



Inside the Mind of an Auditor—Part 2

This series is based on an actual case.

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This month's issue of *DME for DPMS* will provide the second and final installment of the saga of the \$600K recoupment faced by one podiatric physician. As in the previous installment, no identifying information about this individual will be provided. Additionally, some creative license and changes to the substantive issues were taken to further protect the individual's identity.

In March 2020, the pandemic hit and due to the public health emergency, Administrative Law Judge (ALJ) hearings were further delayed with phone pre-trial conferences and hearings placed on several extensions. Finally, the defendant podiatrist, after many years of waiting for the day in "court", was scheduled for preliminary and subsequent hearings early in 2021.

At one of the initial hearings, the ALJ and defendant podiatrist appeared to bond because of some mutual previous life experiences. The doctor reveals that many of the charts audited were for patients who were not seen in the typical office setting. Rather, these were patients living in group homes for the mentally handicapped or a skilled nursing facility. One of the experts was able to closely identify with this as the expert also has a family member liv-

ing in such arrangements. The expert also had previously provided care to many patients living in similar arrangements. This provided the ALJ with a thorough understanding of the logistical difficulties associated with treating these types of patients

and how often notes were lost or misplaced. Of interest to the ALJ was the difficulty locating providers willing to treat patients residing in such locations. The conclusion drawn here is that the human element cannot be overstated. These connections provid-

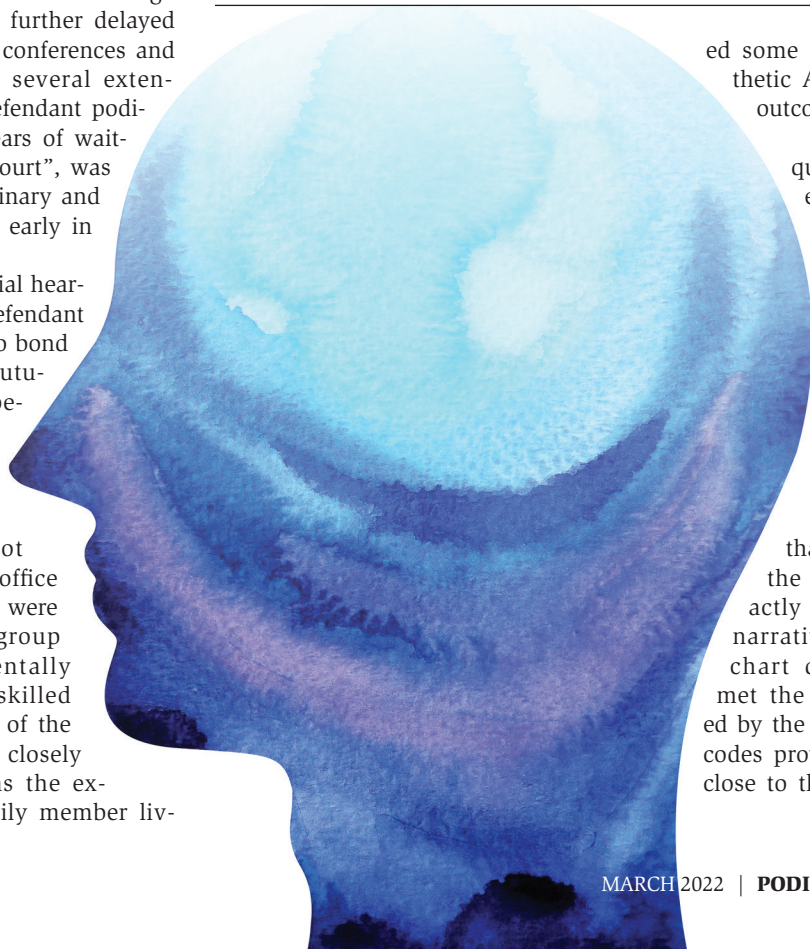
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ed some optimism of a sympathetic ALJ and of a favorable outcome.

The ALJ at a subsequent hearing asked the experts for their opinions of the CMS and MAC auditors' conclusions. The experts provided the analysis previously noted, informing the ALJ that the statistician's analysis was wrong for the following reasons:

- 1) While admitting that diagnostic codes on the claim form didn't exactly match the diagnostic narratives in the chart, the chart documentation itself met the requirements provided by the LCD. Furthermore, the codes provided were reasonably close to the diagnostic narrative

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provided in the chart. Had the earlier MAC auditor noted this, some allowances via re-openings, even given the time frame, may have been provided to the podiatrist and the eventual outcome of the audit might have been more favorable to the podiatrist;

2) For those audited dates of services which allegedly lacked LCD requirements, references were noted to earlier dates of service(s) where those requirements were documented. Upon review, the experts testified that those findings were well documented in those previous dates of service. While admitting that the podiatrist should have provided those chart notes to the auditors at earlier appeals, the CMS contractors also failed to request those charts. The experts testified this was standard documentation well accepted by CMS and other third-party contractors. CMS policy supporting such practice was presented;

3) The expert witnesses made it clear that the basics of the statistical analysis were flawed due to the above arguments. The CMS statistician admitted they lacked any clinical expertise, nor could they refute any of the experts' testimony. The statistician also stated their statistics were based solely on the MAC auditors' results, who also had minimal to no experience dealing with podiatric charts and obviously had failed to take into consideration the opinions (and facts) provided by the expert witness for the defendant podiatrist.

At this time, the ALJ dismissed the CMS statistician (while still providing an opportunity to re-engage should they feel compelled to do so). The ALJ then provided the experts with the opportunity to provide an in-depth analysis of ten charts at a future hearing. Those charts were to serve as the support against the findings of the 100-chart review and subsequent extrapolation.

The expert witnesses subsequently provided the ALJ an in-depth analysis of ten charts, demonstrating how each supported the earlier argument and met the LCD requirements. Of in-

terest was that no further challenges were offered from CMS or any other MAC contractors. Once this concluded, there were many more communications between the ALJ and the defendant's attorneys. Then came the wait for an ALJ decision which took several months.

During early summer of 2021, the defendant finally received a 100% favorable decision for the podiatrist. While mostly celebrating this victory, what loomed was a 90-day period, during which time CMS or any of its

coverage, ADC contracts requires the insured to notify the ADC carrier in a timely fashion should an audit letter be received. As in this case, should the insured fail to respond to the ADC carrier in a timely fashion, the carrier may choose to deny coverage.

It cannot be overstated that the expert witnesses who are hired must not only be well versed on the subject matter of the audit but must not be intimidated by the legal proceedings. Be sure those experts can easily communicate their opinions

Similar to professional liability coverage, ADC contracts requires the insured to notify the ADC carrier in a timely fashion should an audit letter be received.

involved contractors could appeal the ALJ decision.

That fear was allayed in late summer when the podiatrist received a CMS payment of almost \$600,000. However, out of this award, the doctor had to pay almost 1/3 of it to cover legal expenses. Let's not forget the penalties assessed by the IRS on early retirement withdrawals, loan interest payments and lost opportunity of interest and potential growth on other fixed investments.

And what of the doctor's fear of future audits by the MAC? Could you sleep knowing that is a real possibility? Could you stay in practice with these realistic fears that some entity has it in for you?

This case should be a wake-up call to all practicing physicians, no matter the size of the practice or specialty. Even perfect billing and documentation could still make you the victim of an overzealous auditor.

The lessons learned here are painfully apparent: It is extremely important to immediately notify your administrative defense coverage (ADC) carrier in the event you receive an audit letter. The size of the initial request may not properly represent the CMS recoupment demands should the CMS contractor decide to extrapolate on similar previous claims.

Similar to professional liability

prior to and during any future legal proceeding.

This case should also be a wake-up call to those who think they can pull the wool over the eyes of any third-party payer. The same expert witnesses who work tirelessly to prove your innocence possess the knowledge necessary to assist third-party carriers.

The goals of attorneys, auditors, and expert witnesses in these cases should always be the same whether they work for the defendant doctor or government/insurance contractor—that is, to ensure that the records are reviewed fairly. This was no fairy tale but, fortunately in this case, the nightmare finally ended with a successful outcome favorable to the podiatrist. **PM**



Dr. Kesselman is in private practice in NY. He is certified by the ABPS and is a founder of the Academy of Physicians in Wound Healing. He is also a member of the Medicare Provider Communications Advisory Committee for several Regional DME MACs (DMERCs). He is a noted expert on durable medical equipment (DME) for the podiatric profession, and an expert panelist for Codingline.com. He is a medical advisor and consultant to many medical manufacturers.