

Report on Medicare Compliance Volume 27, Number 27. July 30, 2018 Courts: Medical 'Opinion' Can Be the Basis for FCA, Other Fraud Cases

By Nina Youngstrom

Two federal courts of appeals this summer held that “medical opinion” can form the basis for a finding of lack of medical necessity in health care fraud cases under the fraud statutes and the False Claims Act (FCA). In both cases, which involved allegations of excessive cardiac surgery, the Sixth and Tenth Circuit courts reversed district court decisions and remanded the cases for further proceedings.

The decisions should resonate with compliance professionals and attorneys at a time when the question of medical necessity as a premise for false claims is being battled furiously in the courts. “The initial and obvious message for compliance officers is clear: the FCA continues to be read broadly to reach all types of fraud,” says former federal prosecutor Robert Trusiak, an attorney in Buffalo, New York. Compliance officers should continue to engage in monitoring high-volume surgeries and procedures and “critically assess claims of subjective medical judgment” — even in the absence of a national coverage decision, he says.

In a June 25 decision in *United States vs. Paulus*, the U.S. Court of Appeals for the Sixth Circuit reviewed the conviction of Richard Paulus, M.D., by a jury. Paulus, a Kentucky interventional cardiologist, was convicted of committing health care fraud and making false statements to Medicare and Medicaid in violation of the health care fraud statutes in 18 U.S.C. §§1347 and 1035, which carry criminal penalties.

The government alleged that Paulus had performed medically unnecessary cardiac stent procedures on Medicare patients. Medicare covers stent procedures if the blockage indicated by a patient’s angiogram is at least 70%. The government alleged that Paulus recorded a significantly higher level of blockage than angiograms and other tests had shown, and then submitted claims to Medicare and Medicaid for these procedures.

In support of its allegations, the government presented evidence that Paulus ranked among the top 15 cardiologists in the country for the number of inpatient cardiac stent placements performed on Medicare patients and first in the country for total units billed to Medicare for cardiac catheterizations and stent placements between 2006 and 2011. It also presented evidence that government auditors, Anthem Blue Cross, and the Kentucky Board of Medical Licensure reviewed the tests in the medical records and found a high percentage of the procedures medically unnecessary because the cardiac blockage was less than had been recorded.

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