

SHORTS



ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

Navigating RAC Appeals

By now you've probably heard a lot about the Centers for Medicare and Medicaid Services (CMS) Medicare Recovery Audit Contractor (RAC) program, scheduled to crank up in North Carolina in late 2009 or early 2010. Under the program, private contractors called RACs will review paid Medicare claims as far back as three years for CMS and identify alleged "overpayments," which it will seek to recover from the affected provider. A provider that receives a demand letter for recoupment can appeal that decision through several levels of appeal.

The overpayment determination appeals process is relatively complex and technical, involving five distinct levels of appeal. In this article, we will help you understand certain aspects of these levels of appeal should you find your facility with a RAC overpayment determination that you want to appeal.

While data regarding the likelihood of successful RAC appeals is still being evaluated by CMS, preliminary data suggests that it may be worthwhile for providers to appeal overpayment determinations. As of August 2008, approximately 34% of RAC appeals filed during the three-year demonstration project resulted in a favorable decision for the provider and 7.6% of the determinations were overturned entirely on appeal. However, this data may not be representative of the final results, because the appeals filed during the demonstration project continue to work their way through the appeal process. CMS will continue to update the appeal statistics until all appeals are resolved. Connolly Consulting Associates, Inc., the RAC contractor in Region C, which includes North Carolina, had the highest percentage of combined Part A and Part B appeal decisions favorable to the providers (54.1%). Since the RACs do not get paid if an overpayment determination is overturned at any level of appeal, it's in the RACs' best interests if you choose not to appeal their determinations.

Once the RAC concludes that you received an overpayment, you will be sent a demand letter, also known as an initial determination letter, explaining how the overpayment was determined and the amount due. The demand letter will also explain your appeal rights and inform you of how to stop recoupment from occurring. Recoupment is defined as the recovery of outstanding Medicare debt by reducing present or future payments and applying the



by Mike Hale & Jessica Lewis



amount withheld to the indebtedness. Despite language in the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), which provides that recoupment will not occur until a decision on reconsideration is rendered, CMS has taken the position that it may recoup alleged overpayments before a request for redetermination or reconsideration has even been filed.

Following is how the five levels of appeal work.

REDETERMINATION

In the event you wish to appeal an overpayment determination, you must first request a redetermination from your fiscal intermediary (FI) or carrier, as the case may be, within 120 days from the date you receive the demand letter. However, in order to stop recoupment of the alleged overpayment, you must file your request for a redetermination within 30 days from the date of the demand letter; otherwise, withholding will occur on the 41st day. You will also be given the opportunity to "rebut" the findings in the demand letter by submitting a statement within 15 days from the date of the demand letter disputing the debt. However, it is important to remember that the rebuttal or "discussion" period is in addition to, not in lieu of, the appeal process. Only a timely and valid request for a redetermination or reconsideration, as discussed below, will stop the recoupment process. No minimal monetary amount must be in dispute in order to request a redetermination.

In the event you request a redetermination more than 30 days after the date of the demand letter, recoupment may begin on the 41st day but will stop once you file a valid appeal. However, any amounts already recouped will be retained and will not be refunded unless you are successful in your appeal.

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FOR NURSING HOMES



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Interest accrues on overpayments throughout the appeal process. The FI's or carrier's decision is usually issued within 60 days from receipt of the redetermination request. You may wish to consider filing your appeal well before the 120-day deadline to prevent recoupment from occurring for cash flow purposes.

RECONSIDERATION

Assuming you receive a partially favorable or unfavorable decision by your FI or carrier, you have 180 days from the date you receive the redetermination notice, or revised demand letter, to request a reconsideration by your qualified independent contractor (QIC). However, recoupment may occur on the 61st day unless you request a reconsideration within 60 days of the date of the notice. After recoupment begins, it can only be stopped by a timely and valid appeal. As is the case with redeterminations, there is no minimal monetary threshold for this appeal. The QIC's decision is usually issued within 60 days from receipt of the reconsideration request.

ADMINISTRATIVE LAW JUDGE HEARING

If the QIC issues a partially favorable or unfavorable reconsideration decision, recoupment may begin regardless of whether you proceed to the third level of appeal with an administrative law judge (ALJ). You have 60 days from the date of receipt of the reconsideration to file an appeal with an ALJ. However, there must be at least \$120 in controversy (this amount will be increased annually). The ALJ hearing will most likely be held by video-teleconference or telephone, and you may also request the ALJ to make a determination without a hearing based on the record. The ALJ will generally issue his or her decision within 90 days of receipt of the hearing request.

MEDICARE APPEALS COUNCIL

If you receive an unfavorable decision by the ALJ, you may then appeal to the Medicare Appeals Council (MAC). You must file your MAC appeal within 60 days from the date of receipt of the ALJ

hearing decision, and no minimal amount is required to be in controversy. The MAC will generally issue its decision within 90 days from receipt of your request for review.

FEDERAL DISTRICT COURT

The final stage of appeal is in a federal district court. This judicial appeal must be filed no more than 60 days from the date of receipt of the MAC decision or declination to review. At least \$1,220 must be in controversy following the MAC review, and this amount will be increased annually.

Navigating the Medicare appeals process, and preventing or limiting recoupment during the early stages of appeal, will require timely responses to notices and careful attention to detail. However, since more than 30% of the RAC appeals filed thus far have resulted in favorable decisions for the providers, it may be worth your effort to invest the time and resources to challenge RAC overpayment determinations if you disagree with the RAC determination that an overpayment was made.

For more information on this article or other health care law-related issues, please contact Mike Hale at 919.783.2968 or mhale@poynerspruill.com or Jessica Lewis at 919.783.2941 or jlewis@poynerspruill.com.

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The Nicaragua Project is Finished

Two years ago, shortly after my return to North Carolina and Poyner Spruill, my phone rang. It was my friend Dr. Keren Brown Wilson of Portland, Oregon. Keren is a former client, a former president of the Assisted Living Association of America, and the first woman CEO to take an assisted living company to Wall Street. She did this not with fancy buildings and slick marketing, but with facilities aimed at providing quality assisted living to Medicaid-eligible residents. In short, she's one tough cookie. But she's also the CEO of a foundation named for her mother, Jessie F. Richardson, which focuses on charitable work for seniors around the world.



Outside the original center, before renovation

"I need you to come to Nicaragua with me," Keren said, "and we leave in two weeks." After my usual protests about work and family obligations, Keren said, "Hmmm, I see. We leave in two weeks; I'll meet you in Miami."

When we arrived in Jinotepe, Nicaragua, we headed for the Hogare de Ancionas, where, as you know from prior *Shorts* articles, we found 60 homeless, indigent seniors "living" in a ramshackle building, sleeping six to a room and in the hallways on donated cots. The roof was unattached, wiring was exposed, there was no working kitchen, no potable water, and it was just about as bad as you could possibly imagine. "We have to fix this," Keren said.

Much of the next chapter of this story you already know from prior articles. I came back, and my firm helped sponsor a great fund-raiser featuring the paintings of Nicaraguan artist Pablo Beteta, who donated his work and time, came to North Carolina for a week and spent most of that time autographing his work for anyone who would donate to the center. We raised enough money to help renovate the existing center and double its size with a brand-spanking-new addition. I promised to return to Nicaragua when the work was finished.



A look at the old rooms (above) and the new rooms (right)



by Ken Burgess



In February 2009, I got the call. "It's finished," Keren said. "Pack your bags." The rest of this story I'll show you in the pictures of the renovated center and the dedication on May 17. Many, many of you have contributed to this great cause and have asked for pictures, so here they are.

But, first, I have to thank each and every employee of Poyner Spruill, clients and friends of our firm, and members of the North Carolina long term care industry who donated thousands of dollars, many pounds of medical supplies, and lots of good wishes.



The entrance to the new center expansion

Our work together didn't end when our fund-raiser was over. Months later, Keren called again "we need wheelchairs, walkers, therapy equipment, and whatever else you can round up. I have a truck meeting you in North Carolina in 10 days. Be there." That's my Keren.

We put out a call for help. Right away, Su Johnson and Rhonda Durr of Care Matters Consulting said, "We'll get what you need." Within days, I got the call from Rhonda - "Meet me at the Presbyterian Home of Hawfields and bring a truck. Max Kernodle and his staff have everything you need." And they did. They gave us enough walkers, wheelchairs, toileting and mobility-assistance devices for every resident of the center.



Wheelchairs donated by NC long term care providers



One of my favorite residents arrives in her new wheelchair for the big dedication.

So, on May 17, I attended the dedication of the beautiful new center. Everywhere I

looked I saw the generosity and kindness of my friends from North Carolina – wheelchairs, the new building addition (beautiful), three tanks of potable water, and the full-time doctor who's been hired for the center's residents. I met the part-time pharmacist who now helps the center and watched as over half the staff received awards for completing a 40-hour course in senior health care, much like our CNA course here in the U.S.



A resident poses in her new room. Gorgeous!

I also saw the residents, looking healthy, well-fed and dressed to the nines for the big day, local dignitaries, family members, volunteers, and about 350 other people who showed up for the all-day dedication and celebration, complete with local dancers and singers, the local press, and lots of food and hugs. The Nicaraguans are warm, loving and grateful people, and we were treated like rock stars all day. We also met 12 local teenagers from at-risk families who attend a local school where part of their curriculum is working at the center with the seniors and learning skills that will provide them with a future, away from the streets. They were hugging us all day.



The Nicaraguans are warm, loving and grateful people, and we were treated like rock stars all day.



"At-risk" teens who spend part of their school day at the center, keeping them off the streets

In these pictures, you'll see a beautiful stucco plaque full of names – the donors to the new center. When I helped Keren unveil it, I wept to see nearly half the names on the plaque are colleagues here at Poyner Spruill or members of the North Carolina long term care community. And you'll see the beautiful memorial they created in memory of my late father (I really cried when I saw that one), a direct result of your generosity and kindness and a gift for which my family and I will be forever grateful to all those who helped out.

The party may be over, but we'll keep supporting the Center. In fact, two other similar centers are being developed in Nicaragua now, with Jinotepe as the model. And you guys just keep on answering the call for help. Two days after my return from Jinotepe in May, Keren called again. "We're holding the first health fair in Nicaragua in three weeks," she said, "and we desperately need diabetic testing supplies for 450 people." I called my good friend Gerald Cox, owner of Autumn Corporation, and asked if I could buy the supplies at a discount. "No," he said, "but I'll give them to you." And he did – enough diabetic testing meters, strips and lancets for the entire health fair, and he refused to even let me pay for the shipping. Thanks to Gerald and all the Autumn Corporation folks for that great gift.



The upgraded kitchen.

I once read that "of all the things that are cherished, none can surpass the memory of a love between the needy and the fulfiller." The people of Jinotepe, Nicaragua asked me many times when I was down there to tell them about you, their anonymous donors. They told me the memorials they built at the center are not "brag places," but a reminder to the center's seniors and the people of Nicaragua that they are not forgotten. I think that says it all. Thanks again to each of you who made this dream a reality. I think the happy faces you see in these photos prove it was worth it! Ken



Keren, Ken and our friend Carmen unveil the donor plaque just outside the center's new wing.



Memorial to my late father, Jack M. Burgess, by the foundation and the center's volunteers



Time to go home. My new friends from Portland, Miami and Nicaragua pose for a farewell picture.

P.S.

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