

Successful Defenses and Appeal Strategies for Part B Providers

Andrew B. Wachler, Esq.

Wachler & Associates, P.C.

210 E. Third St., Ste. 204

Royal Oak, MI 48067

(248) 544-0888

awachler@wachler.com

www.wachler.com

www.racattorneys.com

THE SCOPE OF PART B AUDITS

- Post-Payment “Big Box” Audits
- Additional Documentation Requests (ADR)
- Pre-Payment Utilization Reviews (PPUR)
- RAC Part B
- Medicaid Integrity Program
- Commercial Payers

THE SCOPE OF PART B AUDITS

Post-Payment “Big Box” Audits

Stopping the withhold

- Amount at issue
- Timeframes
 - Redetermination: file within 30 days to avoid withhold
 - Reconsideration: file within 60 days to avoid withhold
 - “Serially” submitting documentation
- CMS will recoup the alleged overpayment during subsequent stages of appeal.

THE SCOPE OF PART B AUDITS

Post-Payment “Big Box” Audits

- **Review Carrier’s File**
- **Challenges to Statistics**
 - Expert Involvement
 - Section 935 of MMA
 - The guidelines for conducting statistical extrapolations are set forth in the Medicare Program Integrity Manual (CMS Pub. 100-08) Chapter 3, §§ 3.10.1 through 3.10.11.2.

THE SCOPE OF PART B AUDITS

Additional Document Requests and Pre-Payment Utilization Reviews

Pre-Payment Medical Review: requires a benefit category review, statutory exclusion review, reasonable and necessary review, and/or coding review made before claim payment.

Post-Payment Medical Review: requires a benefit category review, statutory exclusion review, reasonable and necessary review, and/or coding review made after claim payment.

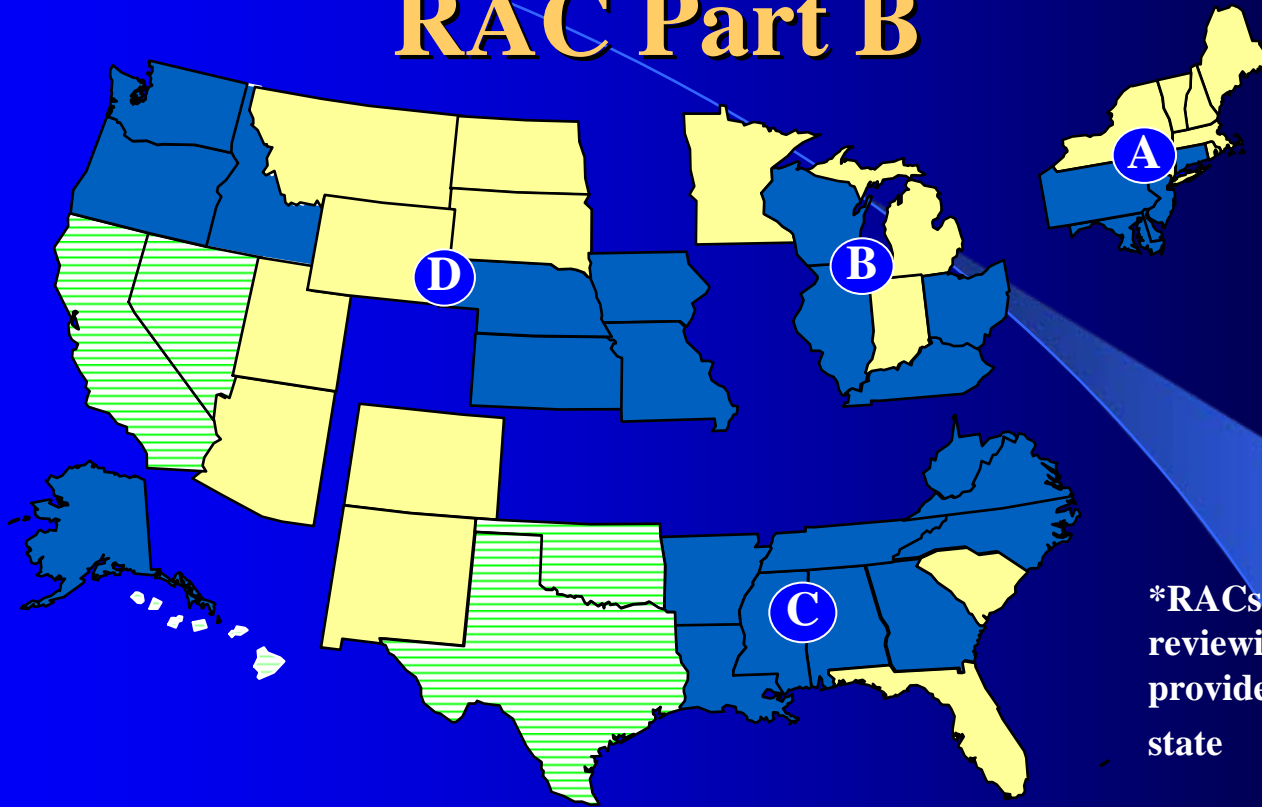
THE SCOPE OF PART B AUDITS

Additional Document Requests and Pre-Payment Utilization Reviews

- **Documentation:** Contractor may use any information deemed necessary to make a pre-payment/post-payment claim review determination.
 - Documentation submitted with claim
 - Additional Documentation Request (ADR) issued to provider or supplier.
 - Documentation related to patient's condition before or after service provided to get a more complete picture of patient's clinical condition.

THE SCOPE OF PART B AUDITS

RAC Part B



*RACs may not begin reviewing until there is provider outreach in the state

Claims Available for Analysis	Provider Outreach	Earliest Correspondence
March 1, 2009	March 1, 2009	March 1, 2009
March 1, 2009	March 1, 2009	March 1, 2009
August 1, 2009	August 1, 2009	August 1, 2009

THE SCOPE OF PART B AUDITS

RAC Review Phase-in Strategy

as of 06/24/09

Earliest possible dates for reviews in yellow/green states

- **Automated Review-** Black & White Issues (June 2009)
- **DRG Validation-** complex review (Aug/Sept 2009)
- **Complex Review for coding errors** (Aug/Sept 2009)
- **DME Medical Necessity Reviews** – complex review (Fiscal year 2010)
- **Medical Necessity Reviews-** complex review (calendar year 2010)

Earliest possible dates for reviews in blue states

- **Automated Review-** Black & White Issues (August 2009)
- **DRG Validation-** complex review (Oct/Nov 2009)
- **Complex Review for coding errors** (Oct/Nov 2009)
- **DME Medical Necessity Reviews** – complex review (Fiscal year 2010)
- **Medical Necessity Reviews-** complex review (calendar year 2010)

THE SCOPE OF PART B AUDITS

RAC Part B

Approved Issues

- Before a review can be completed by the RACs the issue must first be reviewed by CMS and posted on the RAC websites

THE SCOPE OF PART B AUDITS

RAC Part B

Approved Issues --

Region C: Connolly Consulting, Inc.

(initially working in South Carolina, Florida, Colorado and New Mexico)

- Issues affecting South Carolina & Florida providers
 - **Blood Transfusions**
 - **Untimed Codes**
 - **IV Hydration Therapy**
 - **Once in a Lifetime Procedures**
 - **Pediatric codes exceeding age parameters**
 - **J2505: Injection, Pegfilgrastim, 6mg**
- *Issues affecting only South Carolina: **Bronchoscopy Services***
- *Issues affecting only Florida: **Clinical Social Worker (CWS) Services***

THE SCOPE OF PART B AUDITS

RAC Part B

Approved Issues --

Region D: HealthDataInsights, Inc.

(initially working in Montana, Wyoming, North Dakota, South Dakota, Utah & Arizona)

- **Issues Affecting All Region D States providers:**
 - **Newborn Pediatric CPT Codes Billed for Patients Exceeding Age Limit**
 - **Once in a Lifetime Procedures**
 - **Excessive Units-Untimed Codes**
 - **Excessive Units-Blood Transfusions**
 - **Excessive Units-Bronchoscopy**
 - **Excessive Units – IV Hydration**
 - **Neulasta**

SUCCESSFUL APPEALS STRATEGIES

Audit Defenses

- Preparation of Rationales (Position Paper)
- Impact of NCDs and LCDs
- Expert Involvement
- Reviewer Credential Issues

SUCCESSFUL APPEALS STRATEGIES

Audit Defenses

- Provider Without Fault
- Waiver of Liability
- Treating Physician's Rule
- Challenges to Statistics
- Reopening Regulations

SUCCESSFUL APPEALS STRATEGIES

Provider Without Fault

- Section 1870 of the Social Security Act
- Once an overpayment is identified, payment will be made to a provider if the provider was without “fault” with regard to billing for and accepting payment for disputed services
 - Definition of fault
 - 3 Year Rule

SUCCESSFUL APPEALS STRATEGIES

Waiver of Liability

- Section 1879(a) of the Social Security Act
- Under waiver of liability, even if a service is determined to be not reasonable and necessary, payment may be rendered if the provider or supplier did not know, and could not reasonably have been expected to know, that payment would not be made.

SUCCESSFUL APPEALS STRATEGIES

Treating Physician Rule

Treating Physician Rule

- The treating physician rule, as adopted by some courts, reflects that the treating physician's determination that a service is medically necessary is binding unless contradicted by substantial evidence, and is entitled to some extra weight, even if contradicted by substantial evidence, because the treating physician is inherently more familiar with the patient's medical condition than a retrospective reviewer.
 - *Authorities that have addressed this issue include: State of N.Y. v. Sullivan*, 927 F.2d 57, 60 (2nd Cir. 1991); *Klementowski v. Secretary of HHS*, 801 F.Supp 1022 (1992); *Gartman v. Secretary of HHS*, 633 F.Supp. 671, 680-82 (E.D. NY 1986); *Breeden v. Weinberger*, 377 F.Supp. 734 (1974); *Collins v. Richardson*, Medicare/Medicaid Manual, ¶26,500 (Iowa, 1972); *Pillsums v. Harris*, CCH, Medicare/Medicaid Manual, ¶309,080 (CA 1981); *Handerson v. Harris*, No: 80 8066, Slip Opinion at 622 (2nd Cir., 12/17/80); and *Stearns v. Sullivan*, NO 88-2756-Z, CCH Medicare/Medicaid Manual, ¶38,273 (D.C. Mass 1989).

SUCCESSFUL APPEALS STRATEGIES

Treating Physician Rule

- **CMS Ruling 93-1:** With respect to Part A Claims – CMS Ruling 93-1 states that treating physician opinion is evidence, but not presumptive, so need to make a case specific argument why physician's opinion is the best evidence.
 - No similar CMS rulings with respect to Parts B, C, or D
- **42 C.F.R. § 482.30 - Conditions of Participation: Utilization Review**
 - *See* State Operations Manual, Interpretive Guidelines for §482.30(d) – Determination Regarding Admissions or Continued Stays
- Providers should always argue that the opinion of the treating physician is the best evidence.

SUCCESSFUL APPEALS STRATEGIES

Challenges to Statistics

- Section 935 of the MMA
- The guidelines for conducting statistical extrapolations are set forth in the Medicare Program Integrity Manual (CMS Pub. 100-08), Chapter 3, §§ 3.10.1 through 3.10.11.2
- RAC limitations

SUCCESSFUL APPEALS STRATEGIES

Reopening Regulations

- 42 C.F.R. §405.980
 - See MAC decision of
 - *Critical Care of North Jacksonville v. First Coast Service Options, Inc.*
 - *In re Providence St. Joseph Medical Center v. United Government Services, LLC*
 - *In re Memorial Hospital of Long Beach v. PRG Schultz*
 - See also Complaint in *Palomar Medical Center v. Department of Health and Human Services*, No. 09-CV-0605-BEN-NLS (S.D. Cal. Mar. 24, 2009).
 - Note also ALJ decisions permitting challenge of good cause for reopening.

PROVIDER CONSIDERATIONS

DME Suppliers

- Certificate of Medical Necessity
- Contractors may ask for supporting documentation of medical necessity.
 - *Mackenzie Medical Supply, Inc. v. Leavitt*, 419 F.Supp.2d 766 (D. Md. 2006)
 - *Gulf Coast Medical Supply, Inc. v. Secretary, HHS*, 468 F.3d 1347 (11th Cir. 2006).
 - *Maximum Comfort Inc. v. Secretary, HHS*, 512 F3d 1081 (9th Cir. 2007).

Testing

- IDTFs
- Laboratories
- Sleep Clinics

QUESTIONS?

Andrew B. Wachler, Esq.

Wachler & Associates, P.C.

210 E. Third St. Ste. 204

Royal Oak, Michigan 48067

(248) 544-0888

awachler@wachler.com

www.wachler.com

www.racattorneys.com