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SNF Therapy Contractor Settles for $125M, but SNFs Settle Too

The rehabilitation therapy contractor that allegedly caused skilled nursing facilities to overcharge Medicare has agreed to pay $125 million to settle false claims allegations, dwarfing the amount of money some SNFs themselves paid to resolve mostly the same allegations. RehabCare Group Inc., RehabCare Group East Inc. — collectively known as RehabCare — and their parent, Kindred Healthcare Inc., were accused of essentially scoring as many therapy points as they could to increase SNF reimbursement, which resulted in claims for services that weren't reasonable or necessary or didn't happen, the Department of Justice (DOJ) said Jan. 12. Kindred denies the allegations, according to the settlement.

The case (*United States ex rel. Halpin and Fahey v. Kindred Healthcare, Inc., et al.*, No. 1:11cv12139-RGS) underscores the importance of individualized plans of care and has implications for SNFs, hospitals and other health care organizations that rely on contractors for clinical care, says former federal prosecutor David Hoffman, president of David Hoffman & Associates in Philadelphia. "The big issue is how we audit and monitor individualized care, whether it's therapy, wounds or fall interventions. One size doesn't fit all," he says. Having contracts in place for therapy or wound care, for example, doesn't change the calculus on compliance and quality oversight.

The false claims lawsuit against Louisville, Ky.-based Kindred, which bought RehabCare Group and RehabCare Group East in 2011, was originally filed by two whistleblowers who are both former RehabCare therapists. DOJ intervened and filed its own complaint against Kindred, which is the largest therapy provider in the country, contracting with more than 1,000 SNFs in 44 states, DOJ says.

The allegations focus on physical, speech and occupational therapy provided at SNFs from Jan. 1, 2009, to Sept. 30, 2013. Medicare pays SNFs a daily rate for their residents, depending on their resource utilization group (RUG), which is the unit of payment under the SNF prospective payment system. RUG assignment is driven by the need for therapy and skilled nursing services. There are five rehab RUG levels. The most lucrative is "rehabilitation ultra high" (RU), which means patients receive at least 720 minutes of at least two kinds of therapy over five days every week. Next is "rehabilitation very high" (RV), which is 500 minutes over five days. The minutes, and reimbursement, decline from there. Patients are assigned to a RUG rehab level according to the number of therapy minutes and disciplines they need, which the SNF determines during a seven-day "assessment reference period."

According to the DOJ complaint, RehabCare allegedly sold its services to SNFs by predicting it could increase their Part A revenue and percentage of ultra-high RUG levels. When it was hired by SNFs, Kindred usually was paid per patient per day, with the amount varying by the RUG level, the complaint said. But Kindred allegedly played fast and loose with billing rules to help its SNF clients charge as much as possible for physical, speech and occupational therapy.

At its SNF clients, RehabCare usually placed a program director, physical therapists, physical therapist assistants, occupational therapists, occupational therapy assistants, speech-language pathologists and rehabilitation technicians, the complaint stated. Program directors were instructed to use RehabCare software to track therapy, including the percentage of days billed at the ultra-high level. Sometimes this went beyond tracking, the complaint alleged: "RehabCare encouraged its Program Directors to plan an Ultra High RUG for each new SNF patient, regardless of clinical need for care at that level of intensity." For example, a 92-year-old long-term resident of a SNF in Arlington, Texas, with dementia was hospitalized for a urinary tract infection and dehydration. When she returned to the SNF, it billed Medicare for the ultra-high RUG. She had been provided occupational and speech therapy despite her therapist indicating she was already functioning the same as before her hospitalization. The SNF's claim allegedly was false "because care at that level of intensity was not reasonable and necessary," the complaint states.

Some program directors also planned for patients to hit 720 minutes a week whether they needed all of them or not because that's the magic number for the ultra-high RUG, the complaint alleged. "In some instances, RehabCare purportedly provided rehabilitation therapy that was inherently unnecessary because the patients were near death," the complaint alleged.

Because therapy RUGs are assigned based on the assessment reference period, RehabCare "boosted" the amount of therapy provided to Medicare patients during that time, "while providing materially less therapy" before and after, when it doesn't affect reimbursement, a practice known as "ramping," the complaint alleged. That stopped in October 2011, when CMS required SNFs to report changes in therapy so their reimbursement could be cut accordingly. And DOJ alleged RehabCare rounded up or estimated minutes for therapy "instead of reporting the actual minutes of therapy provided."

The allegations in the Kindred case point to the "fundamental challenge" all facilities face with their contractors, Hoffman says. How do you evaluate clinical competencies of third parties? How do you ensure they even belong in the building? "Then think about performance," he advises. "What is their level of expertise? What type of due diligence is done prior to hire, and once in the facility, how are contractors evaluated?" For example, SNFs, hospitals and other facilities may contract with wound-care physicians "as a defense to problems with wound care," he says. How do you ensure that physicians are actually providing the clinical services at the appropriate standard of care, rather than delegating them to a nurse or perhaps someone unqualified?

Use Complaint as Audit Checklist

Hoffman suggests compliance and quality assurance departments work together to evaluate contractors.

SNFs have data showing routine charges for ultra-high therapy, and nurses and therapists should ask whether it's appropriate for each resident on a monthly basis. "Evaluate performance based on resident outcomes and analysis of claims for services rendered," he advises. "Part of that is good communication among your staff to ensure that nursing and nurse assessment coordinators know what residents' individualized needs are." Acknowledge that contractors are there to make a profit, and review with that in mind, Hoffman says. "How do we ensure their performance is addressing each individual resident's needs?"

Compliance officers also can turn the allegations in the Kindred complaint into an audit checklist for therapy in SNFs, hospitals and other settings where therapy is provided, says attorney Paula Sanders, with Post & Schell in Harrisburg, Pa. "If you're a compliance officer, this is an easy audit to do," she says. For one thing, look at billing for therapy sessions, which is time based. If they are almost always all reported as the same duration — or all end in zeros or fives — that's questionable, Sanders says. And rounding minutes may be a red flag that therapists are not recording the actual number of minutes provided. "It indicates you are not recording the actual time you are spending with the patient," she says.

What's most striking, however, is Kindred's corporate integrity agreement (CIA), Sanders says. It requires annual certifications by upper management that the organization is in compliance with laws and regulations, she says. The HHS Office of Inspector General (OIG) has included board certifications in CIAs for several years, but management certifications are a relatively new development and reflect the government's push for individual accountability for corporate behavior *(RMC 1/11/16, p. 1)*. Raising the stakes is the fact that Kindred's CIA also requires board training to include a discussion of other CIAs and false claims settlements in the SNF arena and the OIG guidance on board oversight of compliance programs *(RMC 4/27/15, p. 1)*, she says. "That ratchets things up," Sanders notes.

More SNF Settlements Come Down

The settlement with Kindred comes on the heels of several settlements with its SNF clients, along with four more announced at the same time. For example, in 2014, Episcopal Ministries to the Aging Inc., a Maryland SNF company, agreed to pay $1.3 million to settle allegations that it submitted false Medicare claims for unreasonable or unnecessary rehab provided by RehabCare Group East *(RMC 9/22/14, p. 1)*. DOJ also unveiled four new settlements at the same time as the Kindred resolution: Wingate Healthcare Inc. and 16 of its facilities in Massachusetts and New York settled for $3.9 million; THI of Pennsylvania at Broomall LLC and THI of Texas at Fort Worth LLC settled for $2.2 million; Essex Group Management and two of its Massachusetts facilities, Brandon Woods of Dartmouth and Blaire House of Milford, cut a deal for $1.375 million; and Frederick County, Md., which previously ran the Citizens Care SNF, settled for $750,000.

In a statement, Kindred notes the settlement mostly involves alleged conduct by RehabCare before it was acquired. "RehabCare has denied engaging in any illegal activity, but in order to provide clarity for contract customers, shareholders, and government oversight entities, RehabCare agreed to the settlement without any admission of wrongdoing. The settlement will serve to avoid the cost and distraction of protracted litigation," the statement asserts.

An attorney for Kindred did not respond to *RMC*'s request for comment.

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