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DAB Affirms OIG's \$1.32M Penalty on Provider for Breaching CIA

By Nina Youngstrom

The HHS Departmental Appeals Board (DAB) has upheld the largest stipulated penalty imposed by the HHS Office of Inspector General (OIG) in years. OIG fined Friendship Home Healthcare Inc., and related entities in Nashville, Tennessee, \$1.32 million for failing to return overpayments identified under its corporate integrity agreement (CIA) by an independent review organization (IRO).

Friendship had appealed the 2018 stipulated penalty to an administrative law judge (ALJ), who upheld it in October 2019. The home health company appealed the ALJ ruling to the DAB and lost. Although that decision is not available online yet, OIG said the DAB agreed with the ALJ decision,^[1] which stated, “The IG had the contractual right to demand stipulated penalties because Petitioners breached the CIA when they failed to repay overpayments identified by the IRO.”

According to the ALJ decision, Friendship settled a false claims lawsuit for \$6.5 million in 2014 for allegedly submitting claims for services that were provided by people who weren't authorized to provide care and for relying on falsified authorizations by a director of nursing. As part of the settlement, Friendship entered into a five-year CIA and was required to hire an IRO to review Medicare and Medicaid claims, include the IRO's findings in its annual reports to OIG and repay overpayments identified by the IRO in 30 days.

At the same time, Friendship's CIA gave it 60 days to return overpayments that were self-identified, which is consistent with the 60-day refund rule, said attorney Judy Waltz, with Foley & Lardner in San Francisco.

The CIA also authorized OIG to levy a stipulated penalty of \$2,500 for every day that Friendship failed to meet certain obligations under the CIA, including returning overpayments identified by the IRO, according to the ALJ, Scott Anderson.

And that's how things played out. Because the home health company failed to pay \$1.9 million in overpayments that were identified in its second and third annual reports, OIG sent Friendship a demand for \$1.32 million in stipulated penalties. In response, Friendship asked for a hearing with the ALJ. The attorney for Friendship didn't respond to RMC's request for comment.

Denial Rate Allegedly Was 'Astounding 98%'

Here's the backstory: The CIA took effect on June 1, 2015, and OIG received Friendship's first annual report on Aug. 1, 2016. But OIG told Friendship that the IRO's claims review had flagged “multiple deficiencies,” and OIG gave the home health company 30 days to “submit a proper claims review report” and refund the overpayments stemming from them, the ALJ decision states. Friendship didn't comply and, according to its attorney, had “significant difficulty engaging a competent IRO and obtaining an accurate claims review report.” The IRO concluded Friendship was overpaid \$235,019 by Medicare and Medicaid, which the lawyer confirmed in an October 2018 email.

The IRO subsequently identified \$292,236 in overpayments, “which was based on an astounding Medicare claim

denial rate of 98% and Medicaid claim denial rate of 51%,” according to the ALJ. Friendship’s attorney acknowledged the identification of the overpayment and told OIG it was “in the process of obtaining financing and/or refinancing to be able to repay.” About a month later, in an email dated Sept. 27, 2018, the attorney informed OIG the home health company was trying to sell its business.

The overpayments were piling up, with the IRO adding another \$185,326, including extrapolated overpayments, to the annual report. Friendship’s attorney sent a letter to OIG in November 2018 asking for more time to repay out of proceeds from the sale of its business. But, the ALJ decision said, “No evidence suggests that Petitioners ever repaid the overpayments.”

You Gotta Have Faith (in Your IRO)

In its appeal of the stipulated penalty, Friendship argued that it had 60 days to repay the overpayments, not 30. But the ALJ figures the home health company is confusing the time that providers have to return overpayments under the IRO provision of the CIA with the Medicare–Medicaid 60–day rule, which is independent of CIAs.

Friendship also contended that its attorney asked OIG to work on a payment plan, which is allowed by the CIA, and “took steps necessary to cure the breach” (e.g., sell the company). OIG countered that there’s no evidence to show that Friendship “expressly asked for an extension of time to repay the overpayments,” and even if there were, it wasn’t requested in a timely manner. The only way to cure a CIA breach is to pay what you owe, OIG said.

The ALJ agreed with OIG. “The CIA does not recognize the inability to repay overpayments as an excuse for failing to do so.”

On its website, OIG said the “DAB agreed with the ALJ’s conclusions that the CIA’s auditing and repayment provisions created independent obligations to repay overpayments to Medicare and Medicaid, and that each time the Friendship Entities violated those obligations to repay overpayments, it created a separate basis for OIG to demand stipulated penalties. The DAB also agreed that the Friendship Entities were properly subject to stipulated penalties arising from those failures and further held that the CIA authorizes per–day stipulated penalties to run concurrently for each failure to make timely repayment.”

The size of the stipulated penalty and its support from the administrative tribunals sends a message about how seriously OIG takes CIAs, Waltz said. “OIG is really expecting you to live up to every bit of your obligations,” she noted. Also, if you’re under a CIA, it’s imperative to have faith in your IRO’s competence to review claims. The ALJ and DAB aren’t there to second–guess, or even review, the accuracy of the IRO’s overpayment determination or whether the stipulated penalty is warranted, Waltz explained.

Under the language of the CIA, “the only issues in a proceeding for Stipulated Penalties shall be: (a) whether the Friendship Entities were in full and timely compliance with the obligations of this CIA for which OIG demands payment; and (b) the period of noncompliance.”

For the most part, providers are tilting at windmills as to the amount of stipulated penalties, Waltz said. “It’s a very uphill battle.”

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¹ Scott Anderson, “Friendship Home Healthcare, Inc., et. al., DAB CR5458 (2019),” HHS, October 31, 2019, <https://bit.ly/2NcIQy6>.

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