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Pathology Lab That Cannot Demonstrate Adequate Physician Orders Suffers Medicare Loss [Ober|Kaler]

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Much has been written regarding various Medicare policies that may cause a clinical laboratory to suffer the resulting financial consequences when a test requested by a physician is found to be not medically necessary, most recently in connection with Medicare's physician signature requirement.

A recent federal court decision upholding Medicare's denial of payment for certain renal pathology services confirms that the problem exists with respect to anatomic pathology services as well as clinical laboratory tests. *Nephropathology Assocs., PLC v. Sebelius*, 2013 WL 3285685 (E. D. Ark., June 27, 2013) [PDF] In this case, the laboratory fell victim to the devil's triangle of physician, lab, and Medicare Program.

In this matter, the Medicare contractor denied Medicare payment for certain pathological examinations performed on kidney biopsies. The contractor's determination was upheld by an Administrative Law Judge and then by the Medicare Appeals Council which held that the pathology laboratory had not provided documentation from the ordering physician demonstrating that the service had been ordered. The United States District Court for the Eastern District of Arkansas upheld the Council's decision. According to the court, the Medicare statute required the laboratory to provide information that was necessary to determine whether Medicare should pay for the service and the amount that it should pay. Additionally, Medicare regulations required that diagnostic tests be ordered by the treating physician, and the Medicare Benefit Policy Manual (MBPM) described what constitutes proper orders. Under the MBPM, when tests were ordered over the telephone, both the physician's office and the testing facility had to document the call in their records.

In this case, however, the court stated that the laboratory "did not provide any documents that it received from an ordering physician, nor did it produce documentation of telephone calls from treating physicians ordering the services in question." According to the court, the pathology laboratory "did not provide documentation of what services a physician ordered or even documentation showing that the physician had ordered the services." As a result, it could not prove compliance with the regulatory requirement that the test be ordered by a physician. The court also rejected the laboratory's argument that regulations required the agency to request documentation from the treating physician, stating that, as the provider of the services, the laboratory was required to provide information supporting payment of its claim.

Ober|Kaler's Comments

It would have been logical to infer that when a physician forwarded a surgical specimen to a pathology laboratory, he or she was ordering the performance of a pathological examination. (In fact, CMS has acknowledged that typically a surgical specimen is sent to a pathology laboratory without a specific order for a particular pathology service). It is clear, however, that the Medicare Program will not accept such logic. Therefore, laboratories have to comply with the requirements included in the MBPM related to test orders. In theory, the MBPM permits medical records that are maintained by the physician to satisfy Medicare requirements for a valid test order -- either alone or in conjunction with records maintained by the laboratory (as appears to be required in connection with a telephone order). But a laboratory's reliance on records

maintained by another person is risky; the laboratory does not know whether those records are legally sufficient or whether it will have access to those records if its related claim for payment is called into question. Accordingly, a laboratory should be prepared to demonstrate compliance with Medicare requirements based solely on its own records to the maximum extent possible. Had the pathology lab insisted on signed, written orders when it received the telephone calls requesting pathology services, the loss of payment for its services may have been avoided.