member of Miller & Martin's [Health Care Practice Group](#).

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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