CASE OF THE QUARTER: DEPARTMENT OF JUSTICE FALSE CLAIMS ACT INVESTIGATION

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The "Case of the Quarter" column is a sample case study that highlights best practices in actual scenarios encountered through PRMS' extensive experience in litigation and claims management. Specific names and references have been altered to protect clients' interests. This discussion is for informational and education purposes only and should not be relied upon as legal advice.

FACTS:

ABC Corporation ("ABC") sent Dr. Jane Smith a letter informing her of its Medicare Program Integrity Review. ABC further informed Dr. Smith that it was a Zone Program Integrity Contractor for her practice state and that it performed activities aimed at reducing fraud, waste, and abuse in the Medicare program.

ABC's letter informed Dr. Smith that its data analysis showed she had irregular billing patterns related to psychotherapy services being billed with evaluation and management procedures ("E/M"), and that the total number of procedures billed on given dates of service were suspiciously improbable. ABC then set forth information in its letter to educate Dr. Smith on proper coding and to inform her of potential penalties for filing false claims.

ABC requested Dr. Smith to conduct a self-audit of 100 claims submitted for services associated with the psychotherapy services CPT codes 90833 and 90836 when billed with an E/M code (99201-99205, 99211-99215, 99301-99310, or 99230-99236) on the same date of service to determine adherence to the educational material set forth in the letter. ABC also gave Dr. Smith an opportunity to identify claims that were inappropriately billed and rectify such claims by submitting a voluntary refund to the Medicare program. ABC provided Dr. Smith with a secured CD containing the claims to be audited. Dr. Smith was to respond within 60 days. ABC noted that it would continue to monitor Dr. Smith's claim submissions for adherence to the education it provided in the letter.

Neither Dr. Smith nor the person who handled her billing performed the requested audit.

Within two months of ABC's letter, Special Agent Sam Jones sent a subpoena for medical records to Dr. Smith. SA Jones was with the Department of Health and Human Services Office of Inspector General. SA Jones invited Dr. Smith to call him if she had any questions. Dr. Smith called SA Jones and learned that the subpoena was related to the records ABC asked her to audit. Dr. Smith had multiple conversations with SA Jones after producing the records and made statements that SA Jones later used against her.

Soon after her interactions with SA Jones, Dr. Smith received notice that the Department of Justice ("DOJ") was investigating her for violations of the False Claims Act. DOJ also informed Dr. Smith that it could seek three times the amount of money paid for fraudulent claims. At this point, Dr. Smith reported the matter to her insurance carrier.

ALLEGATIONS:

DOJ alleged that Dr. Smith submitted claims for services totaling in excess of 24 hours per day leading it to believe that Dr. Smith did not perform services billed or that she submitted false claims for reimbursement. DOJ alleged that statements Dr. Smith made to SA Jones were evidence that she knowingly filed false claims. DOJ alleged that Medicare paid Dr. Smith $500,000 for the alleged false claims.

DEFENSES:

Once Dr. Smith reported the matter to her insurance carrier and it was determined she had coverage for such an investigation, an attorney was assigned to defend her. SA Jones interviewed Dr. Smith with her attorney present. One defense asserted was that services were provided and that billing for timed individual psychotherapy codes was appropriate once the mid-point of time spent with the patient was passed. For example, to bill using code 90833 for supplemental psychotherapy performed with separate E/M service, the government says 30 minutes must be spent with the patient which translates to 16-37 minutes spent. Another defense was that Dr. Smith included calls to other providers, family members, and insurance companies in the time she billed as spent with the patient. Lastly, the attorney asserted that statements Dr. Smith made to SA Jones about her understanding of the required time spent with the patient required by the different codes did not prove that she knew the claims submissions were false.

LIABILITY ANALYSIS:

Defense of billing for more time than there is in a day is difficult. Dr. Smith's use of another person to do her billing did not relieve her of the duty to adhere to the law and policies regarding proper billing. Further, Dr. Smith's statements made to SA Jones complicated the defense. Dr. Smith had to repay Medicare a very substantial amount of money.

TAKE AWAY:

Educate yourself and your staff on the laws, policies, and procedures that govern Medicare billing. Consider proactively hiring a professional coder to educate you and your staff, perform a chart review, and make recommendations for improvement to minimize the risk of an audit or False Claims Act investigation. Do not speak to investigators without an attorney present. Notify your insurance carrier promptly when you first learn of a billing/coding audit so that an attorney can be assigned to defend you from the start. Keep in mind that you would be responsible for paying amounts and penalties the government determines are owed which can be significant.