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New Hampshire Health System Pays $2.1M in CMP Settlement Over Diagnostic Test Orders

By Nina Youngstrom

For the third time in about 2 1/2 years, hospitals or other providers that are part of Dartmouth-Hitchcock Health, a large health system in New Hampshire, have settled a case with the HHS Office of Inspector General (OIG) stemming from a self-disclosure. This time around, Dartmouth-Hitchcock Health and several of its provider entities agreed to pay $2.171 million in a civil monetary penalty (CMP) settlement over outpatient diagnostic tests.

According to the settlement, which was obtained through the Freedom of Information Act, OIG alleged that Dartmouth-Hitchcock Health, Cheshire Medical Center, Mary Hitchcock Memorial Hospital, Dartmouth-Hitchcock Clinic and New London Hospital (collectively, the respondent) billed Medicare, New Hampshire and Vermont Medicaid and TRICARE for items or services they knew were fraudulent. OIG alleged from Oct. 1, 2015, through Dec. 31, 2021, the respondent improperly submitted claims to the federal health care programs "for outpatient diagnostic tests (both imaging and clinical lab) performed at Cheshire Medical Center, Mary Hitchcock Memorial Hospital, Dartmouth-Hitchcock Clinic, and New London Hospital, when those tests were not ordered by treating physicians (or another licensed practitioner operating within the scope of his/her license) as required by 42 C.F.R. § 410.32(a)."

That regulation states that diagnostic tests, including X-rays and lab work, "must be ordered by the physician who is treating the beneficiary, that is, the physician who furnishes a consultation or treats a beneficiary for a specific medical problem and who uses the results in the management of the beneficiary's specific medical problem. Tests not ordered by the physician who is treating the beneficiary are not reasonable and necessary."[1] The section goes on to say that it applies to nonphysician practitioners (NPPs) operating within the scope of their licenses.

The settlement doesn't have additional details and attorneys representing Dartmouth-Hitchcock declined to comment, so the specific circumstances are unclear. It didn't admit liability in the settlement. According to its website, Dartmouth-Hitchcock Health was formally renamed Dartmouth Health in 2022.

Errors May Result From Complexity of Claim Form

When providers identify this kind of error, it's conceivable that NPPs (also known as advanced practice providers) were ordering services outside their scope of practice or that NPPs had the treatment relationship with the patient but the claim identified the supervising/collaborating physician as the ordering physician who may not have had an established treatment relationship with the patient, said Richelle Marting, an attorney and certified coder in Olathe, Kansas. "If the physician is identified as the ordering provider but it was an NPP who saw the patient and was treating the patient, when that claim is reviewed and the physician who was listed as the ordering provider doesn't have a treatment relationship with the patient, then you haven't followed the rule or the regulation," she explained.

Operationally, it's easy to run afoul of the rules in this area, Marting said. "Getting a claim out the door is becoming so complex," she noted. The area on the claim form within item 17 is the same field used to identify both the ordering provider and the supervising provider. "If you're talking about NPPs, often you have a physician listed as a supervising provider in this same field of the claim and it's easy to inadvertently designate the physician as the ordering provider for tests when the intent is only to identify them as the supervising physician," Marting said.

CMS requires organizations to break out the multiple ordering, referring and supervising providers onto separate CMS-1500 claim forms, she noted. "That only further complicates the claim configuration process." As CMS explained in Chapter 26 of the Medicare Claims Processing Manual, "When a claim involves multiple referring, ordering, or supervising physicians, use a separate CMS-1500 claim form for each ordering, referring, or supervising physician."[2]

Lawyer: Don't Overreact if Order Isn't Written

Another reason why some organizations might think they have problems with diagnostic tests is a lack of written physician orders, said attorney David Glaser, with Fredrikson & Byron in Minneapolis. But it's a misconception that providers are required to refund money to Medicare in the absence of written orders for diagnostic tests, he contended. In fact, only independent diagnostic testing facilities (IDTF) are required to have a written order, Glaser said. When CMS created IDTFs in a 1997 rule, it specifically said "all procedures performed by the IDTF must be specifically ordered in writing by a physician who treats the beneficiary…" and acknowledged that the physician fee schedule rule "did not explicitly require written orders."[3] The rule went on to say that written orders "served to establish the link between test ordering and the treating physician as a matter of national Medicare law. If the testing entity chose not to maintain a file of written orders from physicians for the tests it performed, the entity might not be able to demonstrate the medical necessity of the tests to a reviewer from a Medicare carrier or another government agency. Some commenters have requested the rationale for requiring specific written orders for tests performed by IDTFs while not imposing the same requirement on testing in physicians' offices."

Obviously, providers document the tests in the medical records, but the lack of formal orders doesn't merit a refund or compel a self-disclosure to OIG, Glaser said.

Dartmouth-Hitchcock Settled Two Other CMP Cases

Dartmouth-Hitchcock entities have self-disclosed to OIG and entered into two other CMP settlements since 2020.

New London Hospital Association in New Hampshire earlier this year settled allegations it held onto Medicare and Medicaid overpayments for too long.[4] This is one of the few times OIG has settled a case under the CMP law applicable to known retention of an overpayment, although the Department of Justice has resolved false claims cases based on alleged violations of the 60-day overpayment refund rule.

New London Hospital Association, which includes New London Hospital (a critical access hospital), the Newport Health Center and the New London Hospital Practices/New London Medical Group, agreed to pay $10,000 in the settlement agreement, which was obtained through the Freedom of Information Act. According to its website, New London Hospital is part of Dartmouth-Hitchcock. OIG contends in the settlement that New London Hospital Association "knew of certain overpayments and did not report and return those overpayments in accordance with" 42 U.S.C. § 1320a-7k(d). New London Hospital Association didn't admit liability in the settlement.

In the other case, Dartmouth-Hitchcock Clinic and the Trustees of Dartmouth College settled a CMP case in 2020 over alleged noncompliance with Medicare rules for nonparticipating physicians.[5] OIG alleged Hanover Psychiatry—which the settlement said is a private practice operated by the clinic—didn't bill Medicare on behalf of some of its patients, charged them too much and didn't follow other rules that CMS sets forth for nonparticipating physicians and physicians opting out of Medicare. Trustees of Dartmouth College agreed to pay $53,940 and Dartmouth-Hitchcock agreed to pay $22,947.

Many providers are under the impression that if they're nonparticipating physicians or opt out of Medicare, they're free to treat Medicare patients as self-pay and avoid the headache of Medicare requirements and administrative burdens altogether, but that's not true, Marting said. There are different rules for formally opting out versus those for enrolled providers who are nonparticipating.

Nonparticipating Providers Still Have Limits

When physicians opt out of Medicare, they can still treat beneficiaries, but Medicare won't pay a dime for the services. Nonparticipating providers are still enrolled in Medicare, but they typically aren't paid directly by Medicare because they didn't agree to the CMS-460 participating physician or supplier agreement as part of their enrollment. They still submit claims to Medicare so the beneficiaries are reimbursed for their services. Unlike opting out—which is all or nothing—nonparticipating providers can choose to accept assignment on a claim-by-claim basis by indicating their acceptance of assignment on the claim form. Their payments, however, are 5% less than the typical Medicare fee schedule amount. Even when they don't accept assignment, nonparticipating providers are subject to restrictions. For example, their charges are limited to 115% of the Medicare Physician Fee Schedule. And that's partly where Hanover Psychiatry ran into trouble, OIG alleged.

The settlement with the trustees focused on physicians and other practitioners at Hanover Psychiatry, which at the time was a clinical practice of the Geisel School of Medicine at Dartmouth College, who provided psychotherapy and counseling to Medicare beneficiaries. OIG alleged that from July 1, 2011, to June 30, 2016, the physicians and other practitioners charged the beneficiaries for these services without billing Medicare on their behalf, didn't accept assignment or limiting charges and failed to properly document their decision to opt out of Medicare. The allegations in the settlement with Dartmouth-Hitchcock are the same, but they apply from July 1, 2016, to June 30, 2017. The respondents didn't admit liability in the settlements.

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1 42 CFR § 410.32.
2 Centers for Medicare & Medicaid Services, "Chapter 26 - Completing and Processing Form CMS-1500 Data Set," § 10.4, *Medicare Claims Processing Manual*, revised May 27, 2022, https://go.cms.gov/3LAT88A.
3 Medicare Program; Revisions to Payment Policies and Adjustments to the Relative Value Units Under the Physician Fee Schedule, Other Part B Payment Policies, and Establishment of the Clinical Psychologist Fee Schedule for Calendar Year 1998, 62 Fed. Reg. at 59,071, 59,072 (Oct. 31, 1997), https://bit.ly/3Sonuxr.
4 Nina Youngstrom, "Hospital Settles CMP Case Over 60-Day Rule With Small Payment but Double Damages," *Report on Medicare Compliance* 31, No. 11 (March 28, 2022), https://bit.ly/3S9VoWX.
5 Nina Youngstrom, "Medicare Nonparticipation, Opt-Out Rules at Heart of CMP Settlement," *Report on Medicare Compliance* 29, No. 17 (May 4, 2020), https://bit.ly/3S6A9W7.