False Claims settlement with Kindred/RehabCare regarding therapy services provided to SNF patients results in $125 million recovery

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On January 12, 2016, the Department of Justice (DOJ) announced a $125 million settlement with RehabCare Group Inc., RehabCare Group East Inc. (collectively, RehabCare), and their parent Kindred Healthcare Inc. (Kindred) to resolve allegations that RehabCare/Kindred violated the False Claims Act (FCA) by causing skilled nursing facilities (SNFs) to submit false claims to the Medicare program "for rehabilitation therapy services that were not reasonable, necessary and skilled, or that never occurred."

According to the DOJ press release, RehabCare's policies and procedures "resulted in RehabCare providing unreasonable and unnecessary services to Medicare patients and led its SNF customers to submit artificially and improperly inflated bills to Medicare that included those services." Specifically, the DOJ alleged that RehabCare:

- Set unrealistic financial goals;
- Scheduled therapy to achieve the highest reimbursement level regardless of the clinical needs of its patients;
- Presumptively placed patients in the highest therapy reimbursement level ("ultra high," which requires 720 minutes of skilled therapy per week), rather than relying on individualized evaluations to determine the appropriate level of care for the patient;
- " Ramping" – which is boosting the amount of reported therapy during "assessment reference periods," thereby causing and enabling SNFs to bill Medicare at the highest therapy reimbursement level while providing materially less therapy during non-assessment periods when the SNFs do not have to report to Medicare the amount of therapy provided by RehabCare;
- Scheduled and continued to report therapy for patients even after the patients' treating therapists recommended that the patients be discharged from therapy;
- Arbitrarily shifting the number of minutes of planned therapy among therapy

disciplines (physical, occupational or speech) in order to ensure targeted therapy reimbursement levels were met without regard for the patient's need for the therapies;
- Provided significantly higher amounts of therapy at the very end of a therapy measurement period in order to reach the minimum time threshold for the highest therapy reimbursement level so that the SNFs could bill for higher acuity patients, even though the amount of therapy provided on preceding days was materially less;
- Inflated initial reimbursement levels by reporting time spent on initial evaluations as therapy time rather than evaluation time;
- Reported that skilled therapy had been provided at times that patients were asleep or otherwise unable to undergo or benefit from skilled therapy (such as after they had transitioned to palliative end-of-life care); and
- Reporting estimated or rounded minutes instead of actual minutes of therapy provided.

United States Attorney Carmen M. Ortiz from the District of Massachusetts commented that "The complaint outlines the extent and sophistication of this fraud, and the government's continuing work to ensure that the provision of care in skilled nursing facilities is based on patients' clinical needs."

In addition to the $125 million settlement amount, RehabCare also was required to enter into a Corporate Integrity Agreement (CIA) with the United States Department of Health and Human Services Office of Inspector General (HHS-OIG). According to HHS-OIG Inspector General Daniel R. Levinson, as part of the five year CIA, RehabCare agreed to allow "an outside review organization (Independent Review Organization, or "IRO") to scrutinize a random sample of medical records annually to assess the medical necessity and reasonableness of therapy services provided by RehabCare." In the initial reporting period under the CIA, the IRO must randomly select 25 service locations and then review the records of 25 rehabilitation therapy patients selected at random for each location, for a total of 625 patient records reviewed. Additional requirements of the CIA include:

- Kindred's Board of Directors must meet at least quarterly to review and oversee the compliance program. All materials and documents reviewed by the board as part of that review and oversight must be submitted to the HHS-OIG.
- Kindred's board must annually adopt a resolution signed by each member of the board that summarizes its review and oversight of RehabCare's compliance with federal health care programs and the obligations of the CIA.
- Certain designated members of management are required to annually certify that their areas of authority are in compliance with federal health care program requirements and the CIA.
- Two hours of compliance training for board members (in addition to training

for those designated as "Covered Persons" under the CIA).

- Annual risk assessment and internal review process, to include (i) identifying and prioritizing risks, (ii) developing an internal audit work plan related to internal risks identified, (iii) implementing the internal audit work plan, (iv) developing corrective action plans in response to the results of internal audits, and (v) tracking the implementation of corrective action plans to assess their effectiveness.
- Monthly exclusion/sanction screening to ensure no Covered Persons are on the HHS-OIG List of Excluded Individuals or Entities or the General Services Administration's System for Award Management debarment list.

In addition to its settlement with Kindred/RehabCare, the DOJ announced settlements with four SNFs for their role in submitting claims to Medicare that were false because they were based, in part, on the therapy provided (or not provided) by RehabCare. DOJ settled with Wingate Healthcare Inc. and 16 of its facilities in Massachusetts and New York for $3.9 million; THI of Pennsylvania at Broomall LLC and THI of Texas at Fort Worth for $2.2 million; Essex group Management and two of its Massachusetts facilities for $1.375 million; and a $750,000 settlement with Frederick County, Maryland which formerly operated Citizens Care SNF. The press release also noted that the DOJ had previously settled with several other SNFs for similar conduct involving RehabCare therapy provided in their facilities.

The RehabCare/Kindred settlement was the result of a whistleblower qui tam lawsuit brought on behalf of the United States by two former employees of RehabCare: Janet Halpin, a physical therapist and former rehabilitation manager at RehabCare, and Shawn Fahey, an occupational therapist. They will receive nearly $24 million as their share of the government's recovery in this case.