UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,
ex. rel. and ELIN BAKLID-KUNZ, Relator,

Plaintiffs,

v. Case No. 6:09-cv-1002-Orl-31TBS

HALIFAX HOSPITAL MEDICAL CENTER, d/b/a Halifax Health, a/k/a Halifax Community Health System, a/k/a Halifax Medical Center and HALIFAX STAFFING, INC.,

Defendants.

REPORT AND RECOMMENDATION

In October, 2013, Elin Baklid-Kunz (the "Relator") filed a motion for the imposition of sanctions against Defendants Halifax Hospital Medical Center and Halifax Staffing, Inc. (collectively "Halifax"), alleging spoliation of medical records for short stay hospital inpatient admissions, and related discovery abuses. (Doc. 362). After conducting a day-long hearing on the motion, I submitted a Report and Recommendation that it be denied because Relator failed to establish that the information contained in the destroyed medical records was not available from an alternate source. (Doc. 426). Relator objected (Doc. 443), and the district judge held a hearing on her objections (Doc. 465). At the hearing, the parties reached an agreement for the random selection and replacement of the destroyed medical records. (Id.). Based upon the parties' agreement it is currently anticipated that Relator will be able to proceed to trial as effectively as if she had the missing records. (Id.). The district judge reserved ruling on those portions of Relator's

motion which sought sanctions for Halifax' inadequate or delinquent production of medical records. (Id.). The district judge also entered an order referring the case to me for the preparation of a new report and recommendation on Relator's request for sanctions pursuant to FED. R. CIV. P. 37(b). (Doc. 589). This Report and Recommendation addresses that issue.

Relator is employed by Halifax as its Director of Physician Services. (Doc. 29 ¶ 8). She filed this lawsuit in June 2009, and alleging that Halifax violated the False Claims Act, 31 U.S.C. §§ 3729-3733 and the Stark Act, 42 U.S.C. § 1395nn because it received improper and excessive compensation from the federal government, and permitted the payment of illegal kickbacks, profit sharing incentives, and other illegal compensation to physicians. (Doc. 1). Her Second Amended Complaint alleges that Halifax submitted false claims to Medicare for healthcare services that were not medically necessary. (Doc. 29 ¶¶ 64-66). In particular, she complains that Halifax submitted claims for short stay inpatient hospital admissions without meeting the criteria required for inpatient stays. She maintains that the majority of the fraudulent admissions involve one and two day inpatient stays. (Id. ¶ 6). She further alleges that Halifax was aware, no later than December 10, 2008, that unless immediate and meaningful action was taken, it faced millions of dollars in financial exposure resulting from the medically unnecessary admission of Medicare patients in general, and short-stay patients in particular. (Doc. 362-3 at 2).

On September 6, 2011, Relator served her second request for production on Halifax. (Doc. 362-4). She asked Halifax to produce, among other things, documents

relating to error rates in "Medicare Short-Stay Reviews," Medicare three-day stays with skilled nursing admissions, and overpayments received by Halifax in connection with Medicare patients with lengths of stay of two days or less.[1] (Doc. 362-4 at 9). Relator believes her second request for production was broad enough to capture medical records for short stay patients. (Doc. 385-5 at 2). Halifax disagrees and did not produce patient medical records. (Doc. 385-4 ¶ 6).

In November, 2012, Relator engaged Jessica Schmor as an expert on short stay patient records, and pushed Halifax to produce short stay records for Ms. Schmor to review. (Doc. 385 at 3; Doc. 362 at 5). Counsel for Relator and Halifax held a meet and confer to discuss Relator's contention that Halifax should have, but had failed to produce all medical records reviewed in connection with all of the Short Stay Reviews. That meet and confer resulted in an agreement that Halifax would produce all of the medical records reviewed in connection with all of the Short Stay Reviews. (Doc. 386-6 at 2). The parties also agreed to treat Relator's request for these records as having been served on November 14, 2012, and that Halifax would produce the records on or before December 14, 2012. (Id.).

[1] Relator defined "Medicare Short-Stay Reviews to mean any reviews performed by the Internal Case Management Department or others on behalf of Halifax Hospital from January 1, 2006 to the present time which relate to the review or analysis of the medical necessity or lack thereof for inpatient admissions with length of stays for two days or less. (Doc. 362-4 at 5-6). References to "Medicare Short-Stay Reviews" includes, but is not limited to, the reviews done by the Halifax Compliance Department, Halifax Hospital Internal Case Management Department or others on behalf of Halifax Hospital relating to chest pain admissions on or about February 29, 2008, April 10, 2008, May 5, 2008, May 30, 2008,July 21, 2008, August 28, 2008, September 23, 2008,October 27, 2008, November 25, 2008, December 15, 2008, January 27, 2009, February 6, 2009, March 16, 2009, April 28, 2009, May 18, 2009,June 3, 2009,July 7, 2009 and August 8, 2009. (Id.). "Medicare Short-Stay Reviews" also include without limitation, the reviews conducted by Halifax Hospital Internal Case Management Department personnel and/or others of Medical Necessity for Medicare patients admitted without chest pain or two days or less as inpatients in April 2009, May 2009,June 2009,and August 2009 and the outside review of short stay inpatient admissions conducted by the Florida Hospital Association that was completed on or about December 18, 2007. (Id.; Doc. 385-3 at 5).

On December 14, 2012, Halifax produced a disc containing medical records for the 272 patient accounts specifically identified in the Second Amended Complaint. (Doc. 385-7 at 2). Halifax stated that of these 272 accounts, it was able to locate complete records for 253 patients, partial records for 17, and that it was still looking for records for the two remaining patients. (Id.). Halifax promised to update its production to the extent additional records were located. (Id.). Three days later, Halifax produced a second disc containing more partial medical records. (Doc. 385-8 at 2). Halifax produced still more partial patient medical records on December 19, 2012. (Doc. 385-9 at 2).

In December, 2012, using the patient medical records available to her, Ms. Schmor generated a report in which she expressed concern that there were multiple problems with the records produced by Halifax including: (1) illegibility, (2) lack of proper patient identification, and (3) the absence of required information, including a proper history and physical or discharge summary. (Doc. 307-1 at 17). Ms. Schmor concluded that the records were not all complete, and that of the patient records she reviewed that were complete, only one documented the level of care billed by Halifax. (Id., at 10-11, 17).

Relator served her third request for the production of documents on Halifax on February 6, 2013. (Doc. 385-10). The third request asked Halifax to produce all electronically stored information ("ESI") for virtually all Medicare inpatients with hospital stays of two or less days. (Id. at 8). Relator also sought all ESI for almost every inpatient with a length of stay of three days who was discharged to a skilled nursing facility. (Id. at 10). Five days later, Relator propounded her fourth request for production in which she

asked for Halifax's complete medical records for the dates of service for patients identified in Relator's third request for production. (Doc. 385-11 at 8-9).

Halifax objected to Relator's third request on the grounds that it was overbroad, oppressive, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. (Doc. 385-12). Subject to these boilerplate objections, it agreed to produce the short stay ESI once a database report containing the information was developed. (Id. at 5, 7). Halifax made the same boilerplate objections to Relator's fourth request, and for the first time, objected on the ground that Relator's requests called for the disclosure of protected health information. (Doc. 385-13 at 4).

Counsel held another meet and confer on March 22, 2103 at which time Halifax agreed to produce ESI for patients with a length of stay of two days or less, and patients with a length of stay of three days who were discharged to skilled nursing facilities by 5:00 p.m. that day. (Doc. 385-15 at 5). But, Halifax insisted upon redacting the patent names and account numbers based upon its concern for protected health information. (Id.). Relator objected to redaction of the patient information because she felt the issue of patient privacy was adequately addressed in the parties' Standard Protective/Confidentiality Agreement. (Id.; Doc. 86 at 8).

On March 22, 2013, Halifax produced a spreadsheet containing ESI detail on 25,256 inpatient admissions for stays of less than two days, and 4,316 inpatient admissions for three day stays discharged to skilled nursing facilities. (Doc. 362 at 9). At Halifax's request, and to facilitate production of the short-stay medical records, a statistician engaged by Relator developed two random samples of patients whose

medical records Halifax could produce in response to Relator's fourth request for production. (Id.). The random samples totaled 206 patients with discharge dates from January 1, 2002 through March 30, 2013. (Id.). Relator sought the complete medical records for each of these patients. (Id.).

Halifax did not produce the promised medical records. On April 4, 2013, its counsel stated that Halifax was still in the process of identifying the 206 patient accounts included in the sample and that it would provide an anticipated production date once the records were located. (Id., at 9-10). One month later, Halifax produced what were supposed to be the requested short-stay medical records for the 206 patients. (Doc. 385-16 at 2). Three days after that, it produced more medical records. (Doc. 362-8). Halifax also promised to separately provide summaries of all the medical records it produced in response to Relator's third and fourth requests for production. (Doc. 362-8 and Doc. 385-16).

Ms. Schmor reviewed the records produced by Halifax and determined that roughly one-quarter of the medical records Halifax said it had produced had in reality, not been produced. (Doc. 362 at 11). She also found that the patient medical records for the period 2002-2004 were missing entirely or largely incomplete. (Id.). In August, 2013, after further review, Ms. Schmor discovered that the medical records produced in May were unorganized, piecemeal and incomplete. (Id.). Halifax did not produce the summaries of the medical records. (Id. at 10). On August 14, 2013, counsel for Relator informed Halifax that the medical records were incomplete and requested the missing summaries. (Id. at 12). Halifax did not respond and on August 19, 2013, counsel for

Relator once again asked for the missing information. (Id.).

On August 22, 2013, Halifax disclosed that missing medical records for 33 patients had been destroyed in the regular course of business. (Id.). But, it said it had been able to recover partial records for 23 of those patients that it would be producing. (Id.). Relator asked for a meet and confer on a potential motion for sanctions. (Id.). She also asked for a copy of Halifax' records retention policy. (Id.). When Halifax did not respond by the end of the day, counsel for Relator made a second request for a meet and confer. (Id.). This time, Halifax agreed to meet but asked for identification of the specific medical records that were missing. (Id. at 13). Halifax took the position that there was no basis for a motion for sanctions because the destroyed records were not unique and could be replaced with other records having the same characteristics. (Id.). Halifax did produce a copy of its records retention policy but, the version it provided was adopted after it destroyed the patient medical records. (Id.).

The parties continued to go back and forth concerning production of the medical records until October 8, 2013, when Halifax revealed that all of the records for 2002, 2003 and 2004 for patients with hospital stays of two days or less and for three day stays with a discharge to skilled nursing facilities had been destroyed between January and September, 2012. (Id. at 14; Doc. 385 at 6). Destruction of the records occurred despite the implementation of a litigation hold notice on December 28, 2009. (Doc. 385 at 2). Realtor brought these issues to the Court in a motion for sanctions rather than a motion to compel, because Halifax did not reveal the destruction of the short stay medical records until after discovery had closed. (Doc. 362 at 1 n.1).

Federal Rule of Civil Procedure 34 allows a party to request the production of documents within the scope of FED.R.CIV.P. 26(b). The party making the request must describe with reasonable particularity each item or category of documents, a reasonable time and place for the inspection, and may specify the form or forms in which ESI is to be produced. FED.R.CIV.P. 34(b)(1). The party to whom the request is directed must respond in writing within 30 days after being served. FED.R.CIV.P. 34(b)(2). For each item or category of documents requested, the responding party must state that inspection will be permitted, or state an objection. Id.

Federal Rule of Civil Procedure 37 gives the Court authority to impose a broad array of sanctions for discovery related abuses. Sanctions may include an award of attorney's fees, the striking of pleadings, dismissal of the action, and entry of a default judgment against the disobedient party. FED. R. CIV. P. 37(d)(3). Rule 37(d)(1)(A)(ii) provides that if a party, after being properly served with a request for production, fails to respond, the court may, on motion, impose sanctions. For purposes of this Rule, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." FED. R. CIV. P. 37(a)(4).

The Court also has the inherent power to impose sanctions "if in the informed discretion of the court ... the Rules are [not] up to the task." Dial HD, Inc. v. ClearOne Commc'ns, 536 F. App'x 927, 929 (11th Cir. 2013) (quoting Peer v. Lewis, 606 F.3d 1306, 1315 (11th Cir. 2010) (quotation omitted)). In the exercise of its inherent power the Court may impose attorney's fees as a sanction when a party willfully disobeys a court order or has "acted in bad faith, vexatiously, wantonly or for oppressive reasons."

Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991).

Despite instituting a litigation hold in 2009, Halifax failed to preserve three years of short stay medical records that were relevant to this case. It also failed to timely produce medical records to Relator. After the records were requested, Halifax failed to promptly inform Relator that they had been destroyed. And, Halifax gave Relator the false impression that it had produced records that were not, and could not have been, produced because they had already been destroyed.

Although I previously found that the destruction of the medical records was not willful, and that the information was available from an alternate source, Halifax conduct is reprehensible. It wrongly, and without substantial justification, delayed the production of relevant information to Relator. And, Halifax' conduct necessitated the expenditure of attorney time, and possibly other related expenses by Relator for which Halifax should be held responsible.

For these reasons, I recommend that the Court sanction Halifax. As a sanction, I recommend that the Court order it to pay all of Relator's attorney's fees and any other expenses she reasonably incurred in attempting to obtain the short stay medical records and ESI she requested in her second, third, and fourth requests for production.

Specific written objections to this report and recommendation may be filed in accordance with 28 U.S.C. § 636, and M.D. Fla. R. 6.02, within fourteen (14) days after service of this report and recommendation. Failure to file timely objections shall bar the party from a de novo determination by a district judge and from attacking factual findings on appeal.

Respectfully recommended in Orlando, Florida on May 8, 2014.

THOMAS B. SMITH
United States Magistrate Judge

Copies to:

United States District Judge
Counsel of Record